Tuesday, October 20
2:30 pm–4:00 pm

1007 Real Issues with Real Estate: Identifying and Avoiding Environmental Liabilities

Daniele Cervino
Senior Vice President and General Counsel
EWMA

Bonnie Harrington
Senior Counsel- Environment, Health & Safety
General Electric Company

Bonni F. Kaufman
Partner
Holland & Knight

Faculty Biographies

Daniele Cervino

Daniele Cervino is currently the senior vice president and general counsel for EWMA in Parsippany, New Jersey, an environmental consulting and remediation firm and its related companies. She is the director for EWMA's fixed price remediation and insurance program, Secur-Itâ. Her environmental, real estate and litigation expertise includes all aspects of ISRA, CERCLA, Spill Act, Clean Water Act, wetlands, brownfields, floodplain and other regulatory compliance matters.

Through her professional affiliations during her years in private law firm practice, Ms. Cervino has been instrumental in obtaining public funding and approvals for cleanups and redevelopment projects.

She has lectured for New York University, Rutgers University's Cook College and at national and state brownfields, real estate and bar conferences. She is a licensed insurance producer and a court appointed mediator. She was honored as a "Women of Influence" by New Jersey Real Estate for the past two years.

Ms. Cervino received a BA from Muhlenberg College and is a graduate of Pace University School of Law.

Bonnie Harrington

Bonnie Harrington is senior counsel, environment, health and safety and EHS legal practice group leader for the General Electric Company's Consumer & Industrial business in Louisville, Kentucky. She is responsible for managing the legal aspects of environmental and worker safety and health matters for an appliance, lighting and electrical distribution equipment manufacturing business that operates manufacturing facilities globally.

Prior to her position at GE Consumer & Industrial, Ms. Harrington was counsel, northeast/midwest/international for GE Corporate Environmental Programs in its Albany, New York office, where she managed the legal issues for large environmental remediation projects. She has specialized in environment, health and safety law since beginning her career with Dechert LLC in both their Philadelphia headquarters and Princeton office. Ms. Harrington was a law clerk for the Honorable Joseph H. Rodriguez in the United States District Court for the District of New Jersey.

Ms. Harrington received a BS, cum laude, from The Richard Stockton College of New Jersey. She received her MS and her JD, cum laude, from Rutgers University.

Bonni F. Kaufman

Bonni F. Kaufman is partner in the public policy and regulation group of Holland & Knight LLP, where she focuses on the practice of environmental law. Ms. Kaufman represents real estate, industrial, transportation, and manufacturing clients in a wide variety of matters relating to environmental laws, focusing on regulatory enforcement and compliance, environmental aspects of corporate and real estate transactions and litigation. She has counseled clients with respect to compliance with environmental regulatory requirements, including requirements under the Clean Water Act, Clean Air Act, RCRA, CERCLA, TSCA, FIFRA and state law and has successfully resolved enforcement actions and litigation related to violations of environmental regulations and migration of contamination. She has represented developers, lenders, and bond issuers in connection with military housing privatization projects around the country. She advises developers, purchasers and real estate portfolio managers in connection with the purchase, sale and development of environmentally impacted properties and brownfields development.

Ms. Kaufman currently serves as the chair of the Holland & Knight, LLP Washington, DC and Bethesda Diversity Committee. She is a member of several environmental committees of her local bar.

Ms. Kaufman received a BA from Emory University and a JD from Georgetown University Law Center.

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Panelists

- Daniele Cervino, General Counsel EWMA
- Bonnie Harrington, Senior Counsel, Environment, Health & Safety, GE Consumer & Industrial
- Bonni Kaufman, Partner, Holland & Knight, LLP

- The ideas and thoughts expressed by the panelists reflect their personal opinions and not necessarily the views of their respective companies and clients.

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What is in the CD?

- Copy of presentation slides
- Presenter's Bios
- EPA's All Appropriate Inquiry Rule
- Statutory Provisions
- Sample consulting contract/proposal
- Sample contract provisions
- Uniform Environmental Covenants Act
- Relevant Articles

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Overview

- Why should you be concerned with environmental issues when you sell or lease real property.
- The Phase I Process
- Drafting protective agreements for purchaser, seller, tenant and landlord
- Risk avoidance mechanisms: insurance, fixed price remediation, indemnity
- Disclosure Obligations (ISRA and other state laws)
- Engineering and Institutional Controls (Deed Restrictions)

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Environmental Liability

- CERCLA and State analogues impose strict liability on the purchasers of contaminated real property, regardless of fault.
- To ameliorate this liability, Congress has provided Landowner Liability Protections:
  - Bona Fide Prospective Purchaser Defense
    - for acquired property that is known to be contaminated
  - Innocent Landowner Defense
    - For purchasers of property that is subsequently found to be contaminated, as long as purchaser undertook all appropriate inquiry prior to purchase
  - Contiguous Landowner Defense
    - For owners of property that are contaminated by migration of contaminants from an adjacent property
  - Secured Creditor Exemption
    - For lenders and others with a secured interest in property that do not participate in the management of the property

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All Appropriate Inquiry (AAI) and ASTM Standard

- In order to avail yourself of Landowner Liability Protections, you must:
  - Conduct All Appropriate Inquiries (i.e. a Phase I Environmental Site Assessment in accordance with ASTM Standard E1527-05)
  - Provide full cooperation to environmental agencies and comply with information requests
  - Comply with land use restrictions and preserve institutional controls
  - Not be affiliated with prior owner or PRP at the property
  - Take reasonable steps and exercise appropriate care with respect to releases of contamination
  - Comply with spill reporting obligations

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- Many states do not have a defense for purchasers of property that are aware of contamination prior to purchase
  - Important distinction because CERCLA Landowner Liability Protections do not apply to petroleum contamination, i.e., underground fuel storage tanks

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The Phase I Process
How to Select / Retain a Remediation Contractor

- Area of expertise in geographic location and nature of contamination (ask for case studies). Some firms use independent contractors.
- Insurance – general liability, contractor's pollution liability, errors and omissions, workman's compensation
- Loss Run – viability of carrier, coverage
- Obtain an indemnity clause, in the event that the contractor's actions are negligent or cause or exacerbate contamination
- Beware of limitation to liability (limit to fees generated from the project or $50,000)
- List of Approved Lenders / Institutional Customers
- Who can rely on report without additional cost
- Who is responsible for reporting in the event a spill or release is discovered

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Cost, Timing and Expiration of Phase I

- Time Constraints – typically need 30 days
- Cost - $1,500 - $20,000. (Average $2,500)
- Confidentiality – as to disclosures and findings
- "Expiration Date" on prior Phase I assessment 180 days
- ASTM Standard – 1527-05

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Scope of Phase I

- ASTM – 1527-05 Standard
  - Review state law for more stringent standard (i.e., NJ – Preliminary Assessment)
- Non-Scope Considerations:
  - Asbestos
  - Mold
  - Lead in Drinking Water
  - Wetlands
  - Radon
- Cooperation in Completion of Questionnaire (Owner / User) and Access to Site
- Lender Requirements
  - Typically controls who conducts an assessment and requires out-of-scope work (ACM, LBP)
  - Require reliance letter – Include in price / Ask for generic name of Lender
- Parties to Rely on Report – Negotiate at retention
- Need for Regulatory Compliance Audit

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Real Estate Contract Drafting Issues
Purchase and Sale Contracts: Definitions

- Ensure EHS definitions are straightforward and comprehensive
- Key definitions include “Environmental Laws” (include petroleum, etc., consider temporal effect) and “Hazardous Materials”
- Defined terms in other areas of the contract may impact EHS rights and responsibilities, e.g., “Claims,” “Losses,” “Laws”

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Survival Periods

- Representations and Warranties (R&Ws) and Indemnities may expire at closing, survive for a time or extend in perpetuity
- When selling you want an express sunset … walk-away
- When buying you want the R&Ws and Indemnities from the Seller to last as long as possible
- As buyer, try to tie to at least the Statute of Limitations and consider your future plans for the property

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Representations and Warranties

- Representations are statements of existing fact; warranties are promises that the facts are true
  - Watch temporal limits (e.g., “laws now in effect;” “as of the date hereof”)
  - Support the R&Ws with corresponding indemnity … materiality thresholds for breach should be cumulative, not per breach
- Typical environmental R&Ws include:
  - Compliance with EHS Laws, Green Building Codes, etc.
  - No pending or threatened claims or liens
  - No releases, ongoing cleanup or investigation
  - No underground storage tanks, asbestos, PCBs, Mold
  - All environmental data, including permits, provided
  - No capital improvements to comply with laws, codes

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Representations and Warranties, cont'd.

- Seller wants to limit the R&Ws
  - Disclose the data/allow inspection
  - Sell "as is" (but need specific release)
  - Let the buyer draw its own conclusions
- Buyer wants seller to commit to its knowledge and schedule any exceptions
- Knowledge "with due inquiry"
  - Make sure the person with knowledge actually has it… or at least the obligation to get it
- Both EHS specific matters and general legal R&Ws affect EHS (e.g., applicable law, damages)

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Covenants

- Promises to do, or refrain from doing, something
- Example environmental covenants:
  - Compliance
  - Access to information
  - No dig, demolition, renovation, construction, etc.
  - Use restrictions (no groundwater use, no residential, etc.)
  - No disclosure to third parties or the government

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Indemnification

- Used to allocate risk or liabilities… trigger, scope, obligation (e.g., cleanup levels, change of law, previous owners, floors, caps, time limits) … usually not a defense to a government action
- Golden Rule: An indemnity is only as good as the financial worth behind it, and, in this global environment, the legal system that permits enforcement and collection
- As seller, you want coverage for past, present or future environmental issues … you no longer control the property
- As buyer, you want to limit to what you control … you didn't create the mess
- Ensure availability of funds for known obligations and contingent liabilities with a financially strong entity or use other tools such as escrows, parent or shareholder guarantees, insurance

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Releases

- In addition to indemnity protection from third party liability, you want to make sure the other party doesn't sue you either
- Release the other party for the liabilities for which you are responsible
- If you otherwise meet your obligations, you are entitled to a release
- Consider all related parties and make as broad as possible

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Access, Inspection and Termination Rights

- Knowledge is key to managing liability risk
- As a buyer, take advantage of all due diligence opportunities
  - All seller reports on environmental conditions
  - Hire a consultant … Phase I … Phase II
  - Termination rights
- As Seller:
  - You want to provide all information you have to limit, or avoid breaching, a R&W
  - Allowing buyer DD: liability insurance, indemnity, interference with ongoing operations, split samples, reporting and confidentiality concerns
  - You may want termination rights or use limits (e.g. risky buyer)

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Reporting and Confidentiality Concerns

- In many jurisdictions, once you find evidence of environmental impacts, it can trigger reporting or investigation obligations
  - Define who must report (generally seller)
  - Issues to consider when doing your own "at risk" due diligence
  - Post-close investigations?
- Sharing your information with each other vs. the rest of the world
  - Define confidentiality up front … at the start of discussions
  - Reinforce in the contract
    - Survival
    - Return of documents

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Remediation Agreement, Escrowed Funds, Discounted Purchase Price

- In negotiating for remediation
  - How clean is clean? … define clean-up goals
  - Define termination point
- Use escrow to ensure funds are available for environmental liabilities, especially if scope is unknown or if the seller may not have the financials to cover the cost of the cleanup
  - Define expenses that will be covered, triggers to draw on the funds, termination
- Discounted purchase price …. another method to ensure funds when seller may not have sufficient funds to cover liabilities

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Access Agreements

- For conducting pre-closing sampling and post-closing remediation obligations
- Key terms:
  - Scope of license
  - Liability insurance
  - Indemnity
  - Interference with ongoing operations
  - Split samples
  - Time of the essence
  - End point
  - Repairs and Restoration

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Unique Considerations for Leases

- Defining responsibility
  - Indemnities … landlord and tenant
  - Baseline sampling
  - Exit sampling
- Limiting risk
  - Restrictions on Hazardous Materials
  - Notices of releases, NOVs, new substances
  - Prohibit Liens
  - EHS management systems
  - Audit/inspection rights
- Unique situations
  - Multi tenant establishments
  - Indoor air quality

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Risk Avoidance Mechanisms

- Environmental Insurance
- Secured Creditor Exemption (and other defenses)
- Contractual Indemnification and third party
- Guarantees

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Environmental Insurance Market
Major Players – AM Best Ratings

- ACE USA, Inc. A+
- AIG/Chartis (AIU) A
- Chubb Group of Insurance Companies A++
- XL Insurance A
- Zurich North American A
- Ironshore A-
- (A paper available)

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Environmental Insurance Market
Other Players

- Arch Insurance Co. A-
- Hudson Specialty A
- Liberty International A
- Some have limits on term

*Ratings current as of August 2009

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Environmental Insurance Products

- Types of Coverage:
  - Pollution Legal Liability
  - Cleanup Cost Cap / Remediation Stop Loss
  - Finite Risk
  - Secured Creditor Protection
- Coverage Limits/Policy Period:
  - Very High Coverage Limits
  - Restriction for Term >10 Years
  - Minimum Premiums
  - Surplus Lines – Non-admitted Paper

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General Underwriting Parameters

- Cleanup Cost Cap
  - $2 Million minimum cleanup (Most carriers are $10 Million)
  - $300,000 minimum premium
  - Premium is 6 – 25% of cleanup costs
    - Average 11 – 13%
    - 10-year term maximum
  - SIR – 10 – 30% buffer over estimated cleanup cost
  - Co-insurance requirements (Approximately 10 - 20%)

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General Underwriting Parameters

- Pre-funded Programs
  - $5 Million minimum cleanup
  - Longer terms: 10 years up to 20 years
  - Formerly known as Finite Risk
    - Used for tax reasons
    - Financial responsibilities
    - Retiring assets (Fin 47)
    - Full liability transfers

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General Underwriting Parameters

- Secured Lender (Impaired Collateral)
  - Underwriting Lender's Risk Review
  - No longer offered by AIG
  - Zurich only offering on a portfolio basis (covers Lenders)
  - Pays lesser of cleanup cost or loan balances
  - Default on loan must be caused by a pollution condition
  - Look at LTV ratio, duration of loan

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General Underwriting Parameters

- Pollution Legal Liability
  - Five years new conditions
  - Maximum 10-year term
  - Minimum premiums $25,000 - $30,000
  - $100,000 for 10-year term

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Environmental Insurance Products (cont.)

- Exclusions (Some can be negotiated):
  - Known Contamination (PLL Policy) – Ask for BI/PD
  - Mold, War, Terrorism
  - Engineering & Institutional Controls Compliance
  - Capital Improvement
  - Material Change in Use – No dry cleaners / gas stations
  - Limit on Terms for New Conditions (5 years)
  - Government Requirement Trigger – No voluntary investigation or discovery trigger
  - Cover vapor exposure (BI / PD) if installing vapor mitigation system

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Evaluate Cost Recovery Options

- Indemnification in contracts, guarantees, personal recourse, use access agreements
- from offsite parties to manage risks
- Prior Owner/Operators – claim letters, assignment of insurance proceeds
- Insurance Policies – (pre-1986 commercial & general liability) or new environmental products
- Public Funding – Grants/Loans
- Reimbursements – Tax reimbursements
- Tax Credits – income, sales, property taxes

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Reasons and Applications for Guaranteed Fixed-Price Remediation

- Purchase
- Sale
- Refinance
- Litigation Settlement
- Tax Consequences

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Level of Inquiry Needed to Obtain a Guarantee

- Need to delineate soil and ground water impacts, a trial approach (systematic planning, dynamic workplan, real-time data)
- Remedy Selection Considerations – future use, timing, ability to fund remediation
- How long does study take?

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Disclosure and Transfer Requirements

- Transfer of Property and Facilities requires transfer of permits, even for non-industrial facilities:
  - Underground storage tanks
  - Emergency Generators with above-ground fuel storage
  - Air permits (boilers, spray booths, process emissions, etc.)
  - Sewer discharge permits
  - Notice to local authorities, fire department
  - SPCC Plan
- Sales Contract or New Lease should specify obligations of seller or tenant to assist with permit transfers prior to closing.
- Environmental Deed Restrictions should be disclosed prior to transfer and recorded.

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State transfer laws require disclosure

- Examples:
  - New Jersey Industrial Site Recovery Act ("ISRA")
  - Connecticut Transfer Act
  - Others

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Engineering And Institutional Controls

- Regulations typically define the levels of contaminants that can remain on-site based upon the proposed future land use … residential, commercial, industrial
- When it is not cost effective or practicable to remove all contamination to the appropriate risk based clean-up level, you may be able to leave such materials provided you have in place proper protective measures
- To avoid exposure to,and disturbance of, impacted media, you can impose either institutional (documented restrictions) or engineering controls (physical restrictions) to put future owners on notice, restrict use and restrict disturbance

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Engineering Controls

- A mechanism to contain or stabilize contaminants which acts as a physical barrier between the contamination and human contact or the environment
- Examples:
  - Caps
    - Soil/clay
    - Vegetation
    - Asphalt
    - Building footprint
  - Fences, signs
  - Vapor barriers

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Institutional Controls

- Institutional control examples: restrictions on groundwater use, restrictions on types of use (e.g., no residential or daycare); construction limits or techniques (e.g., no disturbance of remediation caps, vapor barriers), requirements for future monitoring or maintenance
- Should be recorded to ensure future owners/purchasers are notified: record orders, deed restrictions, environmental easements, environmental covenants
- Limitations of traditional environmental covenants and restrictions: subject to local real estate and common law doctrine limits (adverse possession, waiver, tax foreclosure, marketable title statutes), typically don't run with the land, may be terminated by future owners, generally requires a real property interest to enforce

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Uniform Environmental Covenants Act (UECA)

- Adopted in AL, DE, DC, GA, HI, ID, IL, IA, KY, ME, MD, MS, MO, NE, NV, OH, OK, PA, SD, UT, USVI, WA, WV; Proposed: RI, IN
- Designed to ensure continuity of land use controls may be enforced over time by a variety of parties
- Key provisions:
  - Covenants run with the land and perpetual, unless terminated under the Act
  - Third party enforcement
  - Precludes common law doctrines hindering enforcement
  - Expands notice
  - Optional environmental covenant registry
- http://www.environmentalcovenants.org

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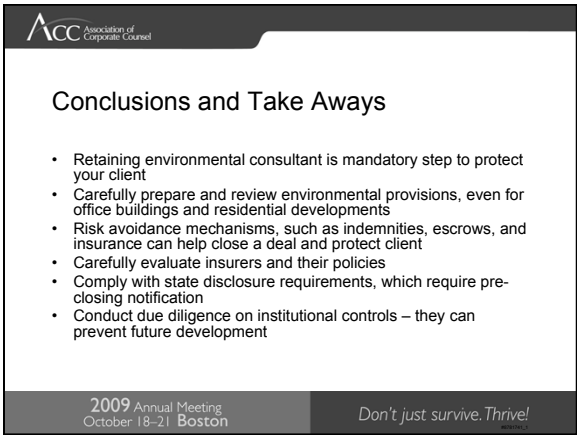
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Conclusions and Take Aways
• Retaining environmental consultant is mandatory step to protect your client
• Carefully prepare and review environmental provisions, even for office buildings and residential developments
• Risk avoidance mechanisms, such as indemnities, escrows, and insurance can help close a deal and protect client
• Carefully evaluate insurers and their policies
• Comply with state disclosure requirements, which require pre-closing notification
• Conduct due diligence on institutional controls – they can prevent future development
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MODEL CONTRACT TERMS

I. EHS Definitions

A. Environmental Laws

"Environmental Laws" shall mean any and all past, present and future local, state, and federal law, statute, treaty, directive, decision, judgment, award, regulation, decree, rule, code of practice, guidance, order, direction, consent, authorization, permit, or similar requirement, approval or standard concerning environmental, health or safety matters (including, but not limited to, the clean-up standards and practices for Hazardous Materials) in buildings, equipment, soil, sub-surface strata, air, surface water, or ground water, applicable to [facility(ies)].

B. Hazardous Materials

"Hazardous Materials" means any and all dangerous substances, hazardous substances, toxic substances, radioactive substances, hazardous wastes, special wastes, controlled wastes, oils, petroleum and petroleum products, hazardous chemicals and any other materials which may be harmful to human health or the environment and which are or may be at any time during the term of this Agreement regulated or controlled under Environmental Laws [jurisdiction].

II. Representations & Warranties (General)

A. Environmental R&W of Seller for Buyer

No notice, citation, summons or order has been issued, no complaint has been filed, no penalty has been assessed and no investigation or review is pending or threatened by any governmental or other entity: (a) with respect to any alleged violation by the Seller of any environmental statute, ordinance, rule, regulation or order of any governmental entity with respect to the Property; or (b) with respect to any alleged failure by the Seller to have any environmental permit, certificate, license, approval, registration or authorization required in connection with its business at the Property; or (c) with respect to any use, possession/generation, treatment, storage, recycling, transportation or disposal (collectively "Management") of any Hazardous Materials by or on behalf of the Seller at or from the Property.

B. Environmental R&W of Seller for Seller

The Seller has received no written notice of any citation, summons, order, complaint, penalty, investigation or review by any governmental or other entity (a) with respect to any alleged violation by the Seller of any environmental statute, ordinance, rule, regulation or order of any governmental entity or (b) with respect to any alleged failure by the Seller to have any environmental permit,

certificate, license, approval, registration or authorization required in connection with its business or (c) with respect to any generation, treatment, storage, recycling, transportation or disposal ("Management") of any Hazardous Materials as defined in the CERCLA or hazardous waste as defined in RCRA by the Seller (collectively "Hazardous Substance"), except for such violations, failures or Management which would not have a material adverse effect on Seller.

III. Covenants

A. Restrictions on Future Use for Seller

WHEREAS, conditions existing on the Property as a result of its use as an industrial facility make the Property unsuitable for certain uses, and

WHEREAS, the Parties hereto desire and intend to restrict the use of the Property in the future so as to reduce the risk of injury or damage to persons and property as a result of the existing conditions.

NOW, THEREFORE, in consideration of the mutual promises of the Parties hereto, each to the other as covenantor and covenantee, Grantee hereby covenants to Grantor, which covenant shall be binding upon all successors in interest to the Property, that the Property or any portion thereof shall not be used for any purpose other than warehouse, manufacturing, industrial, [retail, or commercial] purposes only, at any time from and after the date of recordation of this deed, without first requesting and receiving written permission for such other use from Grantor, its successors or assigns. Said permitted uses shall not include any agricultural use, any livestock raising or breeding use, any food processing uses, or any playground, sports, recreational, open space, public park, school or hospital uses, or any similar, accessory or incidental use or uses thereto on the Property, such as, but not limited to, residential uses. If Grantee, or any successor in interest to the Property, shall cause or permit a breach of said covenant, Grantor, or its successors or assigns, may enjoin such unpermitted use and seek other such relief to which it may be entitled.

Grantee acknowledges that it is accepting this deed on the basis of its own investigation of the physical and environmental conditions of the Property, including subsurface conditions, and assumes the risk that Hazardous Materials may be present on the Property. Grantee hereby releases Grantor and its affiliates and their respective officers, directors, employees, stockholders, agents, and representatives from any present or future losses or liabilities, known or unknown, relating to any such presence.

The covenants contained herein are to run with the land and shall be binding on all Parties and persons claiming under them. Grantee agrees that all the restrictions contained in this deed shall be inserted in full in all future deeds of the property covered by this deed.

IV. Indemnification

A. For Buyer

Indemnification. Except to the extent that elsewhere in this Agreement liabilities or obligations are otherwise provided for, the parties' indemnification obligations shall be as follows:

1. General Indemnification Obligations.

   a. Seller(s) hereby (jointly and severally) agree to indemnify, defend and hold Buyer harmless from and against:

      i. any and all damages, claims, fines, penalties, losses, expenses, obligations and liabilities (including reasonable attorneys' fees and all other reasonable expenses incurred in investigating, preparing or defending any litigation or proceeding commenced or threatened) arising out of or resulting from a misrepresentation, breach of warranty or non-fulfillment of any agreement on the part of the Seller contained in this Agreement or in any statement, certificate or document furnished or to be furnished to Buyer pursuant hereto or in connection with the transactions contemplated hereby;

      ii. any and all liabilities or responsibilities of any Seller of any nature, whether due or to become due, whether accrued, absolute, contingent or otherwise, existing on the Closing Date or arising out of any transactions entered into, or any state of the facts existing, prior to such date;

      iii. any and all liabilities for investigation and clean-up arising from a Release or threat of a Release of Hazardous Substances used, possessed or generated by Seller prior to the Closing Date; and

      iv. any and all damages, claims, fines, penalties, losses, expenses, obligations and liabilities (including reasonable attorneys' fees and all other reasonable expenses incurred in investigating, preparing or defending any litigation or proceeding commenced or threatened) related to violations (and the remediation or abatement of violations) of Environmental Laws, first occurring prior to the Closing Date.

b. For purposes of this Agreement, the aggregate amount of such damages, claims, fines, penalties, losses and expenses (including reasonable attorneys' fees and all other expenses incurred in investigating, preparing or defending any litigation or proceeding, commenced or threatened) referred to in Sections (a) and (b) shall be hereinafter referred to as "Damages."

B. For Seller

1. Buyer(s) (jointly and severally) agrees to indemnify, defend, and hold Seller harmless from and against, and to reimburse Seller with respect to all losses, claims, demands, liabilities, obligations, causes of action, damages, costs, expenses, fines or penalties (including without limitation attorney fees) (hereafter "Claims") asserted against Seller arising from environmental conditions, including without limitation, the presence of Hazardous Substances at, in, on or under the Property or the Release or threat of Release of Hazardous Substances at the Property whether into the air, soil, ground or surface waters on or off-site or for violation of any federal, state, regional or local environmental law, regulation, rule, order, ordinance or notice with respect to the property (often excludes pre-closing Releases and violations of law). Buyer agrees to respond on Seller's behalf and defend such Claims or, at Seller's election, to pay the costs of Seller's response and defense.

   Buyer hereby waives and releases Seller from any and all Claims, known and unknown, foreseen or unforeseen, which exist or which may arise in the future under Environmental Laws.

   (Seller agrees to indemnify, defend and hold Buyer harmless from and against and to reimburse Buyer with respect to any Pre-Closing Environmental Claims. Seller agrees to respond on Buyers' behalf and defend such Pre-Closing Environmental Claims, or, at Buyer's election, to pay the costs of Buyer's response and defense.)

V. Release for Seller

It is expressly understood and agreed by and between the Parties hereto that, as a material inducement to and consideration for Seller to sell the Property to Buyer upon the terms and conditions set forth in this Agreement, Buyer has agreed and does hereby expressly covenant not to sue Seller with respect to any matter or thing arising out of the environmental, health or safety condition of the Property, known or unknown, existing now, in the past or hereafter arising, including without limitation any matter or thing identified in the Reports. Buyer hereby releases and discharges Seller, its directors, officers, employees, contractors and agents from any and all suits, claims, demands, causes of action, damages, consequential damages, losses, costs and expenses of any kind

(including without limitation fines and penalties), whether known or unknown, which Buyer had, has, or at any time may have, based on: (a) any Environmental Laws including, but not by way of limitation, any cost recovery claim under the Environmental Laws relating to any Property; (b) any discharge, disposal, generation, manufacture, release or escape of any Hazardous Materials, as hereinafter defined, on, at, to or from the Property (including all facilities, improvements, structures and equipment thereon, surface water thereon or adjacent thereto, and soil or groundwater thereunder); and (c) any environmental conditions whatsoever on, under, or in the vicinity of the Property.

VI. Access

Buyer's right to enter the Property for purposes of conducting the environmental inspections shall be subject to the following restrictions: (i) Buyer's or its representatives' activities under this section shall not materially interfere with the normal operation of the Business; (ii) Buyer shall give Seller an opportunity to review and approve, at its sole discretion, the scope of the proposed activities prior to the first such entry; (iii) Buyer shall notify Seller prior to each such entry onto the Property to conduct such activities; (iv) Seller shall be permitted to have a representative present during all such investigations; and (v) Seller may take split samples, copy the results of on-site testing and visual inspections, and have complete access to all samples taken, test results, and boring records.

VII. Confidentiality

In conjunction with current discussions between Seller and Buyer concerning the purchase by Buyer of the Property, Buyer has requested copies of the environmental reports listed in Attachment __ hereto concerning the Property. All such information, whether furnished before or after the date of this letter, and irrespective of the form of communication, are collectively referred to in this Agreement as "Environmental Information."

Accordingly, in consideration for Seller's disclosure of such Environmental Information to Buyer, Buyer agrees as follows:

A. The Environmental Information and any additional environmental information disclosed in connection with discussions with Seller's employees, agents and contractors will be kept strictly confidential and will be considered and otherwise used by Buyer solely for purposes within the scope of the aforementioned discussions. The Environmental Information shall not, without Seller's prior written consent, be disclosed by Buyer, or by Buyer's employees, agents, advisors, attorneys, lenders, or contractors, as to each of whom disclosure by Buyer is specifically permitted as set forth in the following sentence, (herein, the "Representatives"), in any manner whatsoever, in whole or in part. Moreover, Buyer agrees to reveal such Environmental Information only to such of the Representatives who need to know the Environmental Information for such

purposes, and only after each such Representative has been informed of the confidential nature of the Environmental Information and agrees to be bound by the terms of this Agreement.

B. Buyer shall not reproduce more than four (4) complete sets of the Environmental Information or otherwise memorialize any such Environmental Information without Seller's prior written consent.

C. If Buyer or anyone to whom Buyer transmits such Environmental Information becomes legally compelled to disclose any portion thereof, Buyer will provide Seller with prompt notice of such requirements so that Seller may seek a protective order or other appropriate remedy and/or waive compliance with the provisions of this Agreement.

D. No consent or waiver by Seller under this Agreement will be effective or binding unless the same is in writing and signed by Seller's designated representative. For the purpose of this Agreement, Seller's representative shall be _____.

E. Seller makes no representation or warranties, express or implied, in connection with any Environmental Information made available hereunder. Buyer shall rely solely upon its independent examination and assessment of such Environmental Information and hereby releases Seller and the employees, agents and contractors of Seller from all claims by Buyer as to the lack of completion or accuracy of such Environmental Information and for all responsibility and liability for conclusions that are derived by Buyer from such Environmental Information.

F. This Agreement shall be inoperative as to particular portions of the Environmental Information if such information becomes generally available to the public other than as a result of a disclosure by Buyer or its Representatives.

G. In the event Seller and Buyer do not enter into a written Purchase and Sale Agreement for the purchase by Buyer of the Property, then at the request of Seller, Buyer shall promptly return, destroy or have destroyed all Environmental Information which has come into Buyer's possession and promptly destroy or have destroyed all memoranda, notes, reports, documents or other records revealing such Environmental Information which Buyer or its employees, agents or contractors have prepared, and, upon request of Seller, certify that such has been accomplished.

VIII. Lease Indemnity

A. <u>For Lessor</u>

Except as specified on Exhibit ___ hereto or as may otherwise be approved in writing by Landlord hereinafter, Tenant will not use the Premises for the generation, use, manufacture, recycling, transportation, treatment, storage,

discharge or disposal of any hazardous, toxic or polluting substance or waste (including petroleum products and radioactive materials) ("Hazardous Substances") or for any use which poses a risk of damage to the environment and will not engage in any activity which could subject Landlord to any liability under federal, state or local environmental law, regulation, order or ordinance.

Tenant will comply with all applicable environmental statutes, rules, regulations and orders of any federal, state or municipal government in effect at any time during the term of this lease; obtain in its own name any and all environmental permits, registrations, licenses or identification numbers necessary for its operations; and comply with all such permits.

Tenant will assume full responsibility for reporting any release, spill, leak, discharge, disposal, pumping, pouring, emission, emptying, injecting, leaching, dumping, or escaping ("Release") or threat of Release of any Hazardous Substance at the Premises to the appropriate environmental agencies and immediately provide notice of such Release or threat of Release to Landlord. Tenant will assume full responsibility for any investigation, clean-up or other action required in relation to any such Release or threat of Release and will indemnify and hold Landlord harmless for any claims, costs or expenditures in relation thereto. Tenant will take all necessary precautions to avoid any such Releases or threats of Release.

Tenant will take no action which could result in a lien being imposed on the Premises by the state or federal government under any environmental statute.

Tenant will not install any Hazardous Substance storage tank, nor asbestos containing materials nor polychlorinated biphenyl ("PCB") containing equipment at the premises without the advance written permission of Landlord.

Tenant will take no action which could require Landlord to include in the deed to the property a notice of disposal/release of Hazardous Substances at the site.

Tenant does hereby agree to indemnify and save harmless Landlord from all losses, costs, damages and expenses, (including fines, penalties, and attorneys' fees) resulting from any claim, demand, liability, obligation, right or cause of action, including but not limited to governmental action, (collectively, "Claims"), that are asserted against Landlord or the Leased Premises as a result of Tenant's breach of any representation, warranty, or covenant hereof; or arising out of the operations or activities or presence of Tenant or any sublessee, agent, representative of Tenant at the Leased Premises; or arising from environmental conditions or violations at the Leased Premises including without limitation the presence of Hazardous Substances at, on, or under the Leased Premises or the discharge or release of hazardous, polluting, or toxic substances from the Leased Premises; provided, however, that Tenant shall not be obligated to indemnify Landlord under this paragraph if Tenant demonstrates that the Claim was based on events or conditions prior to the date of this Agreement.

Landlord does hereby agree to indemnify and save harmless Tenant from all claims that are asserted against Tenant or the Leased Premises as a result of Landlord's breach of any representation, warranty or covenant hereof; or arising out of the operations or activities or presence of the Landlord at the Leased Premises; or arising from environmental conditions or violations at the Leased Premises including without limitation the presence of Hazardous Substances at, on, or under the Lease Premises providing that Tenant demonstrates that such environmental condition or violation was based on events or conditions first existing prior to the date of this Agreement and only to the extent existing prior to the date of this Agreement.

Tenant hereby waives and releases Landlord from any and all Claims, known and unknown, foreseen or unforeseen, which exist or which may arise under common or statutory law, including CERCLA or any other statutes now or thereafter in effect.

Survival. The indemnities contained herein and the environmental representations, warranties and covenants of Landlord and Tenant shall survive termination of this Lease.

Note: Exhibit for first paragraph may include a general statement concerning retail quantities of Hazardous Substances used for commercial or cleaning purposes and the waste produced therefrom.

B. <u>For Lessee</u>

Lessor agrees to indemnify, defend and hold harmless from and against, and to reimburse Lessee with respect to all losses, claims, demands, liabilities, obligations, causes of action, damages, costs, expenses, fines or penalties (including without limitation attorney fees and other defense costs) (hereafter "Claims") asserted against Lessee arising from environmental conditions, including without limitation, the presence of any hazardous, toxic or polluting substance or waste (including petroleum products and radioactive materials) ("Hazardous Substances") at, on, in or under the Property, or the Release or threat of Release of Hazardous Substances at or onto the Property whether into the air, soil, ground or surface waters on or off-site or arising from the off-site transportation, storage, treatment, recycling or disposal of hazardous Substances generated by the Lessor or at the Property or for violation of any federal, state, regional or local environmental law, regulation, rule, order, ordinance or notice by Lessor at the Property. Lessor agrees to respond on Lessee's behalf and defend such Claims or, at Lessee's election, to pay the costs of Lessee's response and defense. [<u>Lessor shall not be obligated to indemnify Lessee under this provision to the extent Lessor can prove that the Claims were based on the activities of Lessee at the Property. ("Lessee Activity Claims").</u>]

Lessor hereby waives and releases Lessee from any and all Claims, known or unknown, foreseen or unforeseen, which exist or may arise under statutory or

common law, including CERCLA or any other statute now or hereafter in effect. [except for Lessee Activity Claims.]

[Lessee agrees to indemnify, defend and hold Lessor harmless from and against and to reimburse Lessor with respect to any Lessee Activity Claims. Lessee agrees to respond on Lessor's behalf and defend such Lessee Activity Claims, or, at Lessor's election, to pay the costs of Lessor's response and defense.]

Federal Register

Tuesday,
November 1, 2005

Part III

Environmental Protection Agency

40 CFR Part 312
Standards and Practices for All Appropriate Inquiries; Final Rule

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 312

[SFUND–2004–0001; FRL–7989–7]

RIN 2050–AF04

Standards and Practices for All Appropriate Inquiries

AGENCY: Environmental Protection Agency.

ACTION: Final rule.

SUMMARY: The Environmental Protection Agency (EPA) today is establishing federal standards and practices for conducting all appropriate inquiries as required under sections 101(35)(B)(ii) and (iii) of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA). Today's final rule establishes specific regulatory requirements and standards for conducting all appropriate inquiries into the previous ownership and uses of a property for the purposes of meeting the all appropriate inquiries provisions necessary to qualify for certain landowner liability protections under CERCLA. The standards and practices also will be applicable to persons conducting site characterization and assessments with the use of grants awarded under CERCLA section 104(k)(2)(B).

DATES: This final rule is effective November 1, 2006.

ADDRESSES: EPA established a docket for this action under Docket ID No. SFUND–2004–0001. All documents in the docket are listed in the EDOCKET index at *http://www.epa.gov/edocket.* Although listed in the index, some information is not publicly available, i.e., information labeled Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available either electronically in EDOCKET or in hard copy at the EPA Docket Center, EPA West Building, Room B102, 1301 Constitution Ave., NW., Washington, DC. This docket facility is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding Federal holidays. The telephone number for the Public Reading Room is (202) 566–1744, and the telephone number for the OSWER Docket is (202) 566–0276.

FOR FURTHER INFORMATION CONTACT: For further information on specific aspects of today's rule, contact Patricia Overmeyer of EPA's Office of Brownfields Cleanup and Redevelopment at (202) 566–2774 or at *overmeyer.patricia@epa.gov.* Mail inquiries may be directed to the Office of Brownfields Cleanup and Redevelopment (5105T), 1200 Pennsylvania Ave. NW., Washington, DC 20460.

SUPPLEMENTARY INFORMATION:

I. General Information

A. Who Potentially May be Affected by Today's Rule?

This regulation may affect most directly those persons and businesses purchasing commercial property or any property that will be used for commercial or public purposes and who may, after purchasing the property, seek to claim protection from CERCLA liability for releases or threatened releases of hazardous substances. Under section101(35)(B) of CERCLA, as amended by the Small Business Liability Relief and Brownfields Revitalization Act (Pub. L. 107–118, 115 stat. 2356, "the Brownfields Amendments") such persons and businesses are required to conduct all appropriate inquiries prior to or on the date on which the property is acquired. Prospective landowners who do not conduct all appropriate inquiries prior to or on the date of obtaining ownership of the property may lose their ability to claim protection from CERCLA liability as an innocent landowner, bona fide prospective purchaser, or contiguous property owner.

In addition, today's rule will affect any party who receives a brownfields grant awarded under CERCLA section 104(k)(2)(B) and uses the grant money to conduct site characterization or assessment activities. This includes state, local and tribal governments that receive brownfields site assessment grants for the purpose of conducting site characterization and assessment activities. Such parties are required under CERCLA section 104(k)(2)(B)(ii) to conduct such activities in compliance with the standards and practices established by EPA for the conduct of all appropriate inquiries. EPA notes that today's rule also may affect other parties who apply for brownfields grants under the provisions of CERCLA section 104(k), since such parties may have to qualify as a bona fide prospective purchaser to ensure compliance with the statutory prohibitions on the use of grant funds under Section 104(k)(4)(B)(I). Any party seeking liability protection as a bona fide prospective purchaser, including eligible brownfields grantees, must conduct all appropriate inquiries prior to or on the date of acquiring a property.

The background document, "Economic Impacts Analysis for the Proposed All Appropriate Inquiries Final Regulation" and the Addendum to this document provide a comprehensive analysis of all potentially impacted entities. These documents are available in the docket established for today's rule. A summary of potentially affected businesses is provided in the table below.

Our aim in the table below is to provide a guide for readers regarding entities likely to be directly regulated or indirectly affected by today's action. This action, however, may affect other entities not listed in the table. To determine whether you or your business is regulated or affected by this action, you should examine the regulatory language amending CERCLA. This language is found at the end of this **Federal Register** notice. If you have questions regarding the applicability of this action to a particular entity, consult the person listed in the preceding section entitled **FOR FURTHER INFORMATION CONTACT.**

Industry category	NAICS code
Manufacturing	31–33
Wholesale Trade	42
Retail Trade	44–45
Finance and Insurance	52
Real Estate	531
Professional, Scientific and Technical Services	541
Accommodation and Food Services	72
Repair and Maintenance	811
Personal and Laundry Services	812
State, Local and Tribal Government	N/A

B. How Can I Get Copies of This Document and Other Related Information?

1. *Docket.* EPA established an official public docket for this action under Docket ID No. SFUND–2004–0001. The official public docket consists of the documents specifically referenced in this action, any public comments received, and other information related to today's action. Although a part of the official docket, the public docket does not include Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Documents in the official public docket are listed in the index list in EPA's electronic public docket and comment system, EDOCKET. Documents may be available either electronically or in hard copy. Electronic documents may be viewed through EDOCKET. Hard copy

documents may be viewed at the EPA Docket Center, EPA West, Room B102, 1301 Constitution Avenue, NW., Washington, DC. The EPA Docket Center Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding Federal holidays. The telephone number for the Public Reading Room is (202) 566–1744, and the telephone number for the OSWER Docket is (202) 566–0276.

2. *Electronic Access.* You may access this **Federal Register** document electronically through the EPA Internet under the "**Federal Register**" listings at *http://www.epa.gov/fedrgstr.*

An electronic version of the public docket also is available through EPA's electronic public docket and comment system, EDOCKET. You may use EDOCKET at *http://www.epa.gov/edocket/* to view public comments, access the index listing of the contents of the public docket, and access those documents in the public docket that are available electronically. Once in the system, select "search," then key in the appropriate docket identification number.

Certain types of information will not be placed in EDOCKET. Information claimed as CBI and other information whose disclosure is restricted by statute, which is not included in the official public docket, will not be available for public viewing in EPA's electronic public docket. EPA's policy is that copyrighted material will not be placed in EPA's electronic public docket but will be available only in printed, paper form in the official public docket. Docket materials that are not available electronically may be viewed at the docket facility identified above.

Contents of Today's Rule

I. Statutory Authority

These regulations are promulgated under the authority of Section 101(35)(B) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (42 U.S.C. 9601), as amended, most importantly by the Small Business Liability Relief and Brownfields Revitalization Act.

II. Background

A. What is the Intent of Today's Rule?

On August 26, 2004, EPA published a notice of proposed rulemaking outlining proposed standards and practices for the conduct of "all appropriate inquiries." This regulatory action was initiated in response to legislative amendments to the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA). On January 11, 2002, President Bush signed the Small Business Liability Relief and Brownfields Revitalization Act (Pub. L. 107–118, 115 Stat. 2356, "the Brownfields Amendments"). The Brownfields Amendments amend CERCLA by providing funds to assess and clean up brownfields sites, clarifying CERCLA liability provisions for certain landowners, and providing funding to enhance state and tribal cleanup programs. The intent of today's rule is to finalize regulations setting federal standards and practices for the conduct of all appropriate inquiries, a key provision of the Brownfields Amendments. Subtitle B of Title II of the Brownfields Amendments revises CERCLA section 101(35), clarifying the requirements necessary to establish the innocent landowner defense. In addition, the Brownfields Amendments add protections from CERCLA liability for bona fide prospective purchasers and contiguous property owners who meet certain statutory requirements.

Each of the CERCLA liability provisions for innocent landowners, bona fide prospective purchasers, and contiguous property owners, requires that, among other requirements, persons claiming the liability protections conduct all appropriate inquiries into prior ownership and use of a property prior to or on the date a person acquires a property. The law requires EPA to develop regulations establishing standards and practices for how to conduct all appropriate inquiries. Congress included in the Brownfields Amendments a list of criteria that the Agency must address in the regulations establishing standards and practices for conducting all appropriate inquiries

section 101(35)(2)(B)(ii) and (iii). The Brownfields Amendments also require that parties receiving a federal brownfields grant awarded under CERCLA section 104(k)(2)(B) to conduct site characterizations and assessments must conduct these activities in accordance with the standards and practices for all appropriate inquiries.

The regulations established today only address the all appropriate inquiries provisions of CERCLA sections 101(35)(B)(i)(I) and 101(35)(B)(ii) and (iii). Today's rule does not address the requirements of CERCLA section 101(35)(B)(i)(II) for what constitutes "reasonable steps."

B. What is "All Appropriate Inquiries?"

An essential step in real property transactions may be evaluating a property for potential environmental contamination and assessing potential liability for contamination present at the property. The process for assessing properties for the presence or potential presence of environmental contamination often is referred to as "environmental due diligence," or "environmental site assessment." The Comprehensive Environmental Response Compensation and Liability Act (CERCLA) or Superfund, provides for a similar, but legally distinct, process referred to as "all appropriate inquiries."

Under CERCLA, persons may be held strictly liable for cleaning up hazardous substances at properties that they either currently own or operate or owned or operated at the time of disposal. Strict liability in the context of CERCLA means that a potentially responsible party may be liable for environmental contamination based solely on property ownership and without regard to fault or negligence.

In 1986, the Superfund Amendments and Reauthorization Act (Pub. L. No. 99–499, 100 stat. 1613, "SARA") amended CERCLA by creating an "innocent landowner" defense to CERCLA liability. The new section 101(35)(B) of CERCLA provided a defense to CERCLA liability, for those persons who could demonstrate, among other requirements, that they "did not know and had no reason to know" prior to purchasing a property that any hazardous substance that is the subject of a release or threatened release was disposed of on, in, or at the property. Such persons, to demonstrate that they had "no reason to know" must have undertaken, prior to, or on the date of acquisition of the property, "all appropriate inquiries" into the previous ownership and uses of the property consistent with good commercial or customary standards and practices. The 2002 Brownfields Amendments added potential liability protections for "contiguous property owners" and "bona fide prospective purchasers" who also must demonstrate they conducted all appropriate inquiries, among other requirements, to benefit from the liability protection.

C. What Were the Previous Standards for All Appropriate Inquiries?

As part of the Brownfields Amendments to CERCLA, Congress established interim standards for the conduct of all appropriate inquiries. The federal interim standards established by Congress became effective on January 11, 2002. In the case of properties purchased after May 31, 1997, the interim standards include the procedures of the ASTM Standard E1527–97 (entitled "Standard Practice for Environmental Site Assessments: Phase 1 Environmental Site Assessment Process"). In the case of persons who purchased property prior to May 31, 1997 and who are seeking to establish an innocent landowner defense or qualify as a contiguous property owner, CERCLA provides that such persons must establish, among other statutory requirements, that at the time they acquired the property, they did not know and had no reason to know of releases or threatened releases to the property. To establish they did not know and had no reason to know of releases or threatened releases, persons who purchased property prior to May 31, 1997 must demonstrate that they carried out all appropriate inquiries into the previous ownership and uses of the property in accordance with generally accepted good commercial and customary standards and practices.

In the case of property acquired by a non-governmental entity or non-commercial entity for residential or other similar uses, the current interim standards for all appropriate inquiries may not be applicable. For those cases, the Brownfields Amendments to CERCLA establish that a "facility inspection and title search that reveal no basis for further investigation shall be considered to satisfy the requirements' for all appropriate inquiries. In addition, such properties are not within the scope of today's rule.

The interim standards remain in effect only until the effective date of today's rule which promulgates federal regulations establishing standards and practices for conducting all appropriate inquiries.

On May 9, 2003, EPA published a final rule (68 FR 24888) clarifying that for the purposes of achieving the all appropriate inquiries standards of CERCLA section 101(35)(B), and until the effective date of today's regulation, persons who purchase property on or after May 31, 1997 could use either the procedures provided in ASTM E1527–2000, entitled "Standard Practice for Environmental Site Assessments: Phase I Environmental Site Assessment Process," or the earlier standard cited by Congress in the Brownfields Amendments, ASTM E1527–97.

Today's notice is a final rule and as such replaces the current interim standards for all appropriate inquiries established by Congress in the Brownfields Amendments and clarified by EPA in the May 9, 2003 final rule. Since the Agency is promulgating a final rule establishing federal regulations containing the standards and practices for conducting all appropriate inquiries, the interim standard will no longer be the operative standard for conducting all appropriate inquiries upon November 1, 2006, the effective date of today's rule. Until November 1, 2006, both the standards and practices included in today's final regulation and the current interim standards established by Congress for all appropriate inquiries will be recognized by EPA as satisfying the statutory requirements for the conduct of all appropriate inquiries under section 101(35)(B) of CERCLA.

D. What are the Liability Protections Established Under the Brownfields Amendments?

The Brownfields Amendments provide important liability protections for landowners who qualify as contiguous property owners, bona fide prospective purchasers, or innocent landowners. To meet the statutory requirements for any of these landowner liability protections, a landowner must meet certain threshold requirements and satisfy certain continuing obligations. To qualify as a bona fide prospective purchaser, contiguous property owner, or innocent landowner, a person must perform "all appropriate inquiries" on or before the date on which the person acquired the property. Bona fide prospective purchasers and contiguous property owners also must demonstrate that they are not potentially liable or affiliated with any other person that is potentially liable for response costs at the property. In the case of contiguous property owners, the landowner claiming to be a contiguous property owner also must demonstrate that he did not cause, contribute, or consent to any release or threatened release of hazardous substances. To meet the statutory requirements for a bona fide

prospective purchaser, a property owner must have acquired a property subsequent to any disposal activities involving hazardous substances at the property.

Continuing obligations required under the statute include complying with land use restrictions and not impeding the effectiveness or integrity of institutional controls; taking "reasonable steps" with respect to hazardous substances affecting a landowner's property to prevent releases; providing cooperation, assistance and access to EPA, a state, or other party conducting response actions or natural resource restoration at the property; complying with CERCLA information requests and administrative subpoenas; and providing legally required notices. For a more detailed discussion of these threshold and continuing requirements please see EPA, Interim Guidance Regarding Criteria Landowners Must Meet in Order to Qualify for Bona Fide Prospective Purchaser, Contiguous Property Owner, or Innocent Landowner Limitations on CERCLA Liability (Common Elements, 2003). A copy of this document is available in the docket for today's rule.

EPA notes that, as explained below, persons conducting all appropriate inquiries in compliance with today's final rule are not entitled to the CERCLA liability protections provided for innocent landowners, bona fide prospective purchasers, and contiguous property owners, unless they also comply with all of the continuing obligations established under the statute. As explained below, compliance with today's final rule is only one requirement necessary for CERCLA liability protection. We also note that the requirements of today's rule apply to prospective property owners who are seeking protection from liability under the federal Superfund Law (CERCLA). Prospective property owners wishing to establish protection from, or a defense to, liability under state superfund or other related laws must comply with the all criteria established under state laws, including any criteria for conducting site assessments or all appropriate inquiries established under applicable state statutes or regulations.

1. Bona Fide Prospective Purchaser

The Brownfields Amendments added a new bona fide prospective purchaser provision at CERCLA section 107(r). The provision provides protection from CERCLA liability, and limits EPA's recourse for unrecovered response costs to a lien on property for the lesser of the unrecovered response costs or increase in fair market value attributable to EPA's response action. To meet the statutory requirements for a bona fide prospective purchaser, a person must meet the requirements set forth in CERCLA sections 101(40) and 107(r). A bona fide prospective purchaser must have bought property after January 11, 2002 (the date of enactment of the Brownfields Amendments). A bona fide prospective purchaser may purchase property with knowledge of contamination after performing all appropriate inquiries, provided the property owner meets or complies with all of the other statutory requirements set forth in CERCLA section 101(40). Conducting all appropriate inquiries *alone* does not provide a landowner with protection against CERCLA liability. Landowners who want to qualify as bona fide prospective purchasers must comply with all of the statutory requirements. The statutory requirements include, without limitation, that the landowner must:

- Have acquired a property after all disposal of hazardous substances at the property ceased;
- Provide all legally required notices with respect to the discovery or release of any hazardous substances at the property;
- Exercise appropriate care by taking reasonable steps to stop continuing releases, prevent any threatened future release, and prevent or limit human, environmental, or natural resources exposure to any previously released hazardous substance;
- Provide full cooperation, assistance, and access to persons that are authorized to conduct response actions or natural resource restorations;
- Comply with land use restrictions established or relied on in connection with a response action;
- Not impede the effectiveness or integrity of any institutional controls;
- Comply with any CERCLA request for information or administrative subpoena; and
- Not be potentially liable, or affiliated with any other person who is potentially liable for response costs for addressing releases at the property.

Persons claiming to be bona fide prospective purchasers should keep in mind that failure to identify an environmental condition or identify a release or threatened release of a hazardous substance on, at, in or to a property during the conduct of all appropriate inquiries does not relieve a landowner from complying with the other post-acquisition statutory requirements for obtaining the liability protections. Landowners must comply with all the statutory requirements to obtain the liability protection. For example, an inability to identify a release or threatened release during the conduct of all appropriate inquiries does not negate the landowner's responsibilities under the statute to take reasonable steps to stop a release, prevent a threatened release, and prevent exposure to any previous release once any release is identified. Compliance with the other statutory requirements for the bona fide prospective purchaser liability protection is not contingent upon the findings of all appropriate inquiries.

2. Contiguous Property Owner

The Brownfields Amendments added a new contiguous property owner provision at CERCLA section 107(q). This provision excludes from the definition of "owner" or "operator" under CERCLA section 107(a)(1) and (2) a person who owns property that is "contiguous to, or otherwise similarly situated with respect to, and that is or may be contaminated by a release or threatened release of a hazardous substance from" property owned by someone else. To qualify as a contiguous property owner, a landowner must have no knowledge or reason to know of contamination at the time of acquisition, have conducted all appropriate inquiries, and meet all of the criteria set forth in CERCLA section 107(q)(1)(A), which include, without limitation:

- Not causing, contributing, or consenting to the release or threatened release;
- Not being potentially liable nor affiliated with any other person who is potentially liable for response costs at the property;
- Taking reasonable steps to stop continuing releases, prevent any threatened release, and prevent or limit human, environmental, or natural resource exposure to any hazardous substances released on or from the landowner's property;
- Providing full cooperation, assistance, and access to persons that are authorized to conduct response actions or natural resource restorations;
- Complying with land use restrictions established or relied on in connection with a response action;
- Not impeding the effectiveness or integrity of any institutional controls;
- Complying with any CERCLA request for information or administrative subpoena;
- Providing all legally required notices with respect to discovery or release of any hazardous substances at the property.

The contiguous property owner liability protection "protects parties that

are essentially victims of pollution incidents caused by their neighbor's actions." S. Rep. No. 107–2, at 10 (2001). Contiguous property owners must perform all appropriate inquiries prior to purchasing property. However, performing all appropriate inquiries in accordance with the regulatory requirements alone is not sufficient to assert the liability protections afforded under CERCLA. Property owners must fully comply with all of the statutory requirements to be afforded the contiguous property owner liability protection. Persons who know, or have reason to know, that the property is or could be contaminated at the time of acquisition of a property cannot qualify for the liability protection as a contiguous property owner, but may be entitled to bona fide prospective purchaser status.

Persons claiming to be contiguous property owners should keep in mind that failure to identify an environmental condition or identify a release or threatened release of a hazardous substance on, at, in or to a property during the conduct of all appropriate inquiries, does not relieve a landowner from complying with the other statutory requirements for obtaining the contiguous landowner liability limitation. Landowners must comply with all the statutory requirements to qualify for the liability protections. For example, an inability to identify a release or threatened release during the conduct of all appropriate inquiries does not negate the landowner's responsibilities under the statute to take reasonable steps to stop the release, prevent a threatened release, and prevent exposure to previous releases once a release is identified. None of the other statutory requirements for the contiguous property owner liability protection is contingent upon the results of the conduct of all appropriate inquiries.

3. Innocent Landowner

The Brownfields Amendments also clarify the innocent landowner defense. To qualify as an innocent landowner, a person must conduct all appropriate inquiries and meet all of the statutory requirements. The requirements include, without limitation:

- Having no knowledge or reason to know that any hazardous substance which is the subject of a release or threatened release was disposed of on, in, or at the facility;
- Providing full cooperation, assistance and access to persons authorized to conduct response actions at the property;
- Complying with any land use restrictions and not impeding the effectiveness or integrity of any institutional controls;
- Taking reasonable steps to stop continuing releases, prevent any threatened release, and prevent or limit human, environmental, or natural resource exposure to any previously released hazardous substances;

To successfully assert an innocent landowner liability defense, a property owner must demonstrate compliance with CERCLA section 107(b)(3) as well. Such persons must establish, by a preponderance of the evidence:

- That the release or threat of release of hazardous substances and the resulting damages were caused by an act or omission of a third party with whom the person does not have employment, agency, or a contractual relationship;
- The person exercised due care with respect to the hazardous substance concerned, taking into consideration the characteristics of such hazardous substance, in light of all relevant facts and circumstances;
- Took precautions against foreseeable acts or omissions of any such third party and the consequences that could foreseeably result from such acts or omissions.

Like contiguous property owners, innocent landowners must perform all appropriate inquiries prior to or on the date of acquisition of a property and cannot know, or have reason to know, of contamination to qualify for this landowner liability protection. Persons claiming to be innocent landowners also should keep in mind that failure to identify an environmental condition or identify a release or threatened release of a hazardous substance on, at, in or to a property during the conduct of all appropriate inquiries, does not relieve or exempt a landowner from complying with the other statutory requirements for asserting the innocent landowner defense. Landowners must comply with all the statutory requirements to obtain the defense. For example, an inability to identify a release or threatened release during the conduct of all appropriate inquiries does not negate the landowner's responsibilities under the statute to take reasonable steps to stop the release, prevent a threatened release, and prevent exposure to a previous release. Compliance with the other statutory requirements for the innocent landowner defense is not contingent upon the results of an all appropriate inquiries investigation.

E. What Criteria Did Congress Establish for the All Appropriate Inquiries Standard?

Congress included in the Brownfields Amendments a list of criteria that the Agency must include in the regulations establishing standards and practices for conducting all appropriate inquiries. In addition to providing these criteria in the statute, Congress instructed EPA to develop regulations establishing standards and practices for conducting all appropriate inquiries in accordance with generally accepted good commercial and customary standards and practices. The criteria are set forth in CERCLA section 101(35)(2)(B)(iii) and include:

- The results of an inquiry by an environmental professional.
- Interviews with past and present owners, operators, and occupants of the facility for the purpose of gathering information regarding the potential for contamination at the facility.
- Reviews of historical sources, such as chain of title documents, aerial photographs, building department records, and land use records, to determine previous uses and occupancies of the real property since the property was first developed.
- Searches for recorded environmental cleanup liens against the facility that are filed under federal, state, or local law.
- Reviews of federal, state, and local government records, waste disposal records, underground storage tank records, and hazardous waste handling, generation, treatment, disposal, and spill records, concerning contamination at or near the facility.
- Visual inspections of the facility and of adjoining properties.
- Specialized knowledge or experience on the part of the defendant.
- The relationship of the purchase price to the value of the property, if the property was not contaminated.
- Commonly known or reasonably ascertainable information about the property.
- The degree of obviousness of the presence or likely presence of contamination at the property, and the ability to detect the contamination by appropriate investigation.

III. Summary of Comments and Changes From Proposed Rule to Final Rule

EPA received over 400 public comments in response to the August 26, 2004 proposed rule. Comments were received from environmental consultants with experience in performing site assessments, trade

associations, state government agencies, environmental interest groups, and other public interest associations. Commenters generally supported the purpose and goals of the proposed rule. Many commenters complimented the Agency on its decision to develop the proposed rule using the negotiated rulemaking process. However, commenters had differing views on certain aspects of the proposed rule. In particular, the Agency received widely differing views on the proposed definition of "environmental professional." Although many commenters supported the definition as proposed, other commenters raised concerns regarding the stringency of the proposed qualifications. A significant number of commenters applauded the proposed definition of an environmental professional and stated that it may increase the rigor and caliber of environmental site investigations. Commenters who would not qualify as an environmental professional under the proposed definition raised concerns with regard to the specific qualifications proposed.

EPA received a significant number of comments regarding the statutory requirements for qualifying for the CERCLA liability protections. Several commenters also raised concerns with regard to the performance-based approach to the all appropriate inquiries investigation included in the proposed rule. Commenters were concerned that the proposed performance-based approach would make it more difficult to qualify for the CERCLA liability protections than an approach that requires strict adherence to prescriptive data gathering requirements that do not allow for the application of professional judgment. However, the vast majority of commenters who commented on the performance-based nature of the proposed rule supported the proposed approach.

Other commenters raised concerns with regard to the proposed rule's requirements to identify and comment upon the significance of "data gaps" where the lack of information may affect the ability of an environmental professional to render an opinion regarding conditions at a property that are indicative of releases or threatened releases of hazardous substances. Commenters were concerned that if any data gaps exist potential contamination would not be identified, allowing property owners to escape liability for contamination. Other commenters supported the proposed requirement to identify data gaps, or missing information, that may affect the environmental professional's ability to render an opinion regarding the environmental conditions at a property and comment on their significance in this regard and stated that the requirement would lend credibility to the inquiry's final report.

We received many comments on the proposed provision to compare the purchase price of a property to the fair market value of the property (if the property were not contaminated). One concern raised is that commenters believe that the exact market value of a property is difficult to determine. Some commenters took exception to the fact that EPA did not propose that prospective landowners have to conduct formal real estate appraisals of the property to determine fair market value. Although this provision has been a statutory requirement for the conduct of all appropriate inquiries since 1986, some commenters thought the requirement should not be included within the scope of all appropriate inquiries. Other commenters stated that the environmental professional should not be required to undertake the comparison.

We received some comments on the results of the economic impact analysis that was conducted to assess the potential costs and impacts of the proposed rule. Many commenters generally agreed with the Agency's conclusion that the average incremental cost increase associated with the requirements in the proposed rule over the current industry standard would be minimal. However, some commenters asserted that EPA underestimated the incremental costs associated with the proposed rule. Although a few commenters mentioned particular activities included as requirements in the proposed rule that would increase the burdens and costs associated with conducting all appropriate inquiries, most of these commenters did not provide specific reasons for claimed cost increases over baseline activities. Some commenters simply stated that the proposed requirements would result in an increase in the price of phase I environmental site assessments. We provide a summary of the comments received on the economic impact analysis for the proposed rule, our responses to issues raised by commenters, and the results of some additional analyses conducted based on some of the issues raised, in an addendum to the economic impact analysis, which is provided in the docket for today's final rule.

In section IV of this preamble, we discuss the requirements of the final rule, including a summary of the provisions included in the August 26, 2004 proposed rule, the significant comments raised in response to the proposed provisions, and a summary of our rationale for the final rule requirements. Generally, the final rule closely resembles the provisions included in the proposed rule. We adopted relatively minor changes in response to public comments. For example, we received a number of comments urging EPA to modify the proposed definition of environmental professional to allow individuals who have significant experience in conducting environmental site assessments, but do not have a Baccalaureate degree, to qualify as environmental professionals. We were convinced by the arguments presented in many of these public comments. Therefore, the definition of an environmental professional included in today's final rule allows individuals with ten years of relevant full time experience to qualify as an environmental professional for the purpose of overseeing and performing all appropriate inquiries.

With respect to the proposed requirements governing the use of previously-conducted environmental site assessments for a particular property, we agreed with commenters who pointed out the proposed rule was unclear. In today's final rule, we modify the proposed rule language to allow for the use of information contained in previously-conducted assessments, even if the information was collected more than a year prior to the date on which the subject property is acquired. The final rule does require that all aspects of a site assessment, or all appropriate inquiries investigation, completed more than one year prior to the date of acquisition of the subject property be updated to reflect current conditions and current property-specific information. In the case of all appropriate inquiries investigations completed less than one year prior to the date of acquisition of the subject property but more than 180 days before the acquisition date, the final rule retains the requirements of the proposed rule that only certain aspects of the all appropriate inquiries must be updated.

In the case of the requirement to search for institutional controls that was included in the proposed requirements to review federal, state, tribal and local government records, we agreed with commenters who pointed out that searching for institutional controls associated with properties located within a half mile of the subject property is overly burdensome and without sufficient benefit to the purpose of the investigation. The final rule

requires that the search for institutional controls be confined to the subject property only.

We adopted one other change in the final rule, based upon public comments. In the proposed rule, we delineated responsibilities for particular aspects of the all appropriate inquiries investigation between the environmental professional and the prospective landowner of the subject property (or grantee). We defined the inquiry of the environmental professional to include: interviews with past and present owners, operators and occupants; reviews of historical sources of information; reviews of federal state tribal and local government records; visual inspections of the facility and adjoining property; commonly known or reasonably ascertainable information; and degree of obviousness of the presence or likely presence of contamination at the property and the ability to detect the contamination by appropriate investigation. We also defined "additional inquiries" that must be conducted by the prospective landowner or grantee (or an individual on the prospective landowner's or grantee's behalf). These "additional inquiries" include: specialized knowledge or experience of the prospective landowner (or grantee); the relationship of the purchase price to the fair market value of the property, if the property was not contaminated; and commonly known or reasonably ascertainable information. The requirement to search for environmental cleanup liens was proposed to be the responsibility of the prospective landowner (or grantee), if the search is not conducted by the environmental professional. The proposed rule required the prospective landowner (or grantee) to provide all information collected as part of the "additional inquiries" to the environmental professional.

The final rule retains the proposed delineation of responsibilities. However, based upon the input provided in public comments, the final rule does not require the prospective landowner (or grantee) to provide the information collected as part of the "additional inquiries" to the environmental professional. Although we continue to believe that the information collected or held by the prospective landowner (or grantee) should be provided to the environmental professional overseeing the other aspects of the all appropriate inquiries, we agree with commenters who asserted that prospective landowners and grantees should not be required to provide this information to the environmental professional. Commenters argued that property owners (and grantees) may want to hold some information (*e.g.*, the purchase price of the property) confidential. CERCLA liability rests with the owner or operator of a property and not with an environmental professional hired by the prospective landowner and who is not involved with the ownership or operation of the property. Since it ultimately is up to the owner or operator of a property to defend his or herself against any claims to liability, we agree with commenters that asserted that the regulations should not require that prospective landowners (or grantees) provide information collected to comply with the "additional inquiries" provisions to the environmental professional. Should the required information not be provided to the environmental professional, the environmental professional should assess the impact that the lack of such information may have on his or her ability to render an opinion with regard to conditions indicative of releases or threatened releases of hazardous substances on, at, in or to the property. If the lack of information does impact the ability of the environmental professional to render an opinion with regard to the environmental conditions of the property, the environmental professional should note the missing information as a data gap in the written report. We discuss each of the requirements of the final rule in Section IV of this preamble.

IV. Detailed Description of Today's Rule

A. What Is the Purpose and Scope of the Rule?

The purpose of today's rule is to establish federal standards and practices for the conduct of all appropriate inquiries. Such inquiries must be conducted by persons seeking any of the landowner liability protections under CERCLA prior to acquiring a property (as outlined in Section II.D. of this preamble). In addition, persons receiving federal brownfields grants under the authorities of CERCLA section 104(k)(2)(B) to conduct site characterizations and assessments must conduct such activities in compliance with the all appropriate inquiries regulations.

In the case of persons claiming one of the CERCLA landowner liability protections, the scope of today's rule includes the conduct of all appropriate inquiries for the purpose of identifying releases and threatened releases of hazardous substances on, at, in or to the property that would be the subject of a response action for which a liability protection would be needed and such a property is owned by the person asserting protection from liability. CERCLA liability is limited to releases and threatened releases of hazardous substances which cause the incurrence of response costs. Therefore, in the case of all appropriate inquiries conducted for the purpose of qualifying for protection from CERCLA liability (CERCLA section 107), the scope of the inquiries is to identify releases and threatened releases of hazardous substances which cause or threaten to cause the incurrence of response costs.

In the case of persons receiving Federal brownfields grants to conduct site characterizations and assessments, the scope of the all appropriate inquiries standards and practices may be broader. The Brownfields Amendments include a definition of a "brownfield site" that includes properties contaminated or potentially contaminated with substances not included in the definition of "hazardous substance" in CERCLA section 101(14). Brownfields sites include properties contaminated with (or potentially contaminated with) hazardous substances, petroleum and petroleum products, controlled substances, and pollutants and contaminants (as defined in CERCLA section 101(33)). Therefore, in the case of persons receiving federal brownfields grant monies to conduct site assessment and characterization activities at brownfields sites, the scope of the all appropriate inquiries may include these other substances, as outlined in § 312.1(c)(2), to ensure that persons receiving brownfields grants can appropriately and fully assess the properties as required. It is not the case that every recipient of a brownfields assessment grant has to include within the scope of the all appropriate inquiries petroleum and petroleum products, controlled substances and CERCLA pollutants and contaminants (as defined in CERCLA section 101(33)). However, in those cases where the terms and conditions of the grant or the cooperative agreement with the grantee designate a broader scope to the investigation (beyond CERCLA hazardous substances), then the scope of the all appropriate inquiries should include the additional substances or contaminants.

The scope of today's rule does not include property purchased by a non-governmental entity or non-commercial entity for "residential use or other similar uses * * * [where] a facility inspection and title search * * * reveal no basis for further investigation." (Pub. L. 107–118 § 223). CERCLA section

101(35)(B)(v) states that in those cases, title search and facility inspection that reveal no basis for further investigation shall satisfy the requirements for all appropriate inquiries.

We note that today's rule does not affect the existing CERCLA liability protections for state and local governments that acquire ownership to properties involuntarily in their functions as sovereigns, pursuant to CERCLA sections 101(20)(D) and 101(35)(A)(ii). Involuntary acquisition of properties by state and local governments fall under those CERCLA provisions and EPA's policy guidance on those provisions, not under the all appropriate inquiry provisions of CERCLA section 101(35)(B).

B. To Whom Is the Rule Applicable?

Today's rule applies to any person who may seek the landowner liability protections of CERCLA as an innocent landowner, contiguous property owner, or bona fide prospective purchaser. The statutory requirements to obtain each of these landowner liability protections include the conduct of all appropriate inquiries. In addition, the rule applies to individuals receiving Federal grant monies under CERCLA section 104(k)(2)(B) to conduct site characterization and assessment activities. Persons receiving such grant monies must conduct the site characterization and assessment in compliance with the all appropriate inquiries regulatory requirements.

C. Does the Final Rule Include Any New Reporting or Disclosure Obligations?

The final rule does not include any new reporting or disclosure obligations. The rule only applies to those property owners who may seek the landowner liability protections provided under CERCLA for innocent landowners, contiguous property owners or bona fide prospective purchasers. The documentation requirements included in this rule are primarily intended to enhance the inquiries by requiring the environmental professional to record the results of the inquiries and his or her conclusions regarding conditions indicative of releases and threatened releases on, at, in, or to the property and to provide a record of the environmental professional's inquiry. Today's rule contains no new requirements to notify or submit information to EPA or any other government entity.

Although today's rule does not include any new disclosure requirements, CERCLA section 103 does require persons in charge of vessels and facilities, including on-shore and off-shore facilities, to notify the National Response Center of any release of a hazardous substance from the vessel or facility in a quantity equal to or greater than a "reportable quantity," as defined in CERCLA section 102(b). Today's rule includes no changes to this reporting requirement nor any changes to any other reporting or disclosure requirements under federal, tribal, or state law.

D. What Are the Final Documentation Requirements?

The proposed rule required that the environmental professional, on behalf of the property owner, document the results of the all appropriate inquiries in a written report. As explained in the preamble to the proposed rule, the property owner could use this report to document the results of the inquiries. Such a report can be similar in nature to the type of report previously provided under generally accepted commercial practices. We proposed no requirements regarding the length, structure, or specific format of the written report. In addition, the proposed rule did not require that a written report of any kind be submitted to EPA or any other government agency, or that a written report be maintained on-site at the subject property for any length of time.

Today's final rule retains the requirements, as proposed, for documenting the results of the all appropriate inquiries investigation conducted under the supervision or responsible charge of an environmental professional. As noted above, the primary purpose of the documentation requirement is to enhance the inquiry of the environmental professional by requiring that the environmental professional record the results of the inquiries and his or her conclusions. The written report may allow any person claiming one of the CERCLA landowner liability protections to offer documentation in support of his or her claim that all appropriate inquiries were conducted in compliance with the federal regulations.[1] The Agency notes that while today's final regulation does not require parties conducting all appropriate inquiries to retain the written report or any other documentation discovered, consulted, or created in the course of conducting the inquiries, the retention of such documentation and records may be helpful should the property owner need to assert protection from CERCLA liability after purchasing a property.

The final rule requires that a written report documenting the results of the all appropriate inquiries include an opinion of an environmental professional as to whether the all appropriate inquiries conducted identified conditions indicative of releases or threatened releases of hazardous substances on, at, in or to the subject property. The rule also requires that the report identify data gaps in the information collected that affect the ability of the environmental professional to render such an opinion and that the environmental professional comment on the significance of the data gaps.

Several commenters raised issues with regard to the proposed requirement that the environmental professional document and comment on the significance of data gaps that affect the ability of the environmental professional to identify conditions indicative of releases or threatened releases of hazardous substances on at, in, or to the subject property. Some commenters stated that the need to identify data gaps will make it difficult to determine when an all appropriate inquiries investigation is complete and therefore the requirement would act as a disincentive to the development of potentially contaminated properties. Other commenters asserted that the fact that the regulations recognize data gaps creates a loophole that would result in property owners claiming to be protected from CERCLA liability after conducting an incomplete investigation that includes significant data gaps. These commenters raised concerns that CERCLA liability protection could be claimed by property owners simply because they conducted an all appropriate inquiries investigation, even in those cases where releases on, at, in, or to the property were missed during the investigation. Other commenters stated their support for the requirements to document data gaps, as proposed. A summary of EPA's response to these comments and the requirements for documenting data gaps included in the final rule is provided below in Section IV.N.

The final rule, at § 312.21(d), retains the proposed requirement that the environmental professional who conducts or oversees the all appropriate inquiries sign the written report. There are two purposes for the requirement to include a signature in the report. First, the individual signing the report must declare, on the signature page, that he or she meets the definition of an

[1] Nothing in this regulation or preamble is intended to suggest that any particular documentation prepared in conducting all appropriate inquiries will be admissible in court in any litigation where a party raises one of the liability protections, or will in any way alter the judicial rules of evidence.

environmental professional, as provided in § 312.10. In addition, the rule requires that the environmental professional declare that: [I, We] have developed and performed the all appropriate inquiries in conformance with the standards and practices set forth in 40 CFR part 312.

Some commenters raised concerns about whether the proposed rule would require the environmental professional to certify the all appropriate inquiries report and its findings. Today's final rule does not require the environmental professional to "certify" the results of the all appropriate inquiries when signing the report. The two statements or declarations mentioned above and required to be included in the final written report documenting the conduct of all appropriate inquiries are meant to document that an individual meeting the qualifications of an environmental professional was involved in the conduct of the all appropriate inquiries and that the activities performed by, or under the supervision or responsible charge of, the environmental professional were performed in conformance with the regulations. Reports signed by individuals holding a Professional Engineer (P.E.) or Professional Geologist (P.G.) license, need not include the individual's professional seal.

A few commenters requested that EPA include specific requirements for the content of a final report in the final rule. Given that the type and extent of information available on a particular property may vary greatly with its size, type, past uses, and location, and the type and extent of information necessary for an environmental professional to render an opinion regarding conditions indicative of releases or threatened releases of hazardous substances associated with any property may vary, we decided not to include in the final rule specific requirements governing the content of all reports.

The provisions of the final rule allow for the property owner (or grantee) and any environmental professional engaged in the conduct of all appropriate inquiries for a specific property to design and develop the format and content of a written report that will meet the prospective landowner's (or grantee's) objectives and information needs in addition to providing documentation that all appropriate inquiries were completed prior to the acquisition of the property, should the landowner (or grantee) need to assert protection from liability after purchasing a property.

E. What Are the Qualifications for an Environmental Professional?

Proposed Rule

In the Brownfields Amendments, Congress required that all appropriate inquiries include "the results of an inquiry by an environmental professional" (CERCLA section 101(35)(B)(iii)(I)). The proposed rule included minimal qualifications for persons managing or overseeing all appropriate inquiries. The intent of setting minimum professional qualifications, is to ensure that all inquiries are conducted at a high level of professional ability and ensure the overall quality of both the inquiries conducted and the conclusions or opinions rendered with regard to conditions indicative of the presence of a release or threatened release on, at, in, or to a property, based upon the results of all inquiries. The proposed rule required that an environmental professional conducting or overseeing all appropriate inquiries possess sufficient specific education, training, and experience necessary to exercise professional judgment to develop opinions and conclusions regarding the presence of releases or threatened releases of hazardous substances to the surface or subsurface of a property. In addition, the proposed rule included minimum qualifications, including minimum levels of education and experience, that characterize the type of professional who is best qualified to oversee and direct the development of comprehensive inquiries and provide the landowner with sound conclusions and opinions regarding the potential for releases or threatened releases to be present at the property. The proposed rule allowed for individuals not meeting the proposed definition of an environmental professional to contribute to and participate in the all appropriate inquiries on the condition that such individuals are conducting inquiries activities under the supervision or responsible charge of an individual that meets the regulatory definition of an environmental professional.

The proposed rule required that the final review of the all appropriate inquiries and the conclusions that follow from the inquiries rest with an individual who qualifies as an environmental professional, as defined in proposed section § 312.10 of the proposed rule. The proposed rule also required that in signing the report, the environmental professional must document that he or she meets the definition of an "environmental professional" included in the regulations.

The proposed definition first and foremost required that, to qualify as an environmental professional, a person must "possess sufficient specific education, training, and experience necessary to exercise professional judgment to develop opinions and conclusions regarding the presence of releases or threatened releases * * * to the surface or subsurface of a property, sufficient to meet the objectives and performance factors" that are provided in the proposed regulation. The proposed definition of an environmental professional included individuals who possess the following combinations of education and experience.

- Hold a current Professional Engineer's (P.E.) or Professional Geologist's (P.G.) license or registration from a state, tribe, or U.S. territory and have the equivalent of three (3) years of full-time relevant experience; or
- Be licensed or certified by the federal government, a state, tribe, or U.S. territory to perform environmental inquiries as defined in § 312.21 and have the equivalent of three (3) years of full-time relevant experience; or
- Have a Baccalaureate or higher degree from an accredited institution of higher education in a relevant discipline of engineering, environmental science, or earth science and the equivalent of five (5) years of full-time relevant experience; or
- As of the date of the promulgation of the final rule, have a Baccalaureate or higher degree from an accredited institution of higher education and the equivalent of ten (10) years of full-time relevant experience.

Public Comments

We received a significant number of public comments on the proposed definition of environmental professional. Many commenters supported the definition of environmental professional as proposed. However, a significant number of commenters raised concerns with regard to the proposed educational requirements. Commenters pointed out that the proposed minimum qualifications for an environmental professional did not allow for individuals with many years of relevant experience in conducting environmental site assessments to qualify as environmental professionals, if such individuals do not have college degrees. The proposed rule only allowed for persons with a Baccalaureate degree or higher in specific disciplines of science and engineering, and a specific number of years of experience, to qualify as an

environmental professional, unless an individual was otherwise licensed as an environmental professional by a state, tribe or the federal government. Some commenters questioned the Agency's reasoning for restricting the degree requirements to only certain types of science or engineering. Commenters requested that EPA provide more specific definitions of the types of science and engineering degrees that would be necessary to qualify as an environmental professional.

Commenters also asserted that the proposed "grandfather clause" allowing for individuals having a Baccalaureate degree (or higher) and who accumulated ten years of full time relevant experience on or before the promulgation date of the final rule to qualify as an environmental professional was too stringent and provided too small of a window of opportunity for individuals not otherwise meeting the proposed definition of environmental professional to qualify.

Some commenters stated that the definition of environmental professional should not be restricted to those individuals licensed as P.E.s or P.G.s. A few commenters stated that a licensed professional is no more qualified to perform all appropriate inquiries investigations than other individuals with a significant number of years of experience in conducting such activities. Other commenters asserted that only licensed P.E.s and P.G.s are qualified to supervise all appropriate inquiries activities.

EPA also received comments from independent professional certification organizations and members of these organizations, including the Academy of Certified Hazardous Materials Managers, requesting that their organizations' certification programs be named in the regulatory definition of an environmental professional.

Final Rule

After careful consideration of the issues raised by commenters regarding the proposed definition of environmental professional, we made a few modifications to the proposed definition to reduce the potential burden that the proposed definition may have placed upon individuals who have significant experience in conducting environmental site assessments but do not meet the proposed educational, or college degree, requirements. We agree with those commenters who asserted that individuals with a significant number of years of experience in performing environmental site assessments, or all appropriate inquiries investigations, should qualify as environmental professionals for the purpose of conducting all appropriate inquiries, even in cases where such individuals do not have a college degree. Therefore, in the final rule, persons with ten or more years of full-time relevant experience in conducting environmental site assessments and related activities may qualify as environmental professionals, without having received a college degree.

In addition, we agreed with commenters who pointed out that the requirement that environmental professionals hold specific types of science or engineering degrees was too limiting. In the final rule, persons with any science or engineering degree (regardless of specific discipline in science or engineering) can qualify as an environmental professional, if they also meet the other required qualifications, including the requirement to have five (5) years of full-time relevant experience.

We also agree with commenters who asserted that the proposed grandfather clause was too restrictive. As mentioned above, we agree with commenters who pointed out that individuals with a significant number of years of experience in conducting environmental site assessments or all appropriate inquiries investigations should be able to qualify as environmental professionals, for the purpose of carrying out the provisions of today's rulemaking. In addition, we agree with commenters who stated that the ability for experienced professionals to qualify as an environmental professional should not be limited to those who meet the threshold qualifications on the effective date of the final rule. Therefore, the proposed grandfather clause is not included within the definition of environmental professional in the final rule. As explained above, in today's final rule, individuals with ten or more years of full-time relevant experience in conducting environmental site assessments and related investigations will qualify as environmental professionals for the purposes of this rulemaking.

The final rule retains the provision recognizing as environmental professionals those individuals who are licensed by any tribal or state government as a P.E. or P.G., and have three years of full-time relevant experience in conducting all appropriate inquiries. We continue to contend that such individuals have sufficient specific education, training, and experience necessary to exercise professional judgment to develop opinions and conclusions regarding conditions indicative of releases or threatened releases on, at, in, or to a property, including the presence of releases to the surface or subsurface of the property, sufficient to meet the objectives and performance factors provided in the regulation. The rigor of the tribal- and state-licensed P.E. and P.G. certification processes, including the educational and training requirements, as well as the examination requirements, paired with the requirement to have three years of relevant professional experience conducting all appropriate inquiries will ensure that all appropriate inquiries are conducted under the supervision or responsible charge of an individual well qualified to oversee the collection and interpretation of site-specific information and render informed opinions and conclusions regarding the environmental conditions at a property, including opinions and conclusions regarding conditions indicative of releases or threatened releases of hazardous substances and other contaminants on, at, in, or to the property. The Agency's decision to recognize tribal and state-licensed P.E.s and P.G.s reflects the fact that tribal governments and state legislatures hold such professionals responsible (legally and ethically) for safeguarding public safety, public health, and the environment. To become a P.E. or P.G. requires that an applicant have a combination of accredited college education followed by approved professional training and experience. Once a publicly-appointed review board approves a candidate's credentials, the candidate is permitted to take a rigorous exam. The candidate must pass the examination to earn a license, and perform ethically to maintain it. After a state or tribe grants a license to an individual, and as a condition of maintaining the license, many states require P.E.s and P.G.s to maintain proficiency by participating in approved continuing education and professional development programs. In addition, tribal and state licensing boards can investigate complaints of negligence or incompetence on the part of licensed professionals, and may impose fines and other disciplinary actions such as cease and desist orders or license revocation.

Although the final rule recognizes tribal and state-licensed P.E. and P.G.s and other such government licensed environmental professionals with three years of experience to be environmental professionals, the rule does not restrict the definition of an environmental professional to these licensed individuals. The definition of an

environmental professional also includes individuals who hold a Baccalaureate or higher degree from an accredited institution of higher education in engineering or science and have the equivalent of five (5) years of full-time relevant experience in conducting environmental site assessments, or all appropriate inquiries. In addition, individuals with ten years of full-time relevant experience in conducting environmental site assessments, or all appropriate inquiries qualify as environmental professionals for the purpose of conducting all appropriate inquiries. Individuals with these qualifications most likely will possess sufficient specific education, training, and experience necessary to exercise professional judgment to develop opinions and conclusions regarding conditions indicative of releases or threatened releases on, at, in, or to a property, sufficient to meet the objectives and performance factors included in § 312.20(e) and (f).

In addition to the qualifications for environmental professionals mentioned above, EPA is retaining the proposed provision to include within the definition of an environmental professional individuals who are licensed to perform environmental site assessments or all appropriate inquiries by the Federal government (e.g., the Bureau of Indian Affairs) or under a state or tribal certification program, provided that these individuals also have three years of full-time relevant experience. We contend that individuals licensed by state and tribal governments, or by any department or agency within the federal government, to perform all appropriate inquiries or environmental site assessments, should be allowed to qualify as an environmental professional under today's regulation. State and tribal agencies may best determine the qualifications defining individuals who "possess sufficient specific education, training, and experience necessary to exercise professional judgment to develop opinions and conclusions regarding conditions indicative of releases or threatened releases on, at, in, or to a property, sufficient to meet the rule's objectives and performance factors" within any particular state or tribal jurisdiction.

In response to requests from members of independent certification organizations that EPA recognize in the regulation those organizations whose certification requirements meet the environmental professional qualifications included in the final rule, we point out that today's final rule does not reference any private party professional certification standards. Such an approach would require that EPA review the certification requirements of each organization to determine whether or not each organization's certification requirements meet or exceed the regulatory qualifications for an environmental professional. Given that there may be many such organizations and given that each organization may review and change its certification qualifications on a frequent or periodic basis, we conclude that such a undertaking is not practicable. EPA does not have the necessary resources to review the procedures of each private certification organization and review and approve each organization's certification qualifications. Therefore, the final rule includes within the regulatory definition of an environmental professional, general performance-based standards or qualifications for determining who may meet the definition of an environmental professional for the purposes of conducting all appropriate inquiries. These standards include education and experience qualifications, as summarized below. The final rule does not recognize, or reference, any private organization's certification program within the context of the regulatory language. However, the Agency notes that any individual with a certification from a private certification organization where the organization's certification qualifications include the same or more stringent education and experience requirements as those included in today's final regulation will meet the definition of an environmental professional for the purposes of this regulation.

Based upon the input received from the public commenters, EPA determined that the definition of environmental professional included in today's final rule establishes a balance between the merits of setting a high standard of excellence for the conduct of all appropriate inquiries through the establishment of stringent qualifications for environmental professionals and the need to ensure that experienced and highly competent individuals currently conducting all appropriate inquiries are not displaced.

Summary of Final Rule's Definition of Environmental Professional

In summary, the definition of environmental professional included in today's final rule includes individuals who possess the following qualifications:

- Hold a current Professional Engineer's or Professional Geologist's license or registration from a state, tribe, or U.S. territory and have the equivalent of three (3) years of full-time relevant experience; or
- Be licensed or certified by the federal government, a state, tribe, or U.S. territory to perform environmental inquiries as defined in § 312.21 and have the equivalent of three (3) years of full-time relevant experience; or
- Have a Baccalaureate or higher degree from an accredited institution of higher education in science or engineering and the equivalent of five (5) years of full-time relevant experience; or
- Have the equivalent of ten (10) years of full-time relevant experience.

The definition of "relevant experience" is "participation in the performance of environmental site assessments that may include environmental analyses, investigations, and remediation which involve the understanding of surface and subsurface environmental conditions and the processes used to evaluate these conditions and for which professional judgment was used to develop opinions regarding conditions indicative of releases or threatened releases * * * to the subject property."

The final rule retains the proposed requirement that environmental professionals remain current in their field by participating in continuing education or other activities and be able to demonstrate such efforts.

The final rule also retains the allowance for individuals not meeting the definition of an environmental professional to contribute to and participate in the all appropriate inquiries on the condition that such individuals are conducting inquiries activities under the supervision or responsible charge of an individual that meets the regulatory definition of an environmental professional. This provision allows for a team of individuals working for the same firm or organization (e.g., individuals working for the same government agency) to share the workload for conducting all appropriate inquiries for a single property, provided that one member of the team meets the definition of an environmental professional and reviews the results and conclusions of the inquiries and signs the final report.

The final rule requires that the final review of the all appropriate inquiries and the conclusions that follow from the inquiries rest with an individual who qualifies as an environmental professional, as defined in § 312.10. The final rule also requires that in signing

the report, the environmental professional must document that he or she meets the definition of an "environmental professional" included in the regulations.

F. References

Proposed Rule

In the proposed rule, the Agency reserved a reference section and stated in the preamble that we may include references to applicable voluntary consensus standards developed by standards' developing organizations that are not inconsistent with the final regulatory requirements for all appropriate inquiries or otherwise impractical. The Agency requested comments regarding available commercially accepted voluntary consensus standards that may be applicable to and compliant with the proposed federal standards for all appropriate inquiries.

Section 12(d) of the National Technology Transfer and Advancement Act of 1995 ("NTTAA"), Public Law 104–113, section 12(d) (15 U.S.C. 272 note), directs agencies to use technical standards that are developed or adopted by voluntary consensus standards bodies, unless their use would be inconsistent with applicable law or otherwise impractical. Voluntary consensus standards are technical standards (*e.g.*, materials specifications, test methods, sampling procedures, and business practices) that are developed or adopted by voluntary consensus standards bodies. When developing the proposed rule, EPA considered using an existing voluntary consensus standard developed by ASTM International as the federal standard for all appropriate inquiries. This standard is known as the ASTM E1527–2000 standard (entitled "Standard Practice for Environmental Site Assessments: Phase I Environmental Site Assessment Process"). In the preamble to the proposed rule, we acknowledged the prevalent use of the ASTM E1527–2000 standard and the fact that it generally is recognized as good and customary commercial practice. However, when we proposed the federal standards for all appropriate inquiries, EPA determined that the ASTM E1527–2000 standard is inconsistent with applicable law. As a result, EPA chose not to reference the ASTM E1527–2000 standard because it was inconsistent with applicable law.

Public Comments

We received relatively few comments citing available and applicable voluntary consensus standards for conducting all appropriate inquiries. Several commenters did argue that the interim standard cited in the statute, the ASTM E1527–97 Environmental Site Assessments: Phase I Environmental Site Assessment Process, or the updated ASTM E1527–2000, is sufficient to meet the statutory criteria. A few commenters stated a preference for the ASTM E1527–2000 standard over the requirements included in the proposed rule. ASTM International is a standards development organization whose committees develop voluntary consensus standards for a variety of materials, products, systems and services. ASTM International is the only standards development organization that submitted a comment requesting that the Agency consider its standard, the ASTM E1527–2000 Standard Practice for Environmental Site Assessments: Phase I Environmental Site Assessment Process, as an equivalent standard to the federal regulations.

Final Rule

Since publication of the proposed rule, ASTM International and its E50 committee, the committee responsible for the development of the ASTM E1527–2000 Phase I Environmental Site Assessment Process, has reviewed and updated the "2000" version of the E1527 standard to address EPA's concerns regarding the differences between the ASTM E1527–2000 standard and the criteria established by Congress in the Brownfields Amendments to CERCLA. These activities were conducted within the normal review and updating process that ASTM International undertakes for each standard over a five-year cycle.

In today's final rule, EPA is referencing the standards and practices developed by ASTM International and known as Standard E1527–05 (entitled "Standard Practice for Environmental Site Assessments: Phase I Environmental Site Assessment Process") and recognizing the E1527–05 standard as consistent with today's final rule. The Agency determined that this voluntary consensus standard is consistent with today's final rule and is compliant with the statutory criteria for all appropriate inquiries. Persons conducting all appropriate inquiries may use the procedures included in the ASTM E1527–05 standard to comply with today's final rule.

It is the Agency's intent to allow for the use of applicable and compliant voluntary consensus standards when possible to facilitate implementation of the final regulations and avoid disruption to parties using voluntary consensus standards that are found to be fully compliant with the federal regulations.

G. What Is Included in "All Appropriate Inquiries?"

Proposed Rule

The proposed regulations for conducting all appropriate inquiries outlined the standards and practices for conducting the activities included in each of the statutory criterion established by Congress in the Brownfields Amendments. These criteria are set forth in CERCLA section 101(35)(B)(iii) and are:

- The results of an inquiry by an environmental professional (proposed § 312.21).
- Interviews with past and present owners, operators, and occupants of the facility for the purpose of gathering information regarding the potential for contamination at the facility (proposed § 312.23).
- Reviews of historical sources, such as chain of title documents, aerial photographs, building department records, and land use records, to determine previous uses and occupancies of the real property since the property was first developed (proposed § 312.24).
- Searches for recorded environmental cleanup liens against the facility that are filed under Federal, State, or local law (proposed § 312.25).
- Reviews of Federal, State, and local government records, waste disposal records, underground storage tank records, and hazardous waste handling, generation, treatment, disposal, and spill records, concerning contamination at or near the facility (proposed § 312.26).
- Visual inspections of the facility and of adjoining properties (proposed § 312.27).
- Specialized knowledge or experience on the part of the defendant (proposed § 312.28).
- The relationship of the purchase price to the value of the property, if the property was not contaminated (proposed § 312.29).
- Commonly known or reasonably ascertainable information about the property (proposed § 312.30).
- The degree of obviousness of the presence or likely presence of contamination at the property, and the ability to detect the contamination by appropriate investigation (proposed § 312.31).

Public Comments

We received a few comments addressing the statutory criteria and the

inclusion of certain particular criteria within the scope of the proposed rule. Some commenters requested that EPA not include in the final rule the criterion to consider the relationship of the purchase price of the property to the fair market value of the property, if the property is not contaminated. In addition, a few commenters stated the final rule should not include within the scope of the all appropriate inquiries the specialized knowledge or experience on the part of the prospective landowner.

The Agency notes that both criteria that commenters requested be removed from the scope of the all appropriate inquiries regulations are criteria specifically required by Congress to be included in the regulations. In addition, both criteria have been part of the all appropriate inquiries provisions under the CERCLA innocent landowner defense since 1986. The proposed rule included no changes from the previous statutory provisions.

Final Rule

The final rule retains provisions addressing each of the statutory criteria for the conduct of all appropriate inquiries included in CERCLA section 101(35)(B)(iii).

H. Who Is Responsible for Conducting the All Appropriate Inquiries?

The Brownfields Amendments to CERCLA require persons claiming any of the landowner liability protections to conduct all appropriate inquiries into the past uses and ownership of the subject property. The criteria included in the Brownfields Amendments for the regulatory standards for all appropriate inquiries require that the inquiries include an inquiry by an environmental professional. The statute does not require that all criteria or inquiries be conducted by an environmental professional.

Proposed Rule

The proposed rule required that many, but not all, of the inquiries activities be conducted by, or under the supervision or responsible charge of, an individual meeting the qualifications of the proposed definition of an environmental professional. The proposed rule also provided that several of the activities included in the inquiries could be conducted either by the prospective landowner or grantee, and not have to be conducted under the supervision or responsible charge of the environmental professional. The proposed rule required that the results of all activities conducted by the prospective landowner or grantee, and not conducted by or under the supervision or responsible charge of the environmental professional, be provided to the environmental professional to ensure that such information could be fully considered when the environmental professional develops an opinion, based on the inquiry activities, as to whether conditions at the property are indicative of a release or threatened release of a hazardous substance (or other contaminant) on, at, in, or to the property.

The proposed rule allowed for the following activities to be the responsibility of, or conducted by, the prospective landowner or grantee and not necessarily be conducted by the environmental professional, provided the results of such inquiries or activities are provided to an environmental professional overseeing the all appropriate inquiries:

- Searches for environmental cleanup liens against the subject property that are filed or recorded under federal, tribal, state, or local law, as required by proposed § 312.25.
- Assessments of any specialized knowledge or experience on the part of the landowner, as required by § 312.28.
- An assessment of the relationship of the purchase price to the fair market value of the subject property, if the property was not contaminated, as required by § 312.29.
- An assessment of commonly known or reasonably ascertainable information about the subject property, as required by § 312.30.

The proposed rule required that all other required inquiries and activities, beyond those listed above to be conducted by, or under the supervision or responsible charge of, an environmental professional.

Public Comments

Several commenters asserted that the mandatory nature of the proposed provision requiring the prospective landowner to provide information regarding the four criteria listed above to the environmental professional is problematic. Particularly with regard to the requirement to provide "specialized knowledge or experience of the defendant," commenters pointed out difficulties in a prospective landowner being able to document such knowledge and experience sufficiently. Also, with regard to the information related to the "relationship of the purchase price to the fair market value of the property, if the property was not contaminated," many commenters pointed out that prospective landowners may not want to divulge information regarding the price paid for a property. Commenters pointed out that the requirement to consider "commonly known or reasonably ascertainable information" about a property is implicit to all aspects of the all appropriate inquiries requirements. In addition, commenters stated that CERCLA liability lies solely with the owners and operators of a vessel or property. A decision on the part of a prospective landowner to not furnish an environmental professional with certain information related to any of the statutory criteria can only affect the property owner's ability to claim a liability protection provided under the statute. In addition, the statute does not mandate that information deemed to be the responsibility of the prospective landowner and not part of the "inquiry of the environment professional" be provided to the environmental professional or even be part of the inquiry of the environmental professional. Some of the statutory criteria are inherently the responsibility of the prospective landowner.

Final Rule

We agree with the commenters who asserted that the results and information related to the criteria identified as being the responsibility of the prospective landowner should not, as a matter of law, have to be provided to the environmental professional. The statute does not mandate that a prospective landowner provide all information to an environmental professional. Given that the burden of potential CERCLA liability ultimately falls upon the property owner or operator, a prospective landowner's decision not to provide the results of an inquiry or related information to an environmental professional he or she hired to undertake other aspects of the all appropriate inquiries investigation can only affect the liability of the property owner. In addition, we believe that the environmental professional may be able to develop an opinion with regard to conditions indicative of releases or threatened releases on, at, in, or to a property based upon the results of the criteria identified to be part of the "inquiry of an environmental professional." Any information not furnished to the environmental professional by the prospective landowner that may affect the environmental professional's ability to render such an opinion may be identified by the environmental professional as a "data gap." The provisions of the final rule (as did the proposed rule) then require that the environmental professional comment on the significance of the data gap or missing information on his or her ability to render such an opinion, in light of all

other information collected and all other data sources consulted.

As a result of our consideration of the issues raised by commenters, today's final rule modifies the requirements of § 312.22 "additional inquiries" by stating (in paragraph (a)) that "persons * * * may provide the information associated with such inquiries [i.e., the information for which the prospective landowner or brownfields grantee is responsible] to the environmental professional * * *." The proposed rule provided that such information "must be provided" to the environmental professional. Although we expect that most prospective landowners and grantees will furnish available information or knowledge about a property to an environmental professional he or she hired when such information could assist the environmental professional in ascertaining the environmental conditions at a property, we affirm that compliance with the statutory criteria does not require that such information be disclosed. Ultimately, CERCLA liability rests with the owner or operator of a facility or property owner and it is the information held by the property owner or operator that may be reviewed in a court of law when determining an owner or operator's liability status, regardless of whether all information was disclosed to an environmental professional during the conduct of all appropriate inquiries.

I. When Must All Appropriate Inquiries Be Conducted?

CERCLA section 101(40)(B)(i), as amended, requires bona fide prospective purchasers to conduct all appropriate inquiries into "previous ownerships and uses of the facility." In the case of contiguous property owners, CERCLA section 107(q)(1)(A)(viii) requires that a person claiming to be a contiguous property owner conduct all appropriate inquiries "at the time at which the person acquired the property." In the case of innocent landowners, section 101(35)(B)(i)(I) of CERCLA requires that the property owner conduct all appropriate inquiries "on or before the date on which the defendant acquired the facility."

Proposed Rule

Other than to specify that all appropriate inquiries must be conducted on or prior to the date a person acquires a property, the statute is silent regarding how close to the actual date of acquisition the inquiries must be completed. The proposed rule required that all appropriate inquiries be conducted or updated within one year prior to taking title to a property. The proposed rule provided that prospective landowners could use information collected as part of previous inquiries for the same property, if the inquiries were completed or updated within one year prior to the date the property is acquired. The proposed rule required that certain information collected as part of a previous all appropriate inquiries be updated if it was collected more than 180 days prior to the date a person purchased the property. In addition, in the preamble to the proposed rule, Agency defined the date of acquisition of a property as the date on which the prospective landowner acquires title to the property.

Public Comments

Commenters generally agreed with the proposed provision to define the date of acquisition of a property as the date on which a person acquires title to the property. A few commenters stated that the requirement for an all appropriate inquiries investigation to be completed within a year of the date of acquisition of the property is too stringent and may not allow sufficient time for some property transactions to be completed. Some commenters also asserted that the proposed requirement to update certain aspects of the all appropriate inquiries investigation, if the investigation was conducted more than 180 days prior to the date of the acquisition of the property was too stringent.

Final Rule

The Agency continues to believe that the event that most closely reflects the Congressional intent of the date on which the defendant acquired the property is the date on which a person received title to the property. As explained in the preamble to the proposed rule, the Agency considered other dates, such as the date a prospective landowner signs a purchase or sale agreement. However, it could be burdensome to require a prospective landowner to have completed the all appropriate inquiries prior to having an agreement with a seller to complete a sales transaction. In fact, the time period between the date on which a sales agreement is signed and the date on which the title to the property is actually transferred to the prospective landowner may be the most convenient time for the prospective landowner to obtain access to the property and undertake the all appropriate inquiries. In addition, requiring that all appropriate inquiries be completed on some date prior to the date of title transfer could result in requiring prospective landowners to undertake all appropriate inquiries so early in the property acquisition process as to require the inquiries to be completed prior to the prospective landowner making a final decision on whether to actually acquire the property.

To increase the potential that the information collected for the all appropriate inquiries accurately reflects the proposed objectives and performance factors, as well as to increase the potential that opinions and judgments regarding the environmental conditions at a property that are included in an all appropriate inquiries report are based on current and relevant information, the Agency is retaining the proposed provision that all appropriate inquiries be conducted within one year prior to the prospective landowner acquiring the property. Today's final rule includes regulatory language at § 312.20(a) clarifying that all appropriate inquiries must be conducted within one year prior to the date on which a person acquires a property.

All appropriate inquiries may include information collected for previous inquiries that were conducted or updated within one year prior to the acquisition date of the property. In addition, as explained in more detail below, the final rule retains the requirement that several of the components of the inquiries be updated within 180 days prior to the date the property is purchased. Today's final rule includes a definition of the "date of acquisition," or purchase date, of a property (i.e., the date the landowner obtains title to the property).

Although commenters may be correct in their assertions that some property transactions may take more than a year to close, we continue to believe that it is important for the all appropriate inquiries investigation to be completed within one year prior to the date the property is acquired. We point out that the final regulation, as did the proposed regulation, allows for information from an older investigation to be used in a current investigation. However, if the prior all appropriate inquiries investigation was completed more than a year prior to the property acquisition date, all parts of the investigation must be reviewed and updated for the all appropriate inquiries to be complete. We believe that a year is sufficient time for conditions at a property to change. In particular, in cases where there is a release or threatened release at a property, significant changes to the environmental conditions of a property could occur during the course of a year. In addition, depending upon the uses and ownership of a property during the

course of a one-year time period, overall conditions at a property could change and new evidence of a release or threatened release could appear. Therefore, today's final rule requires that all appropriate inquiries completed for a particular property more than one year prior to the date of acquisition of that property, be updated in their entirety. As summarized below, the final rule does allow for the use of information contained in previous inquiries, even when the inquiries were completed more than a year prior to the property acquisition date, as long as all information was updated within a year and includes any changes that may have occurred during the interim.

J. Can a Prospective Landowner Use Information Collected for Previous Inquiries Completed for the Same Property?

Proposed Rule

The proposed rule allowed parties conducting all appropriate inquiries to use the results of and information from previous inquiries completed for the same property, under certain conditions. First, the previous inquiries must have been conducted in compliance with the proposed rule and with CERCLA sections 101(35)(B), 101(40)(B) and 107(q)(A)(viii). In addition, the information in the previous inquiries must have been collected or updated within one year prior to the date of acquisition of the property. Certain types of information collected more than 180 days prior to the current date of acquisition must be updated for the current all appropriate inquiries. Also, the information required under some specific criterion (e.g., relationship of purchase price to property value, specialized knowledge on part of defendant) must be collected specifically for the current transaction.

Public Comments

A significant number of commenters pointed out that the regulatory language in proposed § 312.20(b)(1) of the proposed rule precludes the use of information contained in assessments or the results of all appropriate inquiries conducted more than a year prior to the date of acquisition of a property. Commenters pointed out that since the language in the proposed rule stated that previously collected information had to have been collected "in compliance with the requirements of * * * 40 CFR Part 312," any information included in all appropriate inquiries reports completed prior to the promulgation of the final rule could not be used, since compliance with the regulation could not be achieved prior to its publication.

Final Rule

It is not the Agency's intent to disallow the use of information contained in previous inquiries, if the environmental professional and the prospective landowner find the previously collected information to be accurate and valid. However, EPA continues to believe that information collected as part of a prior all appropriate inquiries investigation for the same property should be updated to reflect current environmental conditions at the property and to include any specific information or specialized knowledge held by the prospective landowner. The regulatory language in today's final rule (at § 312.20(c)(1)) allows for the use of information collected as part of prior all appropriate inquiries investigation for the same property provided that the prior information was collected "during the conduct of all appropriate inquiries in compliance with CERCLA sections 101(35)(B), 101(40)(B) and 107(q)(A)(viii)." We have deleted the proposed language that would have required the previously conducted investigation to have been done in compliance with the final regulation. This allows for the use of information collected as part of previous all appropriate inquiries, as long as the information was collected in compliance with the statutory provisions for all appropriate inquiries. For property purchased on or after May 31, 1997, therefore, any information collected as part of an assessment in compliance with the ASTM E1527–97 standard or the ASTM E1527–2000 standard may be used as part of a current all appropriate inquiries investigation. For property purchased before May 31, 1997, information from assessments completed and in compliance with the statutory provisions at CERCLA section 101(35)(B)(iv)(I) may be used as part of a current all appropriate inquiries investigation. However, this prior information may only be used if updated in accordance with §§ 312.20(b) and (c) of today's rule.

The final rule continues to recognize that there is value in using previously collected information when such information was collected in accordance with the statutory provisions and good customary business practices, particularly when the use of such previously-collected information will reduce the need to undertake duplicative efforts.

The final rule also retains the requirement that certain aspects of the all appropriate inquiries investigation be updated if the investigation was completed more than 180 days prior to the date of acquisition of the property (or the date on which the prospective landowner takes title to the property) to ensure that an all appropriate inquiries investigation accurately reflects the current environmental conditions at a property. To increase the potential that information collected about the conditions of a property is accurate, as well as increase the potential that opinions and judgments regarding the environmental conditions at a property that are included in an all appropriate inquiries report are based on current and relevant information, the final rule requires that many of the components of the previous inquiries be updated within 180 days prior to the date of acquisition of the property. The components of the all appropriate inquiries that must be updated within 180 days prior to the date on which the property is acquired are:

- Interviews with past and present owners, operators, and occupants (§ 312.23);
- Searches for recorded environmental cleanup liens (§ 312.25);
- Reviews of federal, tribal, state, and local government records (§ 312.26);
- Visual inspections of the facility and of adjoining properties (§ 312.27); and
- The declaration by the environmental professional (§ 312.21(d)).

Also, the final rule retains the proposed requirement that in all cases where a prospective landowner is using previously collected information, the all appropriate inquiries for the current purchase must be updated to include a summary of any relevant changes to the conditions of the property and any specialized knowledge of the prospective landowner.

In today's final rule, we continue to recognize that it is not sufficient to wholly adopt previously conducted all appropriate inquiries for the same property without any review. Certain aspects of the all appropriate inquiries investigation are specific to the current prospective landowner and the current purchase transaction. Therefore, the final rule requires that each all appropriate inquiries investigation include current information related to:

- Any relevant specialized knowledge held by the current prospective landowner and the environmental professional responsible for overseeing and signing the all appropriate inquiries report (i.e., requirements of § 312.28);

- The relationship of the current purchase price to the value of the property, if the property were not contaminated (i.e., requirements of § 312.29); and
- Commonly known or reasonably ascertainable information about the property.

K. Can All Appropriate Inquiries Be Conducted by One Party and Transferred to Another Party?

Proposed Rule

The proposed rule allowed for all appropriate inquiries to be conducted by one party and transferred to another party, provided that certain conditions are met. Under certain circumstances, the prospective landowner, or a grantee, may use a report of all appropriate inquiries conducted for the property by or for another party, including the seller of the property or another party. For example, there are situations where the federal government or a state government agency may conduct the all appropriate inquiries on behalf of the local government for a property being purchased by a local government, such as the "targeted brownfields assessments" conducted on behalf of local governments by EPA. This situation also may occur when a state government covers the cost of the all appropriate inquiries for a property owned by a local government or actually conducts the all appropriate inquiries itself when the local government does not have access to appropriate staff or capital resources. A local government may conduct all appropriate inquiries for a third party in its community, such as a private prospective landowner. In addition, local redevelopment agencies may locate a contaminated property, conduct all appropriate inquiries, acquire the property, and then sell the property to a private developer.

The proposed rule allowed for a person acquiring a property, or a grantee, to use the results of an all appropriate inquiries report conducted by or for another party, if the report meets the proposed rule's objectives and performance factors and the person who is seeking to use the previously-collected information or report reviews all information collected and updates the contents of the report as required by § 312.20(c) and necessary to accurately reflect current conditions at the property. In addition, the proposed rule required that the prospective landowner, or grantee, update the inquiries and the report to include any commonly known and reasonably ascertainable information, relevant specialized knowledge held by the prospective landowner and the environmental professional, and the relationship of the purchase price to the value of the property, if it were not contaminated.

Public Comments

Commenters generally supported the proposed provision allowing for all appropriate inquiries investigations conducted by or for one party to be used by another party.

Final Rule

For the reasons discussed in the preamble to the proposed rule and summarized above, the final rule retains the provision allowing that all appropriate inquiries investigations may be conducted by or for one party and used by another party. In all cases, the all appropriate inquiries investigation must be updated to include commonly known and reasonably ascertainable information and any relevant specialized knowledge held by the prospective landowner and environmental professional. In addition, the evaluation of the relationship between the purchase price and the fair market value of the property must reflect the current sale of the property. In all other aspects of the investigation, the all appropriate inquiries must be in compliance with the provisions of the final regulation.

L. What Are the Objectives and Performance Factors for the All Appropriate Inquiries Requirements?

Proposed Rule

As explained in the preamble to the proposed rule, when developing the proposed standards, EPA and the Negotiated Rulemaking Committee structured the proposal around the statutory criteria established by Congress in section 101(35)(B)(iii) of CERCLA. As development of the proposed rule progressed, it became apparent that the purposes and objectives for the individual criterion and the types of information that must be collected to meet the objectives of each criterion often overlapped. For example, in developing standards addressing the criterion requiring a review of historical information, a search for recorded environmental cleanup liens, and a review of government records, the Committee concluded that the objectives of each criterion or activity were similar, which could lead to the collection of the same information to fulfill each of the criterion's objectives. For example, a chain of title document is historic information that may include information on environmental cleanup liens, as well as information on past owners of the property indicating that previous owners managed hazardous substances on the property.

To avoid requiring duplicative efforts, but to ensure that the proposed regulations included standards and practices that result in a comprehensive assessment of the environmental conditions at a property, the proposed all appropriate inquiries standards were structured around a concise set of objectives and performance factors. The proposed objectives and performance factors applied to the standards comprehensively. In conducting the inquiries collectively, the landowner and the environmental professional must seek to achieve the objectives and performance factors and use the objectives and standards as guidelines in implementing, in total, all of the other proposed regulatory standards and practices.

Public Comments

Commenters overwhelmingly supported the proposed approach of structuring the all appropriate inquiries standards around a definitive set of performance factors and objectives. Commenters stated that the establishment of performance factors will improve the quality of environmental site assessments because the performance factors allow for the application of professional judgement and provide flexibility.

A few commenters did not support the proposed approach of structuring the regulations around a set of performance factors and objectives. These commenters asserted that the objectives and performance factors made the regulation too vague and open-ended. In addition, the commenters stated that they want the regulation to be centered around a "checklist" of activities, each of which should be required to be completed independently and without consideration of a comprehensive performance approach. Commenters who argued for a checklist approach said that such an approach would ensure that the environmental professional only would have to undertake a finite list of activities and it would be easier (in the commenter's opinion) for property owners to obtain liability protection if the list of activities could be completed without regard to performance goals or an overall objective. These commenters also expressed concern that, if the regulations are based on performance factors that the all appropriate inquiries investigation would not have an

endpoint at which prospective landowners could stop looking for evidence of releases or threatened releases. The commenters believed that under a checklist approach liability protection would be awarded upon completion of all activities on the checklist.

Final Rule

We are retaining the proposed performance factors and objectives in the final rule. We continue to believe, as did many commenters, that basing the regulations on a set of overall performance factors and specific objectives lends clarity and flexibility to the standards. Such an approach also allows for the application of professional judgment and expertise to account for site-specific circumstances. The primary objective of an all appropriate inquiries investigation is to identify conditions indicative of releases and threatened releases of hazardous substances on, at, in, or to the subject property. In the case of recipients of brownfields grants, the objective may be expanded to include petroleum and petroleum products, pollutants, contaminants, and controlled substances, depending upon the scope of the grantee's cooperative agreement.

The performance factors are meant to guide the individual aspects of the investigation toward meeting both the statutory criteria for all appropriate inquiries and the regulatory objectives of (1) collecting necessary information about the uses and ownerships of a property and (2) identifying, through the collection of this information, conditions indicative of releases and threatened releases on, at, in, or to the subject property. By establishing a concise set of objectives and setting some boundaries on the information collection activities through the establishment of performance factors, we believe that the final rule fulfills the statutory objectives, provides for a comprehensive assessment of the environmental conditions at the property, and avoids the conduct of duplicative investigations and data collection efforts.

EPA disagrees with the commenters who argued that the proposed approach of establishing overall objectives and performance factors for the all appropriate inquiries standards would result in an approach that is too vague and open-ended. In fact, by establishing clear objectives and setting parameters to the investigation through a set of performance factors that include gathering information that is publicly available, obtainable from its source within reasonable time and cost constraints, and which can practicably be reviewed, the approach taken in the final rule provides reasonable goals and endpoints to the information collection requirements. The proposed objectives provide a discrete list of the types of information that must be collected as part of the all appropriate inquiries investigation. In addition, the performance factors set boundaries around the efforts that must be taken and the cost burdens that must be incurred to obtain the required information. The fact that the rule is framed within a primary objective, to "identify conditions indicative of releases and threatened releases of hazardous substances," actually reduces the open-ended nature of the investigation and establishes an overall goal for the inquiries.

Commenters who advocated that a checklist approach (or an approach not based upon overall objectives and performance factors) is superior because they believe that it would better provide for a stopping point in the investigation may have misunderstood the statutory requirements that must be met to obtain a defense to CERCLA liability. These commenters may have incorrectly assumed that the completion of the all appropriate inquiries investigation is all that is required to obtain liability protection. The conduct of all appropriate inquiries is only one requirement for obtaining relief from CERCLA liability. Prospective landowners must conduct all appropriate inquiries prior to acquiring a property to qualify for a defense to CERCLA liability as an innocent landowner, bona fide prospective purchaser or contiguous landowner. However, once a property is acquired, the property owner must comply with all of the other statutory criteria necessary to qualify for the liability protections. In particular, landowners must undertake "reasonable steps" to "stop any continuing releases." Therefore, the final rule's objective of identifying conditions indicative of releases and threatened releases of hazardous substances on, at, in, or to a property links appropriately with the statutory criteria requiring the landowner to address such releases to qualify for the liability protections.

Conducting the inquiries merely in compliance with a checklist and without the purpose of meeting an overall objective could result in an inability to recognize the value of certain types of information or in chasing down multiple sources of information that may not have added value for meeting the overall objective of the investigation. A lack of information or an inability to obtain information that may affect the ability of an environmental professional to determine whether or not there are conditions indicative of a release or threatened release of a hazardous substance (or other contaminant) on, at, in or to a property can have significant consequences regarding a prospective landowner's ultimate ability to claim protection from CERCLA liability. Failure to identify a release during the conduct of all appropriate inquiries does not relieve the property owner from the responsibility to take reasonable steps and address the release. Even if the Agency agreed with the commenters and adopted a "checklist" approach for the regulation, simply conducting the checklist of activities and ending the investigation after each activity is conducted would not result in protection from CERCLA liability (as commenters claimed).

The final rule also establishes that in those cases where certain information included in the list of regulatory objectives (§ 312.20(e)) cannot be found or obtained within the parameters of the performance factors, such data gaps must be identified and the significance of the missing information with regard to the environmental professional's ability to render an opinion on the presence of conditions indicative of releases and threatened releases be documented. Exhaustive and costly efforts do not have to be made to access all available sources of data and find every piece of data and information about a property. Nor does the rule require that duplicative information be sought from multiple sources. The inquiries and the overall investigation must be undertaken to meet the data collection objectives and primarily determine the environmental conditions of the property. Structuring the standards around such objectives will render the results of the investigation more valuable to a landowner in his or her efforts to comply with the post acquisition continuing obligations for obtaining the CERCLA liability protections than an approach framed around a mere checklist of activities.

In retaining the proposed objectives and performance factors, the final rule allows that an all appropriate inquiries investigation need not address each of the regulatory criterion in any particular sequence. In addition, information relevant to more than one criterion need not be collected twice, and a single source of information may satisfy the requirements of more than one criterion and more than one objective. However, the information required to achieve each

of the objectives and performance factors must be obtained for the all appropriate inquiries investigation to be complete. Although compliance with the all appropriate inquiries requirements ultimately will be determined in court, the final rule allows the prospective landowner or grantee and environmental professional to determine the best process and sequence for collecting and analyzing all required information. The sequence of activities and the sources of information used to collect any required information is left to the judgment and expertise of the environmental professional, provided that the overall objectives and the performance factors established for the final rule are met.

In performing the inquiries, including but not limited to conducting interviews, collecting historical data and government records, and inspecting the subject property and adjoining properties, all parties undertaking all appropriate inquiries must be attentive to the fact that the primary objectives of the regulation are to identify the following types of information about the subject 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 on, at, in, or to the subject property.

EPA notes that in the case of brownfields grantees, the scope of each of the activities listed above may be broader if the grant or cooperative agreement includes within its scope the assessment of a property for conditions indicative of releases or threatened releases of petroleum and petroleum products, controlled substances, or other contaminants.

The final performance factors for achieving the objectives set forth above are set forth in § 312.20(e) and require the persons conducting the inquiries to: (1) Gather the information that is required for each standard and practice that is publicly available, obtainable from its source within reasonable time and cost constraints, and which can practicably be reviewed, and (2) 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 of this subpart. In complying with § 312.20(f)(2), if the environmental professional or person conducting the inquiries determines through such review and evaluation that the information is either not thorough or not reliable, then further inquiries should be made to ensure that the information gathered is both thorough and reliable. The performance factors are provided as guidelines to be followed in conjunction with the final objectives for the all appropriate inquiries.

M. What Are Institutional Controls?

The final rule requires the identification of institutional controls placed on the subject property. As defined in § 312.10, institutional controls are non-engineered instruments, such as administrative and legal controls, that among other things, can help to minimize the potential for human exposure to contamination, and protect the integrity of a remedy by limiting land or resource use. For example, an institutional control might prohibit the drilling of a drinking water well in a contaminated aquifer or disturbing contaminated soils. Institutional controls also may be referred to as land use controls, activity and use limitations, etc., depending on the program under which a response action is conducted or a release is addressed.

Institutional controls are typically used whenever contamination precludes unlimited use and unrestricted exposure at the property. Thus, institutional controls may be needed both before and after completion of the remedial action or may be employed in place of a remedial action. Institutional controls often must remain in place for an indefinite duration and, therefore, generally need to survive changes in property ownership (i.e., run with the land) to be legally and practically effective. Some common examples of institutional controls include zoning restrictions, building or excavation permits, well drilling prohibitions, easements and covenants.

The importance of identifying institutional controls during all appropriate inquiries is twofold. First, institutional controls are usually necessary and important components of a remedy. Failure to abide by an institutional control may put people at risk of harmful exposure to hazardous substances. Second, an owner wishing to maintain protections from CERCLA liability as an innocent landowner, contiguous property owner, or bona fide prospective purchaser must fulfill ongoing obligations to: (1) Comply with any land use restrictions established or relied on in connection with a response action and (2) not impede the effectiveness or integrity of any institutional control employed in connection with a response action. For a more detailed discussion of these requirements please see EPA, Interim Guidance Regarding Criteria Landowners Must Meet in Order to Qualify for Bona Fide Prospective Purchaser, Contiguous Property Owner, or Innocent Landowner Limitations on CERCLA Liability (Common Elements, 2003).

Those persons conducting all appropriate inquiries may identify institutional controls through several of the standards and practices set forth in this rule. As noted, implementation of institutional controls may be accomplished through the use of several administrative and legal mechanisms, such as zoning restrictions, building permit requirements, easements, covenants, etc. For example, an easement implementing an institutional control might be identified through the review of chain of title documents under § 312.24(a). Furthermore, interviews with past and present owners, operators, or occupants pursuant to § 312.23; and reviews of federal, tribal, state, and local government records under § 312.26, may identify an institutional control or refer a person to the appropriate source to find an institutional control. For example, a review of federal Superfund records, including Records of Decision and Action Memoranda, as well as other information contained in the CERCLIS database, may indicate that zoning was selected as an institutional control or an interview with a current operator may reveal an institutional control as part of an operating permit.

The final rule requires that all appropriate inquiries include a search for institutional controls placed upon the subject property as part of the requirements for reviewing federal, state, tribal, and local government records. A discussion of these requirements is provided in section IV.S below.

N. How Must Data Gaps Be Addressed in the Conduct of All Appropriate Inquiries?

Proposed Rule

The proposed rule required environmental professionals, prospective landowners, and brownfields grant recipients to identify data gaps that affect their ability to identify conditions indicative of releases or threatened releases of hazardous substances (and, in the case of grant recipients, pollutants, contaminants, petroleum and petroleum products, and controlled substances). The proposed rule also required these persons to identify the sources of information consulted to address, or fill, the data gaps and then comment upon the significance of the data gaps with regard to the ability to identify conditions indicative of releases or threatened releases of hazardous substances on, at, in or to the subject property. The proposed rule defined a data gap as a lack of or an inability to obtain information required by the standards and practices listed in the proposed regulation, despite good faith efforts by the environmental professional or the prospective landowner or grant recipient to gather such information.

Public Comments

Some commenters raised concerns that the proposed definition of a data gap may result in difficulties in determining when an all appropriate inquiries investigation is complete. These commenters stated that the need to identify and comment on the significance of data gaps may render it difficult to complete an investigation, that could potentially affect a property owner's ability to claim protection from CERCLA liability. Other commenters asserted that because an investigation could be considered complete despite the existence of a data gap, a regulatory loophole exists (in the opinion of the commenters) that will result in the property owner's being able to claim protection from CERCLA liability even when the all appropriate inquiries investigation results in a failure to identify a release or threatened release at a property.

Some commenters stated that the proposed requirement to identify data gaps, or missing information, that may affect the environmental professional's ability to render an opinion regarding the environmental conditions at a property and comment on their significance in this regard will lend credibility to the inquiry's final report.

Final Rule

We are retaining the proposed definition of data gap and the proposed requirements for identifying and commenting on the significance of data gaps. For the purposes of today's final rule, a "data gap" is a lack of or inability to obtain information required by the standards and practices listed in the regulation, despite good faith efforts by the environmental professional or the prospective landowner (or grant recipient) to gather such information pursuant to the objectives for all appropriate inquiries. In today's final rule, § 312.20(g) requires environmental professionals, prospective landowners, and grant recipients to identify data gaps that affect their ability to identify conditions indicative of releases or threatened releases of hazardous substances (and in the case of grant recipients pollutants, contaminants, petroleum and petroleum products, and controlled substances). The final rule requires such persons to identify the sources of information consulted to address the data gaps and comment upon the significance of the data gaps with regard to the ability to identify conditions indicative of releases or threatened releases. Section 312.21(c)(2) also requires that the inquiries report include comments regarding the significance of any data gaps on the environmental professional's ability to provide an opinion as to whether the inquiries have identified conditions indicative of releases or threatened releases.

In response to issues raised by commenters, we point out that the final regulation, as did the proposal, requires that environmental professionals document and comment on the significance of only those data gaps that "affect the ability of the environmental professional to identify conditions indicative of releases or threatened releases of hazardous substances * * * on, at, in, or to the subject property." If certain information included within the objectives and performance factors for the final rule cannot be found and the lack of certain information, in light of all other information that was collected about the property, has no bearing on the environmental professional's ability to render an opinion regarding the environmental conditions at the property, the final rule does not require the lack of such information to be documented in the final report. Given the restriction on the type of data gaps that must be documented, and given that the documentation is restricted to instances where the lack of information hinders the ability of the environmental professional to render an opinion regarding the environmental conditions at the property, we disagree with the commenters who assert that the requirement is overly burdensome or will result in the inability to complete the required investigations.

Commenters who asserted that the requirement to document data gaps would result in a "loophole" that would allow property owners to claim protection from CERCLA liability after conducting an incomplete all appropriate inquiries investigation may have misunderstood the scope of the rule and the statutory requirements for obtaining the liability protections. As explained in detail in Section II of this preamble, the conduct of all appropriate inquiries is only one requirement necessary for obtaining protection from CERCLA liability. The mere fact that a prospective landowner conducted all appropriate inquiries does not provide an individual with protection from CERCLA liability. To qualify as a bona fide prospective purchaser, innocent landowner or a contiguous property owner, a person must, in addition to conducting all appropriate inquiries prior to acquiring a property, comply with all of the other statutory requirements. These criteria are summarized in section II.D. of this preamble. The all appropriate inquiries investigation may provide a prospective landowner with necessary information to comply with the other post-acquisition statutory requirements for obtaining liability protections. The conduct of an incomplete all appropriate inquiries investigation, or the failure to detect a release during the conduct of all appropriate inquiries, does not exempt a landowner from his or her post-acquisition continuing obligations under other provisions of the statute. Failure to comply with any of the statutory requirements may be problematic in a claim for protection from liability.

The final rule retains the requirement to identify data gaps, address them when possible, and document their significance. Prospective landowners may wish to consider the potential significance of any data gaps, that may exist after conducting the pre-acquisition all appropriate inquiries in assessing their obligations to fulfill the additional statutory requirements after purchasing a property.

If a person properly conducts all appropriate inquiries pursuant to this rule, including the requirements concerning data gaps at §§ 312.10, 312.20(g) and 312.21(c)(2), the person may fulfill the all appropriate inquiries requirements of CERCLA sections

107(q), 107(r), and 101(35), even when there are data gaps in the inquiries. However, as explained further in this preamble, fulfilling the all appropriate inquiries requirements does not, by itself, provide a person with a protection from or defense to CERCLA liability. Failure to identify a release or threatened release during the conduct of all appropriate inquiries does not negate the landowner's continuing responsibilities under the statute, including the requirements to take reasonable steps to stop the release, prevent a threatened release, and prevent exposure to the release or threatened release once the landowner has acquired a property. Also, if an existing institutional control or land use restriction is not identified during the conduct of all appropriate inquiries prior to the acquisition of a property, a landowner is not exempt from complying with the institutional control or land use restriction after acquiring the property. None of the other statutory requirements for the liability protections is satisfied by the results of the all appropriate inquiries.

We emphasize that the mere fact that a prospective landowner conducted all appropriate inquiries does not provide an individual with a defense to or limitation from CERCLA liability. To qualify as a bona fide prospective purchaser, innocent landowner or a contiguous property owner, a person must, in addition to conducting all appropriate inquiries prior to acquiring a property, comply with all of the other statutory requirements. These criteria are summarized in section II.D. of this preamble. The all appropriate inquiries investigation may provide a prospective landowner with necessary information to comply with the other post-acquisition statutory requirements for obtaining liability protections. The failure to detect a release during the conduct of all appropriate inquiries does not exempt a landowner from his or her post-acquisition continuing obligations under other provisions of the statute.

Section 312.20(g) of the final rule points out that one way to address data gaps may be to conduct sampling and analysis. The final regulation does not require that sampling and analysis be conducted to comply with the all appropriate inquiries requirements. The regulation only notes that sampling and analysis may be conducted, where appropriate, to obtain information to address data gaps. The Agency notes that sampling and analysis may be valuable in determining the possible presence and extent of potential contamination at a property. Such information may be valuable for determining how a landowner may best fulfill his or her post-acquisition continuing obligations required under the statute for obtaining protection from CERCLA liability.

O. Do Small Quantities of Hazardous Substances That Do Not Pose Threats to Human Health and the Environment Have To Be Identified in the Inquiries?

Proposed Rule

The environmental professional should identify and evaluate all evidence of releases or threatened releases on, at, in or to the subject property, in accordance with generally accepted good commercial and customary standards and practices. However, the proposed rule provided that the environmental professional need not specifically identify, in the written report prepared pursuant to § 312.21(c), extremely small quantities or amounts of contaminants, so long as the contaminants generally would not pose a threat to human health or the environment.

Public Comments

EPA received no significant comment on the proposed provision on the identification of extremely small quantities of contamination.

Final Rule

The final retains the provision that the environmental professional need not specifically identify, in the written report prepared pursuant to § 312.21(c), extremely small quantities or amounts of contaminants, so long as the contaminants generally would not pose a threat to human health or the environment.

P. What Are the Requirements for Interviewing Past and Present Owners, Operators, and Occupants?

Proposed Rule

CERCLA section 101(35)(B)(iii)(II) requires EPA to include in the standards and practices for all appropriate inquiries "interviews with past and present owners, operators, and occupants of the facility for the purpose of gathering information regarding the potential for contamination at the facility." The Agency proposed that the inquiry of the environmental professional include interviews with the current owner(s) and occupant(s) of the subject property. In addition, the proposed rule required that interviews be conducted with current and past facility managers with relevant knowledge of the property, as well as past owners, occupants, or operators, and employees of current and past occupants of the property, as necessary, to meet the proposed objectives and performance factors. In the case of abandoned properties, the Agency proposed that the inquiry of the environmental professional include interviewing one or more owners or occupants of neighboring or nearby properties to obtain information on current and past uses of the property and other information necessary to meet the objectives and performance factors.

Public Comments

Several commenters asserted that the requirement to interview current and past owners and occupants of a property may be burdensome. Commenters gave several reasons for asserting that interviews may be burdensome. Some commenters said it is difficult to locate current and past owners and occupants. Other commenters questioned the accuracy of any information that would be provided by a current or past owner or occupant. One commenter expressed concern that the requirement to conduct interviews of current and past owners and occupants of a property could result in the environmental professional divulging information regarding the sale of the property against the prospective landowner's wishes.

In the case of the proposed interview requirements for abandoned properties, some commenters opposed the requirement to interview at least one owner or occupant of a neighboring property. Commenters stated that the proposed requirement was unreasonable and that it is impractical to attempt to find and contact neighboring property owners and occupants. Some commenters said that neighboring property owners and occupants can not be relied upon to provide accurate information about a property.

Final Rule

The requirements for conducting interviews of past and present owners, operators, and occupants of the subject property are included in § 312.23. The final rule identifies these interviews as being within the scope of the inquiry of the environmental professional. Therefore, all interviews must be conducted by the environmental professional or by someone under the supervision or responsible charge of the environmental professional. The intent is that an individual meeting the definition of an environmental professional (§ 312.10) must oversee the conduct of, or review and approve the results of, the interviews to ensure the interviews are conducted in compliance with the objectives and performance

factors (§ 312.20). This is to ensure that the information obtained from the interviews provides sufficient information, in conjunction with the results of all other inquiries, to allow the environmental professional to render an opinion with regard to conditions at the property that may be indicative of releases or threatened releases of hazardous substances (and pollutants, contaminants, petroleum and petroleum products, and controlled substances, if applicable).

The final rule requires the environmental professional's inquiry to include interviewing the current owner and occupant of the subject property. In addition, the rule provides that the inquiry of the environmental professional include interviews of additional individuals, including current and past facility managers with relevant knowledge of the property, past owners, occupants, or operators of the subject property, or employees of current and past occupants of the subject property, as necessary to meet the rule's objectives and in accordance with the performance factors. A primary purpose of the interviews portion of the all appropriate inquiries is to obtain information regarding the current and past ownership and uses of the property, and obtain information regarding the potential environmental conditions of the property. The final rule does not prescribe particular questions that must be asked during the interview. The type and content of any questions asked during interviews will depend upon the site-specific conditions and circumstances and the extent of the environmental professional's (or other individual's under the supervision or responsible charge of the environmental professional) knowledge of the property prior to conducting the interviews. Therefore, the final rule does not include specific questions for the interviews, but requires that the interviews be conducted in a manner that achieves the objectives and performance factors. Interviews with current and past owners and occupants may provide opportunities to collect information about a property that was not previously recorded nor well documented and may provide valuable perspectives on how to find or interpret information required to complete other aspects of the all appropriate inquiries. Information gathered during the interview portion of the all appropriate inquiries may in turn provide valuable information for the on-site visual inspection. Persons conducting the interviews of current and past owners and occupants may want to spend some time during the interviews requesting information on the locations of operations or units used to store or manage hazardous substances on the property.

In the case of properties where there may be more than one owner or occupant, or many owners or occupants, the final rule requires the inquiry to include interviews of major occupants and those occupants that are using, storing, treating, handling or disposing (or are likely to have used, stored, treated, handled or disposed) of hazardous substances (or pollutants, contaminants, petroleum and petroleum products, and controlled substances, as applicable) on the property. The rule does not specify the number of owners and occupants to be interviewed. The environmental professional must perform this function in the manner that best fulfills the objectives and performance factors for the inquiries in § 312.20(e) and (f). Environmental professionals may use their professional judgment to determine the specific occupants to be interviewed and the total number of occupants to be interviewed in seeking to comply with the objectives and performance factors for the inquiries. Interviews must be conducted with individuals most likely to be knowledgeable about the current and past uses of the property, particularly with regard to current and past uses of hazardous substances on the property.

In response to commenters who asserted that the proposed interview requirements are burdensome, we point out that the statutory criteria in CERCLA section 101(35)(B)(iii) include "interviews with past and present owners, operators, and occupants of the facility for the purpose of gathering information regarding the potential for contamination at the facility." EPA asserts that it was clearly congressional intent that the all appropriate inquiries investigation include the conduct of interviews with current and past owners and occupants. We also assert that current and past owners and occupants of a property may be excellent sources of information regarding past and on-going uses of the property as well as the types of waste management activities that were undertaken at the property. Given that the ASTM E1527 Phase 1 Environmental Site Assessment Process, the interim standard for the conduct of all appropriate inquiries, includes requirements for conducting interviews with the current owners and occupants of a property and provides that other owners and occupants are good additional sources of information about property uses and potential contamination at a property, we disagree with commenters who asserted that the proposed and final requirements for conducting interviews will be overly burdensome.

In the case of abandoned properties, the final rule requires the inquiry of the environmental professional to include interviews with one or more owners or occupants of neighboring or nearby properties. In the case of abandoned properties, it most likely will be difficult to identify or interview current or past owners and occupants of the property. Therefore, the final rule requires that at least one owner or occupant of a neighboring property be interviewed to obtain information regarding past owners or uses of the property in cases where the subject property is abandoned and no current owner is available to be interviewed. The final rule defines an abandoned property as a "property that can be presumed to be deserted, or an intent to relinquish possession or control can be inferred from the general disrepair or lack of activity thereon such that a reasonable person could believe that there was an intent on the part of the current owner to surrender rights to the property." As is the case with interviews conducted with current and past owners and occupants of the property, interview questions should be developed prior to the conduct of the interviews, and tailored to gather information to achieve the rule's objectives and performance factors. The final rule contains no specific requirements with regard to the type or content of questions that must be asked during the interviews.

EPA disagrees with commenters who stated that it will be difficult to locate and contact neighboring property owners and occupants. The final rule, as did the proposed rule, requires that the environmental professional only locate and interview one neighboring property owner or occupant and only in those cases where no owner or occupant of the subject property can be identified. An environmental professional should be able to locate one owner or occupant of a neighboring property when conducting the on-site visual inspection of the property. If the environmental professional cannot easily locate an owner and occupant of a neighboring property, he or she may enlist the assistance of local government officials in identifying a neighboring property owner or occupant. As is the case with information ascertained from any interview, the environmental professional must apply his or her judgment when drawing conclusions

based on the information provided in interviews with neighboring property owners and occupants and should attempt to verify any information provided by reviewing other available sources of information.

Q. What Are the Requirements for Reviews of Historical Sources of Information?

Proposed Rule

Historical documents and records may contain information regarding past ownership and uses of a property that may be essential to assessing the potential for environmental conditions indicative of releases or threatened releases of hazardous substances to be present at the property. Historical documents and records, among others, may include chain of title documents, land use records, aerial photographs of the property, fire insurance maps, and records held at local historical societies. The proposed rule required that the inquiry of the environmental professional include a review of historical documents and records for the subject property that document the ownership and use of the property for a period of time as far back in the history of the property as it can be shown that the property contained structures, or from the time the property was first used for residential, agricultural, commercial, industrial, or governmental purposes.

Public Comments

Some commenters raised concerns regarding the proposed requirements to review historical records covering "a period of time as far back in the history of the subject property as it can be shown that the property contained structures or from the time the property was first used for residential, agricultural, commercial, industrial, or governmental purposes." Commenters said that the proposed historical scope of the records search is too extensive. Some commenters requested that in the final rule EPA adopt the provisions for historical records searches provided in the ASTM E1527–2000 standard. Several commenters requested that EPA explicitly require as part of the review of historical records a review of chain of title documents. The commenters asserted that a review of chain of title documents is the only reliable way to identify previous owners of a property.

Final Rule

The statutory criteria in the Brownfields Amendments require that reviews of historical sources of information be conducted to "determine previous uses and occupancies of the real property since the property was first developed." The final rule requires (as did the proposed rule) that historical records on the subject property be searched for information on the property covering a time period as far back in history as there is documentation that the property contained structures or was placed into use of some form. This provision follows the statutory language. In addition, the final rule requires that historical documents and information be reviewed to obtain necessary information for meeting the objectives and performance factors in § 312.20(e) and (f). If a search of historical sources of information results in an inability of the environmental professional to document previous uses and occupancies of the property as far back in history as it can be shown that the property contained structures or was placed into use of some form, and such information is not acquired elsewhere during the investigation then it must be documented as a data gap to the inquiries. The requirements of §§ 312.20(g) and 312.21(c)(2) are applicable to all instances in the all appropriate inquiries that result in data gaps.

Despite the concerns raised by some commenters regarding the scope of the historical records review, we assert that the scope of the requirements in the final rule (as did the scope of the proposed requirements) reflects the statutory language provided in CERCLA section 101(35)(B)(iii). The statutory criterion provide that all appropriate inquiries include "reviews of historical sources * * * to determine previous uses and occupancies of the real property since the property was first developed." We point out that the final rule does allow the environmental professional to exercise his or her professional judgment "in context of the facts available at the time of the inquiry as to how far back in time it is necessary to search historical records." We believe that this provides sufficient flexibility to allow for any circumstances where, due to the availability of other information about a property an environmental professional may conclude that a comprehensive search of historical records is not necessary to meet the objectives and performance factors.

In response to commenters that requested that EPA adopt the provisions of the ASTM E1527–2000 standard for conducting searches of historical records, we assert that the scope of the historical records search in today's final rule is very similar to the scope of ASTM E1527 standard. The ASTM E1527 standard, at section 7.3.1, requires that historical sources of information be searched to identify "all obvious uses of the property* * *from the present, back to the property's obvious first developed use, or back to 1940, whichever is earlier." Given that the language of both the ASTM E1527 standard and the requirements in the final rule for conducting historical records searches is very similar, we conclude that the intent is the same and the final rule represents no change from current good customary business practice. In addition, the final rule provides for sufficient flexibility both within the application of the performance factors to the historical records search requirements and in allowing the environmental professional to apply his or her judgment "in the context of the facts available at the time of the inquiry."

The final rule does not require that any specific type of historic information be collected. In particular, the rule does not require that persons obtain a chain of title document for the property. The rule allows for the environmental professional to use professional judgment when determining what types of historical documentation may provide the most useful information about a property's ownership, uses, and potential environmental conditions when seeking to comply with the objectives and performance factors for the inquiries. Although we agree with commenters that chain of title documents may serve as an important source of information regarding past ownership of a property, it may not be the only source of this information. To the extent that chain of title documents are otherwise obtained for other purposes during the conduct of a property sale or transaction, we believe that these documents can easily be made available to the environmental professional by the prospective landowner. Given that the final rule requires that historical records be searched for information on previous uses and ownership of a property for as far back in the history of property as can be shown that the property contained structures or was first used for residential, agricultural, commercial, industrial or governmental purposes, if chain of title documents are the best and most easily attainable source of this information, we assume that such documents will be obtained and used by the environmental professional.

Given the wide variety of property types and locations to which the final rule could apply, any list of specific documents could result in undue burdens on many prospective

landowners and grantees due to difficulties in collecting any specific document for any particular property or property location. Therefore, the final requirements for reviewing historical documents allow the prospective landowner or grantee and the environmental professional to use their judgment, in accordance with generally accepted good commercial and customary standards and practices, in locating the best available sources of historical information and reviewing such sources for information necessary to comply with the rule's objectives and performance factors.

As explained in section IV.J of this preamble, the prospective landowner, grantee, or environmental professional may make use of previously collected information about a property when conducting all appropriate inquiries. The collection of historical information about a property may be a particular case where previously collected information may be valuable, as well as easily accessible. In addition, nothing in the rule prohibits a person from using secondary sources (*e.g.*, a previously conducted title search) when gathering information about historical ownership and usage of a property. As explained in section IV.J, information must be updated if it was last collected more than 180 days prior to the date of acquisition of the property.

R. What Are the Requirements for Searching for Recorded Environmental Cleanup Liens?

For purposes of this rule, recorded environmental cleanup liens are encumbrances on property for the recovery of incurred cleanup costs on the part of a state, tribal or federal government agency or other third party. Recorded environmental cleanup liens often provide an indication that environmental conditions either currently exist or previously existed on a property that may include the release or threatened release of a hazardous substance. The existence of an environmental cleanup lien should be viewed as an indicator of potential environmental concerns and as a basis for further investigation into the potential existence of on-going or continued releases or threatened releases of hazardous substances on, at, in, or to the subject property.

Proposed Rule

The proposed rule required that prospective landowners and grantees, or environmental professionals on their behalf, search for environmental cleanup liens that are recorded under federal, tribal, state, or local law. Environmental cleanup liens that are not recorded by government entities or agencies are not addressed by the language of the statute (the statute speaks only of "recorded liens"); therefore, the proposed rule required that only a search for recorded environmental liens be included in the all appropriate inquiries investigation.

Public Comments

Some commenters asked that EPA state more clearly that the responsibility for searching for environmental cleanup liens rests with the prospective landowner and not the environmental professional. A few commenters requested that the Agency provide some guidance on where to find recorded environmental cleanup liens.

Final Rule

EPA is finalizing the proposed requirements to search for recorded environmental cleanup liens without changes. The all appropriate inquiries investigation must include a search for recorded environmental cleanup liens. The final rule allows that the search for recorded environmental cleanup liens be performed either by the prospective landowner or grantee, or through the inquiry of the environmental professional. The search for such liens may not necessarily require the expertise of an environmental professional and therefore may be more efficiently or more cost-effectively performed by the prospective landowner or grantee, or his or her agent. Such liens may be included as part of the chain of title documents or may be recorded in some other manner or format by state or local government agencies. If such information is collected by the prospective landowner or grantee, or other agent who is not under the supervision or responsible charge of the environmental professional, the final rule allows for, but does not require, the information that is collected by or on the behalf of the prospective landowner or grantee to be provided to the environmental professional. If the information is provided to the environmental professional, he or she can then make use of such information during the conduct of the all appropriate inquiries and when rendering conclusions or opinions regarding the environmental conditions of the property. If such information is not provided to the environmental professional and the lack of such information affects the ability of the environmental professional to identify conditions indicative of releases or threatened releases of hazardous substances on, at, in or to the property, the lack of information should be noted as a data gap (per the requirements of § 312.21(b)(2)).

Although some commenters requested that EPA be more explicit in the final rule in requiring that the search for recorded environmental cleanup liens be conducted by the prospective landowner (or grantee), we believe that the decision of who conducts the search may be best left up to the judgment of the prospective landowner or grantee and environmental professional. The final rule provides in § 312.22 that the search for recorded environmental cleanup liens can fall outside the inquiries conducted by the environmental professional. The search for recorded environmental cleanup liens is not included as part of the requirements governing the results of an inquiry by an environmental professional (§ 312.21). Therefore, the search may be conducted by the prospective landowner or grantee, his or her attorney or agent, or the environmental professional.

We offer one caution about the conclusion that might be drawn if no recorded environmental cleanup liens are found. If EPA is conducting a cleanup at site at the time it is transferred or acquired, EPA is able to record a lien post acquisition. For example, one type of lien, often referred to as a windfall lien, has no statute of limitations and arises at the time EPA first spends Superfund money. States and localities may have similar mechanisms. Therefore, even if a recorded environmental cleanup lien is not found during the conduct of the all appropriate inquiries investigation, one may be recorded at a later date if EPA is undertaking a cleanup or response action at the property.

With regard to commenters who requested that EPA provide guidance on where to search for environmental cleanup liens, we advise that prospective landowners and grantees to seek the advice of a local realtor, real estate attorney, title company, or other real estate professional. Environmental cleanup liens may be recorded as part of the land title records or as part of other state or local government land or real estate records. Recorded environmental cleanup liens may be recorded in different places, depending upon the particular state and particular locality in which the property is located.

S. What Are the Requirements for Reviewing Federal, State, Tribal, and Local Government Records?

Federal, tribal, state and local government records may contain

information regarding environmental conditions at a property. In particular, government records, or data bases of such information, may include information on previously reported releases of hazardous substances, pollutants, contaminants, petroleum and petroleum products and controlled substances. Government records and available databases can provide valuable information on remedial actions and emergency response activities that may have been conducted at a particular property. Government records also may include information on institutional controls related to a particular property. For example, in the case of NPL sites, EPA Superfund records, including Action Memoranda and Records of Decision, may have information on institutional controls in place at such properties. Government records also may include information on activities or property uses that could cause releases or threatened releases to be present at a property.

Proposed Rule

The proposed rule required that federal, state, tribal and local government records be searched for information necessary to achieve the objectives and performance factors, including information regarding the use and occupancy of and the environmental conditions at the subject property and conditions of nearby or adjoining properties that could have a impact upon the environmental conditions of the subject property. The proposed rule included requirements to search federal, tribal, state, and local government records for information indicative of environmental conditions at the subject property.

The proposed rule also included requirements to review government records, or data bases of information contained in government records, for information about nearby and adjoining properties. Reviews of such records may provide valuable information regarding the potential impact to the subject property from hazardous substances and petroleum contamination migrating from contiguous or nearby properties. The proposed rule included required minimum search distances for government records searches of nearby properties.

To account for property-specific and regionally-specific conditions that can influence the appropriateness of the proposed search distances for any given type of record and property, the proposed rule allowed the environmental professional to adjust the applicable search distances when searching for information about off-site properties by applying professional judgment. For example, appropriate search distances for properties located in rural settings may differ from appropriate search distances for urban settings. In addition, ground water flow direction, depth to ground water, arid weather conditions, the types of facilities located on nearby properties, and other factors may influence the degree of impact to a property from off-site sources. Therefore, the proposed rule allowed the environmental professional to adjust any or all of the proposed minimum search distances for any of the record types, based upon professional judgment and the consideration of site-specific conditions or circumstances when seeking to achieve the proposed objectives and performance factors for the required inquiries.

Public Comments

The Agency received a variety of comments in which commenters expressed concerns about the applicability or adequacy of specific types of government records included in the proposed rule (e.g., CERCLIS records, information on RCRA facilities, ERNS). A few commenters raised concerns about the availability of tribal records. Several commenters raised concerns regarding the availability of government records on institutional controls. Commenters also pointed out that, given the lack of available databases and other information on institutional controls, it may be particularly difficult to search for institutional controls associated with adjoining and nearby properties.

Final Rule

We are finalizing the requirements for reviewing federal, state, tribal, and local government data bases as proposed, with one exception. The final rule requires that government records and available lists for institutional and engineering controls be searched only for information on such controls at the subject property. All appropriate inquiries investigations do not have to include searches for institutional and engineering controls in place at nearby and adjoining properties. We made this change because we agree with commenters who pointed out that information on institutional and engineering controls may be difficult to find as there are no available national sources of this information. Only a few states have available lists of institutional controls. In addition, the information that may be inferred from knowledge of institutional and engineering controls that are in place at adjoining and nearby properties, i.e., that there was a response action, a remedial action, or corrective action taken at the site, can be inferred from information obtained from other sources (e.g., CERCLIS, RCRIS, state records of response actions).

It is important that prospective landowners obtain information on institutional and engineering controls in place at the property being acquired. It also may be important to locate information on such controls in place at nearby properties. To obtain the liability protections afforded under CERCLA (i.e., innocent landowner, contiguous property owner, bona fide prospective purchaser), the statute requires, as part of the "continuing obligations," that the property owner comply with all land use restrictions and not impede the effectiveness of institutional controls. Therefore, it is important that information on institutional and engineering controls be obtained by prospective landowners, even though information about such controls may not have been routinely obtained as part of due diligence practices prior to today's final rule (we note that the current interim standard does include provisions for searching for "activity and use limitations").

Routine "chain of title" reports may not always contain information labeled as institutional or engineering controls. However, title companies may include, as part of the chain of title reports "restrictions of record on title" when such restrictions are recorded because of underlying environmental conditions at a property. Therefore, when requesting information on "institutional controls" or "engineering controls" about a property, prospective landowners, grantees, and environmental professionals may want to request information on "restrictions of record on title" as well, in case any available information on institutional or engineering controls is so labeled in the chain of title records. In addition to chain of title records, information on institutional controls and engineering controls may be recorded in local land records. Also, some states are beginning to create registries to track information on institutional and engineering controls. Therefore, prospective landowners and grantees should consider consulting these other sources of information in addition to chain of title records for information on institutional and engineering controls.

In response to the commenters who pointed out particular shortcomings with specific sources of information (e.g., CERCLIS, RCRIS, ERNS) we point out that the requirement to review government records explicitly provides

that the reviews be conducted in compliance with the objectives and performance standards. If a particular source of information cannot be accessed within a reasonable time frame or within reasonable costs, then the information should be sought from other sources. In addition, if a particular source of information will only provide information that can more easily or readily be found elsewhere, the particular source does not have to be obtained or consulted. If application of the objectives and performance standards to the requirement to review government records results in an inability to provide necessary information (or information identified as necessary in the objectives for the final rule), then the lack of information should be documented as a data gap in the final report. In addition, the environment professional should comment on the significance the lack of any information has on his or her ability to identify conditions at the property that are indicative of releases or threatened releases of hazardous substances (in compliance with § 312.21(c)(2)).

In response to commenters who pointed out that it may be difficult to obtain or gain access to tribal government records, we point out that such records need only be searched for and reviewed in those instances where the subject property is located on or near tribal-owned lands. In these cases, it is important to attempt, within the scope of the rule's objectives and performance factors, to review such records. When such records are not available, necessary information should be sought from other sources. When no information is available and the objectives and performance factors of the final rule cannot be met and the result is a lack of information that may affect the environmental professional's ability to render an opinion regarding the environmental conditions of a property, the lack of information must be documented as a data gap in compliance with § 312.21(c)(2).

The final rule requires that the following types of government records or data bases of government records be reviewed to obtain information on the subject property and nearby properties necessary to meet the rule's objectives and performance standards:

1. Government records of reported releases or threatened releases at the subject property, including previously conducted site investigation reports.

2. Government records of activities, conditions, or incidents likely to cause or contribute to releases or threatened releases, including records documenting regulatory permits that were issued to current or previous owners or operators at the property for waste management activities and government records that identify the subject property as the location of landfills, storage tanks, or as the location for generating and handling activities for hazardous substances, pollutants, contaminants, petroleum and petroleum products, or controlled substances.

3. CERCLIS records—EPA's Comprehensive Environmental Response, Compensation, and Liability Information System (CERCLIS) database contains general information on sites across the nation and in the U.S. territories that have been assessed by EPA, including sites listed on the National Priorities List (NPL). CERCLIS includes information on facility location, status, contaminants, institutional controls, and actions taken at particular sites. CERCLIS also contains information on sites being assessed under the Superfund Program, hazardous waste sites and potential hazardous waste sites.

4. Government-maintained records of public risks—the all appropriate inquiries government records search should include a search for available records documenting public health threats or concerns caused by, or related to, activities currently or previously conducted at the site.

5. Emergency Response Notification System (ERNS) records—ERNS is EPA's data base of oil and hazardous substance spill reports. The data base can be searched for information on reported spills of oil and hazardous substances by state.

6. Government registries, or publicly available lists of engineering controls, institutional controls, and land use restrictions. The all appropriate inquiries government records search must include a search for registries or publicly available lists of recorded engineering and institutional controls and recorded land use restrictions. Such records may be useful in identifying past releases on, at, in, or to the subject property or identifying continuing environmental conditions at the property.

The final rule requires that government records be searched to identify information relative to the objectives and in accordance with the performance factors on: (1) Adjoining and nearby properties for which there are governmental records of reported releases or threatened releases (e.g., properties currently listed on the National Priorities List (NPL), properties subject to corrective action orders under the Resource Conservation and Recovery Act (RCRA), properties with reported releases from leaking underground storage tanks); (2) adjoining and nearby properties previously identified or regulated by a government entity due to environmental conditions at a site (e.g., properties previously listed on the NPL, former CERCLIS sites with notices of no further response actions planned (NFRAP)); and (3) adjoining and nearby properties that have government-issued permits to conduct waste management activities (e.g., facilities permitted to manage RCRA hazardous wastes).

In the case of government records searches for nearby properties, the final rule includes minimum search distances (e.g., properties located either within one mile or one-half mile of the subject property) for obtaining and reviewing records or data bases concerning activities and facilities located on nearby properties. The search distances are based upon our best judgment regarding the potential impacts that incidents or circumstances at an adjoining property may have on the subject property. With the exception of the required searches for institutional and engineering controls, the search distances finalized in today's rule are the search distances that were proposed in the proposed rule. For example, government records identifying properties listed on the NPL must be searched to obtain information on NPL sites located within one mile of the subject property. NPL sites located beyond one mile of a property most likely will have little or no impact on the environmental conditions at the subject property. In the case of two types of records, records of hazardous waste handler and generator records and permits, records of registered storage tanks, the final requirements specify that such records only be searched for information specific to the subject property and adjoining properties (the rule contains no requirement to search for these two types of government records for other nearby properties). The final rule requires that available lists of institutional controls and engineering controls only be searched for information on the subject property.

In the case of all the government records listed above and in the final rule in § 312.26, the requirements of this criterion may be met by searching data bases containing the same government records mentioned in the list above that are accessible and available through government entities or private sources. The review of actual records is not necessary, provided that the same information contained in the government records and required to

meet the requirements of this criterion and achieve the objectives and performance factors for these regulations is attainable by searching available data bases.

The final rule allows the environmental professional to adjust the search distances for reviewing government records of nearby properties based upon his or her professional judgment. Environmental professionals may consider one or more of the following factors when determining an alternative appropriate search distance:

- The nature and extent of a release;
- Geologic, hydrogeologic, or topographic conditions of the subject property and surrounding environment;
- Land use or development densities;
- The property type;
- Existing or past uses of surrounding properties;
- Potential migration pathways (e.g., groundwater flow direction, prevalent wind direction); or
- Other relevant factors.

The final rule requires environmental professionals to document the rationale for making any modifications to the required minimum search distances included in § 312.26 of the regulation.

T. What Are the Requirements for Visual Inspections of the Subject Property and Adjoining Properties?

Proposed Rule

The proposed rule required that an on-site visual inspection of the subject property be conducted as part of the all appropriate inquiries investigations, with one limited exception. The proposed on-site visual inspection requirements included requirements to inspect any facilities and improvements on the property as well as all areas where hazardous substances are or may have been used, stored, treated, handled, or disposed. In addition, the proposed rule included requirements to visually inspect adjoining properties. The proposal required that inspections of adjoining properties be conducted from the property line, public right-of-way, or other vantage point.

The proposed rule included a limited exception from the requirement to conduct the visual inspection "on-site." The proposed exception provided that in unusual circumstances where an on-site visual inspection cannot be performed because of physical limitations, remote and inaccessible location, or another inability to obtain access to the property, provided good faith efforts are taken to obtain such access and access to the property could not be obtained, a visual inspection could be conducted from an off-site vantage point (e.g., property-line, airplane, public right-of-way). To qualify for the exception from the requirement to conduct the inspection on site, the proposed rule required that the environmental professional document the good faith efforts undertaken to gain access to the property and explain why such efforts were unsuccessful. The proposed rule also required that the environmental professional document what other sources of information were consulted to obtain information regarding the potential environmental conditions at the property and the significance of the failure to conduct the inspection on site on his or her ability to identify conditions indicative of releases or threatened releases of hazardous substances on, at, in, or to the subject property.

In the preamble to the proposed rule, EPA recommended that an environmental professional conduct the on-site visual inspection.

Public Comments

A few commenters stated that EPA should not recommend, as we did in the preamble to the proposed rule, that an individual meeting the definition of environmental professional conduct the on-site visual inspection. These commenters stated that anyone under the responsible charge or supervision of an environmental professional should be able to conduct the on-site visual inspection. Commenters stated, that by recommending in the preamble that the environmental professional conduct the on-site visual inspection, the Agency was effectively requiring an environmental professional to conduct the visual inspection. Other commenters expressed support for the Agency's recommendation.

A few other commenters thought the proposed exception from the requirement to conduct the visual inspection on site was "broad" and "would increase the likelihood of inspections not being performed and contamination not being detected." These commenters expressed a concern that any exception from the requirement to conduct an on-site visual inspection could open the door to abuse and result in properties being transferred without being inspected. Commenters raised concerns that owners of uninspected properties could obtain liability protection by claiming to have fulfilled the requirements of all appropriate inquiries without knowledge of on-going releases at a property.

Final Rule

The final rule, at § 312.27, retains the proposed requirement that a visual on-site inspection be conducted of the subject property. The final visual on-site inspection requirements include requirements to inspect the facilities and any improvements on the property, as well as visually inspect areas on the property where hazardous substances may currently be or in the past may have been used, stored, treated, handled, or disposed of. We continue to assert that, and commenters agreed, that every all appropriate inquiries investigation must include an on-site visual inspection of the property. The on-site inspection of a property most likely will be an excellent source of information regarding indications of environmental conditions on a property. The final rule requires that a visual on-site inspection of the subject property be conducted in all but a few very limited cases. In addition, the final rule retains the proposed requirement that in those cases where physical limitations restrict the portions of the property that may be visually inspected, that the physical limitations encountered during the visual on-site inspection (e.g., weather conditions, physical obstructions) must be documented.

We note that persons conducting all appropriate inquiries with monies provided in a grant awarded under CERCLA section 104(k)(2)(B) must, depending on the terms and conditions of the grant or cooperative agreement, include within the scope of the on-site visual inspection an inspection of the facilities, improvements, and other areas of the property where pollutants, contaminants, petroleum and petroleum products, or controlled substances may currently be or in the past may have been used, stored, treated, handled, or disposed.

The visual on-site inspection of a property during the conduct of all appropriate inquiries may be the most important aspect of the inquiries and the primary source of information regarding the environmental conditions on the property. In all cases, every effort must be made to conduct an on-site visual inspection of a property when conducting all appropriate inquiries.

We understand that a prospective landowner, grantee, or environmental professional, in some limited circumstances, may not be able to obtain on-site access to a property. Extreme and prolonged weather conditions and remote locations can impede access to a property. A prospective landowner, grantee or environmental professional also could be unable to gain on-site

access to a property if the owner refuses to provide access to the party, even after the party exercises all good faith efforts to gain access to the property (e.g., seeking assistance from state government officials). Such circumstances may arise in cases where a local government becomes a last resort purchaser of a potentially-contaminated property that has little economic value. The unique nature of such transactions may result in a local government facing an uncooperative or recalcitrant property owner. Unlike commercial property transactions between private parties, where the parties' economic and legal liability interests and the ability to abandon the transaction can work in favor of the purchasing party's ability to gain access to a property prior to acquisition, property transactions between a private party and a local government may not afford the local government the same leverage, even if it is in the public interest to attain ownership of the property. This situation may occur when the local government seeks to assess, clean up, and revitalize an area, but the owner of the property is unreachable, unavailable, or otherwise unwilling to provide access to the property. In such limited circumstances, the public benefit attained from a government entity gaining ownership of a property may outweigh the need to gain on-site access to the property prior to the transfer of ownership.

The final rule requires, in unusual circumstances, that the prospective landowner or grantee make good faith efforts to gain access to the property. However, the mere refusal of a property owner to allow the prospective property owner or grantee to have access to the property does *not* constitute an unusual circumstance, absent the making of good faith efforts to otherwise gain access. The final rule, at § 312.10, defines "good faith" as "the absence of any intention to seek an unfair advantage or to defraud another party; an honest and sincere intention to fulfill one's obligations in the conduct or transaction concerned."

In those unusual circumstances where a prospective landowner, a grantee, or an environmental professional, after undertaking good faith efforts, cannot gain access to a property and therefore cannot conduct an on-site visual inspection, the final rule requires that the property be visually inspected, or observed, by another method, such as through the use of aerial photography, or be inspected, or observed, from the nearest accessible vantage point, such as the property line or a public road that runs through or along the property. In addition, the rule requires that the all appropriate inquiries report include documentation of efforts undertaken by the prospective landowner, grantee, or the environmental professional to obtain on-site access to the subject property and include an explanation of why good faith efforts to gain access to subject property were unsuccessful. The all appropriate inquiries report must include documentation of other sources of information that were consulted to obtain information necessary to achieve the objectives and performance factors. This documentation should include comments, from the environmental professional who signs the report, regarding any significant limitations on the ability of the environmental professional to identify conditions indicative of releases or threatened releases on, at, in, or to the subject property, that may arise due to the inability of the prospective landowner, grantee, or environmental professional to obtain on-site access to the property.

In those limited cases where an on-site visual inspection cannot be conducted prior to the date a property is acquired, we remind prospective landowners that protection from CERCLA liability depends upon the prospective landowner complying with all of the post-acquisition continuing obligations provided in the statute. Therefore, to ensure that adequate information is attained about a property to ensure that the property owner can fulfill these obligations, we recommend that once a property is purchased, the property owner conduct an on-site visual inspection of the property once the property is acquired, if it could not be conducted prior to acquisition. Such an inspection may provide important information necessary for the property owner to fully comply with the other statutory provisions, including on-going obligations, governing the CERCLA liability protections.

We disagree with the commenters who argued that the exception from the requirement to conduct the visual inspection on-site is "broad." We point out that the exception is limited to the requirement that the visual inspection be conducted on-site. In all cases where the exception applies, the visual inspection must still be conducted from another vantage point. In addition, the exception is limited to only those circumstances where all good faith efforts are made to gain access the property. The final rule requires that all good faith efforts to gain access be documented and requires that the environmental professional comment on the consequences that the inability to gain access to the property may have on his or her ability to render an opinion on property conditions that may be indicative of releases or threatened releases on, at, in, or to the property. The exception is very limited in scope and the documentation requirements should limit the use of the exception as well as provide the prospective landowner with useful information for determining the potential need for further investigations of the property after acquisition.

The final rule also requires that the all appropriate inquiries investigation include visual inspections of properties that adjoin the subject property. Visual inspections of adjoining properties may provide excellent information on the potential for the subject property to be affected by contamination migrating from adjoining properties. Visual inspections of adjoining properties may be conducted from the subject property's property line, one or more public rights-of-way, or other vantage point (e.g., via aerial photography). Where practicable, a visual on-site inspection is recommended and may provide greater specificity of information. The visual inspections of adjoining properties must include observing areas where hazardous substances currently may be, or previously may have been, stored, treated, handled, or disposed. Visual inspections of adjoining properties otherwise also must be conducted to achieve the objectives and performance goals for all the appropriate inquiries. Physical limitations to the visual inspections of adjoining properties should be noted.

As explained in the preamble to the proposed rule, EPA and the Negotiated Rulemaking Committee considered, when developing the proposed rule, requiring that all activities in the all appropriate inquiries investigation to be conducted by persons meeting the proposed definition of an environmental professional. Requiring that an environmental professional conduct all activities could ensure that all data collection and investigations are conducted in a manner and to a degree of specificity that allows the environmental professional to make best use of all information in forming opinions and conclusions regarding the environmental conditions at a property. However, after careful review of the specific activities included in the statutory criteria and conducting an assessment of the costs and burdens of such a requirement, EPA and the Committee concluded that it is not necessary for each and every regulatory requirement to be conducted by an environmental professional. As outlined

in section IV.H of this preamble, today's final rule, as did the proposed rule, allows for certain aspects of the inquiries to be conducted solely by the prospective landowner or grantee, while providing that all other aspects be conducted under the supervision or responsible charge of the environmental professional. Among the activities required to be conducted under the supervision or responsible charge of an environmental professional is the on-site visual inspection.

It continues to be EPA's recommendation that visual inspections of the subject property and adjoining properties be conducted by an individual who meets the regulatory definition of an environmental professional. Although many other aspects of the all appropriate inquiries may be conducted sufficiently and accurately by individuals other than an environmental professional (e.g., a research associate or librarian may be well qualified to search government records, an attorney may be well qualified to conduct a search for an environmental lien), EPA believes that an environmental professional is best qualified to conduct a visual inspection and locate and interpret information regarding the physical and geological characteristics of the property as well as information on the location and condition of equipment and other resources located on the property. EPA recognizes that other individuals who do not meet the regulatory definition of an environmental professional, particularly when these individuals are conducting such activities under the supervision or responsible charge of an environmental professional, may have the required skills and knowledge to conduct an adequate on-site visual inspection. However, EPA believes that the professional judgment of an individual meeting the definition of an environmental professional is important to ensuring that all circumstances at the property that are indicative of environmental conditions and potential releases or threatened releases are properly identified and analyzed. An environmental professional is best qualified for identifying such situations and conditions and rendering a judgment or opinion regarding the potential existence of conditions indicative of environmental concerns.

Although some commenters stated that EPA should not recommend that the visual inspection be conducted by a person meeting the definition of environmental professional, we point out that other commenters stated their support for our recommendation and some even stated that EPA should require in the regulation that the inspection be conducted by an environmental professional. We remain convinced that the on-site visual inspection of the property can be the single most important source of information regarding the environmental conditions of a property and that an individual meeting the regulatory definition of environmental professional is best able to interpret such observations of a property and ascertain the probability of conditions indicative of releases or threatened releases of hazardous substances being present at the property. In addition, we point out that the definition of environmental professional included in the final rule is less stringent than the proposed definition. Therefore, commenter concerns regarding any significant cost burdens associated with the environmental professional conducting the on-site visual inspection may be alleviated. We emphasize that EPA is recommending that the on-site visual inspection be conducted by an individual who meets the definition of environmental professional included in the final rule; it is not a requirement that the inspection be conducted by an environmental professional. The rule requires only that the inspection be conducted by an individual who is under the supervision or responsible charge of an individual meeting the definition of environmental professional. EPA agrees that if the final rule required that the on-site visual inspection be conducted by an individual meeting the definition of an environmental professional, the requirement could impose undue burdens in certain circumstances. In addition, there may be circumstances that in the best professional judgment of an environmental professional, another person under the responsible charge of the environmental professional may be more qualified to conduct the on-site inspection. To allow for flexibility and the application of professional judgment to specific circumstances, EPA continues to recommend that an environmental professional conduct the on-site inspection, but the Agency is not requiring that the inspection be conducted by an environmental professional.

U. What Are the Requirements for the Inclusion of Specialized Knowledge or Experience on the Part of the "Defendant?"

Because the conduct of all appropriate inquiries is one element of a legal defense to CERCLA liability, the statute refers to the prospective landowner, or the user of the all appropriate inquiries investigation, as the "defendant." This ensures that any information or special knowledge held by the prospective landowner with regard to a property and its conditions be included in the pre-acquisition inquiries and be considered, along with all information collected during the conduct of all appropriate inquiries, when an environmental professional renders a judgment or opinion regarding conditions indicative of environmental conditions indicative of releases or potential releases of hazardous substances on, at, in, or to the subject property. It is recommended that this information be revealed to the parties conducting the all appropriate inquiries so that any specialized knowledge may be taken into account during the conduct of the required aspects of the all appropriate inquiries.

Congress first added the innocent landowner defense to CERCLA in the Superfund Amendments and Reauthorization Act (SARA) of 1986. The Brownfields Amendments amended the innocent landowner defense and added to CERCLA the bona fide prospective purchaser and the contiguous property owner liability protections to CERCLA liability. The 1986 SARA amendments to CERCLA established that among other elements necessary for a defendant to successfully assert the innocent landowner defense, a defendant must demonstrate that he or she had, on or before the date of acquisition of the property in question, made all appropriate inquiries into previous ownership and uses of the property. Congress directed courts evaluating a defendant's showing of all appropriate inquiries to take into account, among other things, "any specialized knowledge or experience on the part of the defendant." Nothing in today's rule changes the nature or intent of this requirement as it has existed in the statute since 1986.

Proposed Rule

The proposed rule retained, as part of the federal all appropriate inquiries requirements, the consideration of any specialized knowledge or experience of the prospective landowner (or grantee if the grantee is or will be the property owner). The proposed rule did not extend this requirement beyond what already was required under CERCLA and established through case law. The proposed rule required that all appropriate inquiries include the consideration of specialized knowledge held by the prospective landowner or grantee with regard to the subject property, the area surrounding the subject property, the conditions of

adjoining properties, as well as other experience relative to the inquiries that may be applicable to identifying conditions indicative of releases or threatened releases at the subject property. The proposed rule also required that the results of the inquiries take into account any specialized knowledge related to the property, surrounding areas, and adjoining properties held by the persons responsible for undertaking the inquiries, including any specialized knowledge on the part of the environmental professional.

Public Comments

EPA did not receive significant comment on the proposed requirements for considering the specialized knowledge or experience on the part of the defendant. A few commenters mentioned that the proposed requirements would result in the all appropriate inquiries investigations having to include interviews with all previous owners and occupants of the property. These commenters may have mistakenly interpreted the proposed provisions as requiring that the specialized knowledge of all current owners and occupants be considered as part of the all appropriate inquiries investigation. We clarify that only the specialized knowledge of the prospective landowner or grantee, and the environmental professional overseeing the conduct of the inquiries need be considered.

Final Rule

The final rule retains the proposed provisions governing the consideration of specialized knowledge or experience on the part of the prospective landowner (or grantee) and the environmental professional conducting the all appropriate inquiries investigation on the part of the prospective landowner or grantee.

As provided in the preamble to the proposed rule, existing case law related to the innocent landowner defense shows that courts appear to have interpreted the "specialized knowledge" factor to mean that the professional or personal experience of the defendant may be taken into account when analyzing whether the defendant made all appropriate inquiries. For example, in *Foster* v. *United States*, 922 F. Supp. 642 (D. D.C. 1996), the owner of a property formerly owned by the General Services Administration and contaminated by, among other things, lead, mercury and PCBs, brought an action against the United States and District of Columbia, prior owners or operators of the site. The plaintiff was a principal in Long & Foster companies and purchased the property through a general partnership, and received it by quitclaim deed. The innocent landowner defense requires a property owner to demonstrate that when he or she purchased a property, he or she did not know and had no reason to know of contamination at, on, in, or to the property. The court rejected the plaintiff's claim to the innocent landowner defense based in part on the plaintiff's specialized knowledge. The court found that his specialized knowledge included his position at Long & Foster, which did hundreds of millions of dollars of commercial real estate transactions, and his position as a partner in at least 15 commercial real estate partnerships. The partnership was involved as an investor in a number of real estate transactions, some of which involved industrial or commercial or mixed-use property. The court ruled that "it cannot be said that [the partnership] is a group unknowledgeable or inexperienced in commercial real estate transactions." *Foster*, 922 F. Supp. at 656.

In *American National Bank and Trust Co. of Chicago* v. *Harcros Chemicals, Inc.*, 1997 WL 281295 (N.D. Ill. 1997), the plaintiff was a company "involved in brownfields development, purchasing environmentally distressed properties at a discount, cleaning them up, and selling them for a profit." *American National Bank*,1997 WL 281295 at *4. As a counter-claim defendant, the company asserted it was an innocent landowner and therefore not liable pursuant to CERCLA. The court found that among other reasons the defense failed because the company possessed specialized knowledge. The court ruled that the company was an expert environmental firm and possessed knowledge that should have alerted it to the potential problems at the site.

The final rule requires that the specialized knowledge of prospective landowners and the persons responsible for undertaking the all appropriate inquiries, including grantees, be taken into account when conducting the all appropriate inquiries for the purposes of identifying conditions indicative of releases or threatened releases at a property. However, as evidenced by the case law cited above, the determination of whether or not the all appropriate inquiries standard is met with regard to specialized knowledge (as well as in regard to all the criteria) remains within the discretion of the courts.

V. What Are the Requirements for the Relationship of the Purchase Price to the Value of the Property, if the Property Was Not Contaminated?

Congress included in the statutory criteria for all appropriate inquiries a requirement to consider the relationship of the purchase price of a property to the value of the property, if the property was not contaminated. The criteria was retained in the criteria included in the Brownfields Amendments from the all appropriate inquiries provisions of the innocent landowner defense established by Congress in the 1986 amendments to CERCLA.

Proposed Rule

The proposed rule required that the prospective landowner or grantee consider whether or not the purchase price of the property reflects the fair market value of the property, assuming that the property is not contaminated. The proposed rule required that the prospective landowner or grantee consider whether any differential between the purchase price and the value of the property is due to the presence of releases or threatened releases of hazardous substances at the property. There may be many reasons that the price paid for a particular property is not an accurate reflection of the fair market value. The all appropriate inquiries investigation need only include a consideration of whether a significant difference between the price paid for a property and the fair market value of a property, if the property were not contaminated, is an indication that the property may be contaminated.

Public Comments

Many commenters asserted that an environmental professional should not be required to consider the relationship of the purchase price to the value of the property as part of the all appropriate inquiries investigation. Concerns raised by commenters include whether environmental professionals are qualified to assess the fair market value of a property. Some commenters thought that a requirement that prospective landowners or environmental professionals consider the relationship of the purchase price of property to the value of the property could violate federal or state laws governing property appraisals. Some commenters argued that the all appropriate inquiries investigation should not include the requirement to consider the relationship of the purchase price to the value of the property because the fair market value

is not always easily ascertainable. Other commenters requested that the preamble to the final rule include a recommendation that an appraisal be performed to determine a property's fair market value. In addition, commenters requested that in cases where an appraisal is conducted to determine the fair market value of a property, the rule should require that it meet the Uniform Standards of Professional Appraisal Practice. Still other commenters supported including the requirement in the final rule, but asked the Agency to require prospective landowners to obtain a property appraisal conducted by a trained or certified real estate appraiser. Some commenters stated that prospective landowners should not be required to divulge information on the price paid for a property to the environmental professional or other third party.

Final Rule

The final rule retains the requirement to consider the relationship of the purchase price to the fair market value of the property, if the property were not contaminated. The requirement is part of the statutory criteria established by Congress and has been part of the statutory provisions governing all appropriate inquiries, within the innocent landowner defense, since 1986. Today's rule does not change the previously existing provision. As did the proposed rule, today's final rule allows for this criterion to be conducted by the prospective landowner or the grantee or undertaken as part of the inquiry by an environmental professional. If an environmental professional is not qualified to consider the relationship of the purchase price to the value of the property, the prospective landowner or grantee may undertake the task or hire another third party to make the comparison of price and fair market value and consider whether any differential is due to potential environmental contamination.

If the relationship of the purchase price to the fair market value of the property, assuming the property is not contaminated, is determined by the prospective landowner or grantee, or other agent who is not under the supervision or responsible charge of the environmental professional, the final rule allows for, but does not require, the information that is collected and the determination made by or on the behalf of the prospective landowner to be provided to the environmental professional. If the information is provided to the environmental professional, he or she can then make use of such information during the conduct of the all appropriate inquiries and when rendering conclusions or opinions regarding the environmental conditions of the property. If the information is not provided to the environmental professional and the environmental professional determines that the lack of such information affects his or her ability to identify conditions indicative of releases or threatened releases of hazardous substances on, at, in, or to the property, then the environmental professional should identify the lack of information as a data gap and comment on its significance in the written report for the all appropriate inquiries investigation.

The rule does not require that a real estate appraisal be conducted to achieve compliance with this criterion. Although some commenters requested that the final rule require that a formal appraisal be conducted and we acknowledge that there may be potential value in conducting an appraisal, we determined that a formal appraisal is not necessary for the prospective landowner or grantee to make a general determination of whether the price paid for a property reflects its fair market value. In the case of many property transactions, a formal appraisal may be conducted for other purposes (*e.g.*, to establish the value of the property for the purposes of establishing the conditions of a mortgage or to provide information of relevance where a windfall lien may be filed). In cases where the results of a formal property appraisal are available, the appraisal results may serve as an excellent source of information on the fair market value of the property.

In cases where the results of a formal appraisal are not available, the determination of fair market value may be made by comparing the price paid for a particular property to prices paid for similar properties located in the same vicinity as the subject property, or by consulting a real estate expert familiar with properties in the general locality and who may be able to provide a comparability analysis. The objective is not to ascertain the exact value of the property, but to determine whether or not the purchase price paid for the property generally is reflective of its fair market value. Significant differences in the purchase price and fair market value of a property should be noted and the reasons for any differences also should be noted.

Although some commenters requested that EPA be more explicit in the final rule in requiring that the comparison of the purchase price to the fair market value of the property be conducted by the prospective landowner or grantee (and not the environmental professional), we believe that the decision of who conducts the comparison may be best left up to the judgment of the individual prospective landowner (or grantee) and environmental professional. The final rule provides in § 312.22 that the comparison of the purchase price to the fair market value of the property, if it were not contaminated, can fall outside the inquiries conducted by the environmental professional. The criteria to consider the relationship of the purchase price to the fair market value of the property, if it was not contaminated is not included as part of the requirements governing the "results of an inquiry by an environmental professional" (§ 312.21). Therefore, the requirement may be conducted by the prospective landowner or grantee, his or her attorney or agent, or the environmental professional. Given that a prospective landowner or grantee can conduct the comparison of the purchase price and the fair market value of the property or hire another agent other than the environmental professional to conduct this task, we conclude that commenter concerns regarding the prospective landowner (or grantee) having to divulge the price paid for a property to the environmental professional are unfounded.

W. What Are the Requirements for Commonly Known or Reasonably Ascertainable Information About the Property?

Commonly known or reasonably ascertainable information includes information about a property that generally is known to the public within the community where the property is located and can be easily sought and found from individuals familiar with the property or from easily attainable public sources of information. As mentioned above, the Brownfields Amendments to CERCLA amended the innocent landowner defense previously added to CERCLA in 1986. In addition, the Brownfields Amendments added to CERCLA the bona fide prospective purchaser and the contiguous property owner liability protections. The 1986 amendments to CERCLA established, that among other elements necessary for a defendant to successfully assert the innocent landowner defense, a defendant must take into account commonly known or reasonably ascertainable information about the property. Congress retained this criterion as part of the all appropriate inquiries requirements included in the Brownfields Amendments. Today's rule does not change the nature or intent of

this requirement as it has existed in the statute since 1986.

Proposed Rule

The proposed rule required that all appropriate inquiries include the collection and consideration of commonly known information about the potential environmental conditions at a property. The proposed rule required both the prospective landowner or grantee and the environmental professional obtain and consider commonly known or reasonably ascertainable information during the conduct of the all appropriate inquiries investigation. The proposed rule also provided a list of potential sources of such information.

Public Comments

A few commenters expressed concern that the requirement to consider commonly known or reasonably ascertainable information about a property renders the all appropriate inquiries requirements too vague and open-ended. Commenters stated that the requirement is broad and may result in the need to interview a large number of people and consult a wide variety of sources of information. One commenter expressed a preference that the federal standards include only a checklist of specific sources of information that must be consulted. A few commenters thought the list of potential sources of commonly known information included in the proposed rule was too broad.

Final Rule

The final rule retains the proposed provisions requiring that prospective landowners and environmental professionals consider commonly known or reasonably ascertainable information about a property when conducting all appropriate inquiries. This information may be ascertained from the owner or occupant of a property, members of the local community, including owners or occupants of neighboring properties to the subject property, local or state government officials, local media sources, and local libraries and historical societies. In many cases, this information may be incidental to other information collected during the inquiries, and separate or distinct efforts to collect the information may not be necessary. Information about a property, including its ownership and uses, that is commonly known or reasonably ascertainable within the community or neighborhood in which a property is located may be valuable to identifying conditions indicative of releases or threatened releases at the subject property. Such information, if not collected during the course of collecting other information necessary to complete the all appropriate inquiries investigation, may be obtained by interviewing community officials and other residents of the locality. For example, neighboring property owners and local community members may have information regarding undocumented uses of a property during periods when the property was idle or abandoned. Local community sources may be good (i.e., reasonably ascertainable) sources of commonly known information on uses of a property and activities conducted at a property, particularly in the case of abandoned properties.

The collection and use of commonly known information about a property may be done in connection with the collection of all other required information for the purposes of achieving the objectives and performance factors contained in § 312.20. Persons undertaking the all appropriate inquiries may collect commonly known or reasonably ascertainable information on the subject property from a variety of sources, including sources located in the community in which the property is located. The opinion provided by an environmental professional regarding the environmental conditions of a property and included in the all appropriate inquiries report should be based upon a balance of all information collected, including commonly known or reasonably ascertainable information about the property. The potential sources of commonly known or reasonably ascertainable information provided in the proposed rule and retained in the final rule are provided as suggestions for where such information may be found and the list provided is not meant as an exhaustive list of sources that must be consulted. Commonly known information may be collected from other sources and may be most easily collected during the conduct of other aspects of the all appropriate inquiries investigation (*e.g.*, interviews, reviews of historical sources of information, reviews of governmental records). The requirement is not meant to require exhaustive data collection efforts, as some commenters asserted. The intent of the requirement is to establish that a prospective landowner or grantee and an environmental professional conducting all appropriate inquiries on his or her behalf must make efforts to collect and consider information about a property that is commonly known within the local community or that can be reasonably ascertained.

There is some case law, related to the innocent landowner defense, that provides guidance on how a court may rule with regard to the need to consider commonly known or reasonably ascertainable information about the property. For example, in *Wickland Oil Terminals* v. *Asarco, Inc.*, 1988 WL 167247 (N.D. Cal. 1988), the court noted that Wickland was aware of potential water quality problems at the subject property due to large piles of mining slag stored at the property, even though Wickland argued that previous owners withheld such information, because the information was available from other sources consulted by Wickland prior to purchasing the property, including the Regional Water Quality Control Board and a consulting firm hired by Wickland. Such information was commonly known by local sources and therefore should have been considered by Wickland during its conduct of all appropriate inquiries.

In *Hemingway Transport Inc.* v. *Kahn*, 174 FR 148 (Bankr. D. Mass. 1994), the court ruled against an innocent landowner claim because it found "that had [the defendants] exerted a modicum of effort they may easily have discovered information that at a minimum would have compelled them to inspect the property further * * * the [defendants] could have taken a few significant steps, literally, to minimize their liability and discover information about the property * * *" The court noted that one action the defendants should have taken to collect available information about the property included phone calls to city officials to inquire about conditions at the property.

X. What Are the Requirements for "The Degree of Obviousness of the Presence or Likely Presence of Contamination at the Property, and the Ability to Detect the Contamination by Appropriate Investigation?"

Proposed Rule

The proposed rule required that the inquiries conducted by a prospective landowner (or grantee) and environmental professional take into account all the information collected during the conduct of the all appropriate inquiries in considering the degree of obviousness of and ability to detect the presence of a release or threatened release of hazardous substances at, in, on, or to a property. In addition, the proposed rule required the environmental professional to provide an opinion regarding additional appropriate investigation, if any may be

necessary in his or her opinion to determine the environmental conditions of the property.

Public Comments

A few commenters asserted that the proposed requirements regarding the degree of obviousness of the presence or likely presence of contamination at the property, and the ability to detect the contamination by appropriate inquiry were too open-ended. Also, a few commenters suggested that the final rule should include requirements to conduct sampling and analysis to meet the "ability to detect contamination by appropriate investigation" portion of the statutory criteria. However, commenters overwhelmingly agreed that the standards for all appropriate inquiries should not require sampling and analysis.

Final Rule

The final rule requires that persons conducting all appropriate inquiries consider all the information collected during the conduct of the inquiries in totality to ascertain the potential presence of a release or threatened release at the property. Persons conducting all appropriate inquiries, following the collection of all required information, must assess whether or not an obvious conclusion may be drawn that there are conditions indicative of a release or threatened release of hazardous substances (or other pollutants, contaminants, petroleum or petroleum products, and controlled substances) on, at, in, or to the property. In addition, the rule requires parties to consider whether or not the totality of information collected prior to acquiring the property indicates that the parties should be able to detect a release or threatened release on, at, in, or to the property. The final rule also retains the proposed requirement that the environmental professional include as part of the results of his or her inquiry an opinion regarding additional appropriate investigation, if any may be necessary.

We interpret the statutory criterion to require consideration of information already obtained during the conduct of all appropriate inquiries investigation and not as a requirement to collect additional information. We do not agree with commenters who asserted that the criterion is open-ended. In fact, we see this criterion as providing direction on how all of the information collected while carrying out the other criteria and regulatory requirements must be viewed comprehensively. After collecting and considering all the information required to comply with the rule's objectives and performance standards, all the information should be considered in total to determine whether or not there are indications of releases or threatened releases of hazardous substances on, at, in, or to the property. In addition, the environmental professional should provide an opinion regarding whether or not additional investigation is necessary to detect potential contamination at the site, if in his or her opinion there are conditions indicative of releases or threatened releases of hazardous substances.

The previous innocent landowner defense (added to CERCLA in 1986) required a court to consider the degree of obviousness of the presence or likely presence of contamination at a property, and the ability of the defendant (i.e., the landowner) to detect the contamination by appropriate investigation. Nothing in today's rule changes the nature or intent of this requirement as it has existed in the statute since 1986.

Case law relevant to this criterion indicates that defendants may not be able to claim an innocent landowner defense if a preponderance of evidence available to a prospective landowner prior to acquiring the property indicates that the defendant should have concluded that there is a high likelihood of contamination at the site. In some cases (e.g., *Hemingway Transport Inc.* v. *Kahn*, 174 F.R. 148 (Bankr. D. Mass. 1994), and *Foster* v. *United States*, 922 F. Supp. 642 (D.D.C. 1996), courts have ruled that if a defendant had done a bit more visual inspection or further investigation, based upon information available to the defendant prior to acquiring the property, it would have been obvious that the property was contaminated. In *Foster* v. *United States*, the court determined that the innocent landowner defense was not available based in part on the fact that the partnership presumed the site was free of contamination based upon cursory visual inspections despite evidence in the record that, at the time of the sale, the soil was visibly stained by PCB-contaminated oil. In addition, although the property was located in a run-down industrial area, the defendant did no investigation into the environmental conditions at the site prior to acquiring the property.

EPA also notes that in *U.S.* v. *Domenic Lombardi Realty, Inc.*, 290 F. Supp. 2d 198, 211 (D.R.I. 2003), the court held that the defendant did not qualify for the innocent landowner defense. The defendant could not show he had "no reason to know" of contamination at the property or that he had performed all appropriate inquiries in accordance with "good commercial or customary practices." The court also found that the defendant had not performed even a minimal environmental assessment of the site despite having learned that the property had been used as an automobile scrapyard. The court noted the distinction between Phase I and Phase II environmental assessments and credited the testimony of the United States' expert who concluded that, under the circumstances of this case, the defendant should have conducted a Phase II assessment. *Id.* at 203–04.

With regard to the conduct of sampling and analysis, today's final rule does not require sampling and analysis as part of the all appropriate inquiries investigation. However, sampling and analysis may be valuable in determining the possible presence and extent of potential contamination at a property. In addition, the fact that the all appropriate inquiry standards do not require sampling and analysis does not prevent a court from concluding that, under the circumstances of a particular case, sampling and analysis should have been conducted to meet "the degree of obviousness of the presence or likely presence of contamination at the property, and the ability to detect the contamination by appropriate investigation" criterion and obtain protection from CERCLA liability. Prospective landowners should keep in mind that the conduct of all appropriate inquiries prior to acquiring a property is only one requirement that he or she must comply with to assert protection from CERCLA liability. The statute requires that persons, after acquiring a property, comply with continuing obligations to take reasonable steps to stop on-going releases at the property, prevent any threatened future releases, and prevent or limit any human, environmental, or natural resource exposure to any previously released hazardous substances (these criteria are summarized in detail in section II.D. of this preamble). In certain instances, depending upon site-specific circumstances and the totality of the information collected during the all appropriate inquiries prior to the property acquisition, it may be necessary to conduct sampling and analysis, either pre-or post-acquisition, to fully understand the conditions at a property, and fully comply with the statutory requirements for the CERCLA liability protections. In addition, sampling and analysis may help explain existing data gaps. Prospective landowners should be mindful of all the statutory requirements for obtaining the CERCLA liability protections when

considering whether or not to conduct sampling and analysis prior to or after acquiring a property. Today's final regulation does *not* require that sampling and analysis be conducted as part of the all appropriate inquiries investigation.

V. Statutory and Executive Order Reviews

A. Executive Order 12866: Regulatory Planning and Review

Under Executive Order 12866 (58 FR 51735), the Agency must determine whether this regulatory action is "significant" and therefore subject to formal review by the Office of Management and Budget (OMB) and to the requirements of the Executive Order. The Executive Order defines "significant regulatory action" as one that is likely to result in a rule that may: (1) Have an annual effect on the economy of $100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or state, local, or tribal governments or communities; (2) create a serious inconsistency or otherwise interfere with an action taken or planned by another agency; (3) materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or (4) raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the Executive Order.

Pursuant to the terms of Executive Order 12866, it has been determined that today's final rule is a "significant regulatory action" because this rule contains novel policy issues, although it is not economically significant. As such, this action was submitted to OMB for review. Changes made in response to OMB suggestions or recommendations are documented in the docket for today's rule.

To estimate the economic effects of today's final rule, we conducted an evaluation of the potential effects of this rule on the universe of prospective landowners who may chose to comply with the provisions of today's final rule to obtain protection from CERCLA liability for potential releases and threatened releases of hazardous substances that may exist at properties they intend to purchase. The results of this analysis are included in the document titled "Economic Impact Analysis for the Final All Appropriate Inquiries Regulation," which is included in the docket for today's final rule. Based upon the results of the Economic Impact Analysis (EIA), EPA has determined that this final rule will have an annual effect on the economy of less than $100 million. The annualized benefits associated with the final rule have not been monetized but are identified and summarized in the EIA for the all appropriate inquiries rule.[2]

1. Methodology

The value of any regulatory action is traditionally measured by the net change in social welfare that it generates. The EIA conducted in support of today's rule examines both costs and qualitative benefits in an effort to assess the overall net change in social welfare. The primary focus of the EIA document is on compliance costs and economic impacts. Below, EPA summarizes the analytical methodology and findings for the all appropriate inquiries rule. The information presented is derived from the EIA.

The all appropriate inquiries regulation potentially will apply to most commercial property transactions. The requirements will be applicable to any public or private party, who may potentially claim protection from CERCLA liability as an innocent landowner, a bona fide prospective purchaser, or a contiguous property owner. However, the conduct of all appropriate inquiries, also known as environmental due diligence or Phase I Environmental Site Assessment, is not new to the commercial property market. Prior to the Brownfields Amendments to CERCLA, commercial property transactions often included an assessment of the environmental conditions at properties prior to the closing of any real estate transaction whereby ownership was transferred for the purposes of confirming the conditions at the property or to establish an innocent landowner defense should environmental contamination be discovered after the property was acquired. The process most prevalently used for conducting all appropriate inquiries, or environmental site assessments, is the process developed by ASTM International (formerly known as the American Society for Testing and Materials) and entitled "E1527, Standard Practice for Environmental Site Assessments: Phase I Environmental Site Assessment Process." In addition, some properties, particularly in cases where the subject property is assumed not to be contaminated or was never used for industrial or commercial purposes, were assessed using a less rigorous process developed by ASTM International, sometimes referred to as a "transaction screen" and entitled "E1528, Standard Practice for Environmental Site Assessments: Transaction Screen Process."

Our first step in assessing the economic impacts of the rule was to establish a baseline to represent the relevant aspects to the commercial real estate market in the absence of any changes in regulations. Because under existing conditions almost all commercial property transactions are accompanied by either an environmental site assessment (ESA) conducted in accordance with ASTM E1527–2000 or a transaction screen as specified in ASTM E1528, it was assumed these practices would continue even in the absence of the all appropriate inquiries regulation. The numbers of each type of assessment were estimated on the basis of industry data for recent years, with recent growth rates in transactions assumed to continue for the 10-year period covered by the EIA. An adjustment in the relative numbers of ESAs and transaction screens was made to account for the fact that, under the rule, an ESA will provide more certain protection from liability. This adjustment was made by comparing shifts between the two procedures that occurred when the Brownfields Amendments established the ASTM E1527–2000 standard as the interim standard for all appropriate inquiries, and thus as one requirement for qualifying as an innocent landowner, bona fide prospective purchaser, or contiguous property owner.

We then considered the requirements included in the final rule and compared them to the requirements for environmental site assessments conducted under the ASTM E1527–2000 and ASTM E1528 standards.

When compared to the ASTM E1527–2000 standard (i.e., the baseline standard), today's final rule is expected to result in a reduced burden for the conduct of interviews in those cases where the subject property is abandoned; increased burden in those cases where past owners or occupants need to be interviewed; increased burden associated with documenting recorded environmental cleanup liens; increased burden for documenting the reasons for the price and fair market value of a property in those cases where the purchase price paid for the subject property is significantly below the fair

[2] The document titled "The Economic Impact Analysis for the Final All Appropriate Inquiries Regulation" includes (1) the EIA conducted for the proposed rulemaking and (2) the Addendum to the EIA. The cost estimates presented in the Addendum are the estimated costs of the final all appropriate inquiries regulation.

market value of the property; and increased burden for recording information about the degree of obviousness of contamination at a property.

To estimate the changes in costs resulting from the rule, we developed a costing model. This model estimates the total costs of conducting site assessments as the product of costs per assessment, numbers of assessments per year, and the number of years in the analysis. The costs per assessment, in turn, are calculated by dividing each assessment into individual labor activities, estimating the labor time associated with each, and assigning a per-hour labor cost to each activity on the basis of the labor category most appropriate to that activity. Labor times and categories are assumed to depend on the size and type of property being assessed, with the nationwide distribution of properties based on data from industry on environmental sites assessments and brownfield sites.[3] The estimates and assignments of categories are made based on the experience of professionals who have been involved in large numbers of site assessments, and who are therefore skilled in cost estimation for the relevant activities. Other costs, such as reproduction and the purchase of data, are added to the labor costs to form the estimates of total costs per assessment. These total costs, stratified by size and type of property, are then multiplied by estimated numbers of assessments of each size and type to generate our estimates of total annual costs. The model was tested by comparing its results to industry-wide estimates of average price of conducting assessments under baseline conditions, and generally found to agree. The difference between the estimated cost to comply with the final rule and the estimated cost in the baseline constitutes our estimate of the incremental regulatory costs.

The EIA provides a qualitative assessment of the benefits of the all appropriate inquiries rule. The benefits discussed are those that may be attributed to an increased level of certainty with regard to CERCLA liability provided to prospective purchasers of potentially contaminated properties, including brownfields, who comply with the provisions of the rule and the other statutory provisions associated with the liability protections. The basic premise for associating certain benefits to the rule is the expectation that the level of certainty provided by the liability protections may result in increased brownfields property transactions. However, it is difficult to predict how many additional transactions may occur that involve brownfields properties in direct response to the increased certainty of the liability protections. It also is difficult to obtain data on changes in behaviors and practices of prospective landowners in response to the liability protections. Therefore, EPA made no attempt to quantify potential benefits or compare the benefits to estimated incremental costs.

The Agency believes that increasing property transactions involving brownfields and other contaminated and potentially contaminated properties and improving information about environmental conditions at these properties may provide additional indirect benefits such as increased numbers of cleanups, reduced use of greenfields, potential increases in property values, and potential increases in quality of life measures (*e.g.*, decreases in urban blight, reductions in traffic, congestion, and reduced pollution due to mobile source emissions). However, as stated above, the benefits of the rule are considered only qualitatively, due to the difficulty of predicting how many additional brownfields and contaminated property transactions may occur in response to the increased certainty of liability protections provided by the rule, as well as the difficulty in getting data on changes in behaviors and practices in response to the availability of the liability protections. EPA is confident that the new liability protections afforded to prospective landowners, if they comply with the all appropriate inquiries provisions, will result in increased benefits. EPA is not able to quantify, with any significant level of confidence, the exact proportion of the benefits attributed only to the availability of the liability protections and the all appropriate inquiries regulations. For these reasons, the costs and benefits could not be directly compared.

2. Summary of Regulatory Costs in Proposed Rule

For a given property, the costs of compliance with the all appropriate inquiries rule relative to the baseline depend on whether that property would have been assessed, in absence of the all appropriate inquiries regulation, with an ASTM E1527–2000 assessment process or with the simpler ASTM E1528 transaction screen. EPA estimated the average incremental cost of the proposed rule relative to conducting an ASTM E1527–2000 to be between $41 and $47. For the small percentage of cases for which a transaction screen would have been preferred to the ASTM E1527–2000 in the baseline, but which would, as a result of the proposed rule, require an assessment in compliance with the all appropriate inquiries rule, the average incremental cost was estimated to be between $1,448 and $1,454. We estimated that approximately 97 percent of property transactions will bear only the incremental cost of the rule relative to the ASTM E1527–2000 process. Therefore, the weighted average incremental cost of the proposed rule, per transaction, was estimated to be fairly low, between $84 and $89.

3. Public Comments on EIA for Proposed Rule

EPA received a number of public comments on the EIA conducted to assess the potential costs and impacts of the proposed rule. We summarized the public comments received related to the cost and economic impacts in the document titled "Addendum to Economic Impact Analysis for the Final All Appropriate Inquiries Regulation" (Addendum to the EIA). This document is included in the docket for today's final rule. The Addendum to the EIA also summarizes EPA's responses to the comments received that addressed the estimated costs and economic impacts.

Many commenters generally agreed with EPA's conclusion that the average incremental cost increase per transaction associated with the requirements of the proposed rule would be minimal. Some commenters mentioned that the EIA conducted for the proposed rule underestimated the incremental costs associated with the proposed rule. However, only a few commenters provided an explanation as to why they thought our cost estimates were low or provided information regarding which particular activities would result in an incremental increase in the activities and costs associated with conducting an environmental site assessment, if conducted in compliance with the requirements of the proposed rule. Most commenters did not provide specific reasons for their claims of cost increases over the ASTM E1527–2000 standard. A few commenters suggested that the EIA for the proposed rule underestimated the level of effort necessary for locating and interviewing past owners or occupants, with one commenter providing an estimated level of effort of one to three hours for this task.

[3] The distribution of abandoned properties and properties with known owners, modeled as a range, is based on an estimate of vacant lands in urban areas and an estimate of abandoned Superfund sites.

4. Estimate of Costs Associated With the Final Rule

EPA made one revision to the analysis of cost impacts associated with the requirements of the proposed and final rule in response to specific issues raised by commenters. EPA agrees with the commenters who asserted that locating past owners or occupants of a property may be more time consuming than locating the current owners or occupants, as was assumed in the analysis of costs conducted for the proposed rule. Locating past owners or occupants could require as little as one 5-minute phone call (e.g., if the current owner has the contact information for the past owner) or it could require multiple phone calls that could take in excess of one hour. For the purpose of estimating the cost under the final rule, EPA estimates the incremental burden for locating past owners or occupants to be, on average, 0.5 hours per interview regardless of the property type or size. EPA did not account for this incremental burden in our analysis of the costs associated with the proposed rule. EPA also recognizes that in some cases the environmental professional will need to complete the full interview with the current owner before determining that it is necessary to interview a past owner. In other words, the environmental professional may need to complete the interview with the current owner, and then perform a more focused interview of a past owner to fill data gaps. EPA estimates that the incremental burden for interviewing past owners or occupants will be 0.5 hours for undeveloped and residential properties, one hour for commercial and industrial properties (of all sizes except large industrial), and 1.5 hours for large industrial properties. Therefore, EPA estimates that the total incremental level of effort for locating and interviewing past property owners or occupants will range from one hour to two hours depending on the property type or size.

The additional incremental hour burden, however, will not be incurred in the case of every site assessment. EPA expects that the interview with past owners or occupants will be conducted only for properties with a higher than average owner or occupant turnover rate. To derive the number of potentially affected properties, we assume that the environmental professional will interview only the current property owner if the owner was in the possession of the subject property for more than two years. We assume that after two years of owning a property, the current property owner should have a reasonably good knowledge of its condition. EPA estimates that 19 percent of Phase I ESAs conducted in a given year are conducted on properties that were sold at least once in the previous two years (for a detailed explanation on the derivation of this estimate, see the Addendum to the EIA). Using the assumption that 15 percent of all properties are abandoned properties (see Section 5.6.5.2 of EIA) which would not be affected by the requirement to interview past owners or occupants, we revised our original cost estimate to account for non-abandoned properties that were sold over the past two years. Therefore, for the purpose of our revised cost analysis, we estimate that 16 percent of properties will require an additional interview with past owners or occupants.

Except for the increase in the level of effort for the interview task for non-abandoned properties, all other parameters used in modeling our cost estimates are the same as presented in the EIA conducted for the proposed rule. To derive the incremental average cost per transaction and the total annual cost of the final rule, we employed the methodology explained in detailed in Chapters 7 and 8 of the EIA conducted for the proposed rule. Based on our analysis, the cost of a Phase I ESA under the final regulation will increase, on average, between $52 and $58. The estimated average cost for a Phase I ESA thus will range between $2,185 and $2,190.[4]

Using our revised incremental cost estimate for conducting interviews of past owners or occupants, we revised our estimated total annual cost of the final rule and our incremental total annual cost estimate. Our revised total annual cost estimate for all activities included in the all appropriate inquiries investigations conducted under the final rule is between $693.5 and $695.3 million (calculated using a discount rate of three percent). Our revised estimate of the incremental total annual cost of the final rule is between $29.7 million and $31.4 million. A more detailed explanation of our revised cost estimates, including an additional sensitivity analysis performed in response to the public comments, is included in the document titled "Addendum to the Economic Impact Analysis for the Final All Appropriate Inquiries Regulation." This document is in the public docket for today's final rule.

[4] We assumed that the environmental professionals will need to complete the full interview with the current owner before conducting an interview with the past owners or occupants. To the extent that this may not always be the case, the average incremental cost (and by extension, the average cost for an AAI Phase I ESA) is overestimated.

B. Paperwork Reduction Act

The information collection requirements contained in this final rule were submitted for approval to the Office of Management and Budget under the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.* The information collection requirements are not enforceable until OMB approves them. The Information Collection Request (ICR) document prepared by EPA has been assigned EPA ICR Number 2144.02.

Under the PRA, EPA is required to estimate the notification, reporting and recordkeeping costs and burdens associated with the requirements specified in today's rule. Today's rule will require persons wanting to assert one of the liability protections under CERCLA to conduct some activities that go beyond current customary and usual business practices (i.e., beyond ASTM E1527–2000) and therefore will impose an information collection burden under the provisions of the Paperwork Reduction Act. The information collection activities are associated with the activities mandated in section 101 (35)(B) of CERCLA for those persons wanting to claim protection from CERCLA liability. None of the information collection burdens associated with the provisions of today's rule include requirements to submit the collected information to EPA or any other government agency. Information collected by persons affected by today's rule may be useful to such persons if their potential liability under CERCLA for the release or threatened release of a hazardous substance is challenged in a court.

The activities associated with today's rule that go beyond current customary and usual business practices include interviews with neighboring property owners and/or occupants in those cases where the subject property is abandoned, documentation of all environmental cleanup liens in the Phase I Environmental Site Assessment report, discussion of the relationship of purchase price to value of the property in the report, and consideration and discussion of whether additional environmental investigation is warranted. Paperwork burdens are estimated to be 546,179 hours annually, with a total cost of $29,583,206 annually. The estimated average burden hours per response is estimated to be approximately one hour (or 25 hours per response, assuming a transition from a transaction screen). The estimated average cost burden per response is estimated to be either $67 or $1,479,

depending on whether, under baseline conditions, an ASTM E1527–2000 process or a transaction screen (ASTM E1528) would have been used.

Under the Paperwork Reduction Act, "burden" means the total time, effort, or financial resources expended by persons to generate, maintain, retain, or disclose or provide information to or for a Federal agency. This includes the time needed to review instructions; develop, acquire, install, and utilize technology and systems for the purposes of collecting, validating, and verifying information, processing and maintaining information, and disclosing and providing information; adjust the existing ways to comply with any previously applicable instructions and requirements; train personnel to be able to respond to a collection of information; search data sources; complete and review the collection of information; and transmit or otherwise disclose the information.

An agency may not conduct or sponsor, and a person is not required to respond to a collection of information unless it displays a currently valid OMB control number. The OMB control numbers for EPA's regulations in 40 CFR are listed in 40 CFR part 9. This ICR is approved by OMB, and the Agency will publish a technical amendment to 40 CFR part 9 in the **Federal Register** to display the OMB control number for the approved information collection requirements contained in this final rule.

C. Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA), as amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), 5 U.S.C. 601 *et. seq.*, generally requires an agency to prepare a regulatory flexibility analysis of any rule subject to notice and comment rulemaking requirements under the Administrative Procedure Act or any other statute, unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. Small entities include small businesses, small organizations, and small governmental jurisdictions.

For the purposes of assessing the impacts of today's rule on small entities, small entity is defined as: (1) A small business that is defined by the Small Business Administration by category of business using the North American Industrial Classification System (NAICS) and codified at 13 CFR 121.201; (2) a small governmental jurisdiction that is a government of a city, county, town, school district or special district with a population of less than 50,000; and (3) a small organization that is any not-for-profit enterprise which is independently owned and operated and is not dominant in its field.

Since all non-residential property transactions could be affected by today's rule, if it is promulgated, large numbers of small entities could be affected to some degree. However, we estimate that the effects, on the whole, will not be significant for small entities. We estimate that, for the majority of small entities, the average incremental cost of today's rule relative to conducting an ASTM E1527–2000 Phase I Environmental Site Assessment will be between $52 and $58. When we annualize the incremental cost of $58 per property transaction over ten years at a seven percent discount rate, we estimate that the average annual cost increase per establishment per property transaction will be $8. Thus, the cost impact to small entities is estimated to not be significant. A more detailed summary of our analysis of the potential impacts of today's rule to small entities is included in "Economic Impacts Analysis of the Final All Appropriate Inquiries Regulation." This document is included in the docket for today's rule.

After considering the economic impacts of today's final rule on small entities, I certify that this action will not have a significant economic impact on a substantial number of small entities. We estimate that, on average, 266,000 small entities may purchase commercial real estate in any given year and therefore could potentially be impacted by today's final rule. Though large numbers of small entities could be affected to some degree, we estimated that the effects, on the whole, would not be significant for small entities. We estimate that, for the majority of small entities, the average incremental cost of today's rule relative to conducting an ASTM E1527–2000 will be between $52 and $58. For the small percentage of cases for which a transaction screen would have been preferred to the ASTM E1527–2000 in the baseline, but which now will require an assessment in compliance with the rule, the average incremental cost of conducting an environmental site assessment will be between $1,459 and $1,465. When we annualize the incremental cost per property transaction over ten years at a seven percent discount rate, we estimate that for the majority of small entities the average annual cost increase per establishment per property transaction will be approximately $8. For the small percentage of entities transitioning from transaction screens to the all appropriate inquiries requirements of the final rule, the average annual cost increase per establishment per property transaction will be $209.[5]

D. Unfunded Mandates Reform Act

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA), Public Law 104–4, establishes requirements for federal agencies to assess the effects of their regulatory actions on State, local, and tribal governments and the private sector. Under section 202 of the UMRA, EPA must prepare a written statement, including a cost-benefit analysis, for proposed and final rules with "Federal mandates" that may result in expenditures to State, local, and tribal governments, in the aggregate, or to the private sector, of $100 million or more in any one year. Before promulgating an EPA rule for which a written statement is needed, section 205 of the UMRA generally requires EPA to identify and consider a reasonable number of regulatory alternatives and adopt the least costly, most cost-effective, or least burdensome alternative that achieves the objectives of the rule. The provisions of section 205 do not apply when they are inconsistent with applicable law. Moreover, section 205 allows EPA to adopt an alternative other than the least costly, most cost-effective or least burdensome alternative if the Administrator publishes with the final rule an explanation of why that alternative was not adopted.

Before EPA establishes any regulatory requirements that may significantly or uniquely affect small governments, including tribal governments, it must have developed under section 203 of the UMRA, a small government agency plan. The plan must provide for notifying potentially affected small governments, enabling officials to have meaningful and timely input in the development of regulatory proposals with significant federal intergovernmental mandates, and informing, educating, and advising small governments on compliance with the regulatory requirements.

Today's rule contains no federal mandates (under the regulatory provisions of Title II of the UMRA) for

[5] For a very small percentage of entities transitioning from transaction screens to the all appropriate inquiries requirements, the maximum increase per establishment per property transaction is estimated to be approximately $2,845. When we annualize this incremental cost per property transaction over ten years at a seven percent discount rate, we estimate that the maximum annual cost increase per establishment per property transaction will be $405. We estimate that approximately one fifth of one percent of the properties transitioning from a transaction screen to a Phase I ESA will have an impact of this magnitude each year.

state, local, or tribal governments or the private sector. The rule imposes no enforceable duty on any state, local, or tribal governments. EPA also determined that today's rule contains no regulatory requirements that might significantly or uniquely affect small governments. In addition, as discussed above, the private sector is not expected to incur costs of $100 million or more as a result of today's rule. Therefore, today's rule is not subject to the requirements of Sections 202 and 205 of UMRA.

E. Executive Order 13132: Federalism

Executive Order 13132, entitled "Federalism" (64 FR 43255, August 10, 1999), requires EPA to develop an accountable process to ensure "meaningful and timely input by State and local officials in the development of regulatory policies that have federalism implications." "Policies that have federalism implications" is defined in the Executive Order to include regulations that have "substantial direct effects on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government."

Today's rule does not have federalism implications. It will not have substantial direct effects on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132. No state and local government bodies will incur compliance costs as a result of today's rulemaking. Therefore, Executive Order 13132 does not apply to this rule.

F. Executive Order 13175: Consultation and Coordination With Indian Tribal Governments

Executive Order 13175, entitled "Consultation and Coordination with Indian Tribal Governments" (65 FR 67249, November 9, 2000), requires EPA to develop an accountable process to ensure "meaningful and timely input by tribal officials in the development of regulatory policies that have tribal implications." Today's rule does not have tribal implications, as specified in Executive Order 13175. Today's rule does not significantly or uniquely affect the communities of Indian tribal governments, nor would it impose direct compliance costs on them. Thus, Executive Order 13175 does not apply to this rule.

G. Executive Order 13045: Protection of Children From Environmental Risks and Safety Risks

Executive Order 13045, entitled "Protection of Children from Environmental Health Risks and Safety Risks (62 FR 19885, April 23, 1997) applies to any rule that: (1) Is determined to be "economically significant" as defined under Executive Order 12866, and (2) concerns an environmental health or safety risk that EPA has reason to believe may have a disproportionate effect on children. If the regulatory action meets both criteria, the Agency must evaluate the environmental health or safety effects of the planned rule on children; and explain why the planned regulation is preferable to other potentially effective and reasonably feasible alternatives considered by the Agency.

Today's rule is not subject to the Executive Order because it is not economically significant as defined in Executive Order 12866.

H. Executive Order 13211: Actions That Significantly Affect Energy Supply, Distribution or Use

Today's final rule is not a "significant energy action" as defined in Executive Order 13211, "Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use" (66 FR 28355, May 22, 2001) because it is not likely to have a significantly adverse effect on the supply, distribution, or use of energy. Further, we have concluded that this rule is not likely to have any adverse energy effects.

I. National Technology Transfer and Advancement Act

Section 12(d) of the National Technology Transfer and Advancement Act of 1995 ("NTTAA"), Public Law 104–113, section 12(d) (15 U.S.C. 272 note), directs EPA to use voluntary consensus standards in its regulatory activities, unless to do so would be inconsistent with applicable law or otherwise impractical. Voluntary consensus standards are technical standards (e.g., materials specifications, test methods, sampling procedures, and business practices) that are developed or adopted by voluntary consensus standards bodies. The NTTAA directs EPA to provide Congress, through OMB, explanations when the Agency decides not to use available and applicable voluntary consensus standards. Today's rule involves technical standards. Therefore, the requirements of section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272) apply.

Today's final rule is based upon a proposed rule that was developed with the assistance of a regulatory negotiation committee comprised of various affected stakeholder groups and modified slightly, based upon public comments received in response to the proposed rule. When developing the proposed rule, EPA considered using the existing standard developed by ASTM International as the federal standard for all appropriate inquiries. This standard is known as the ASTM E1527–2000 standard ("Standard Practice for Environmental Site Assessment: Phase I Environmental Site Assessment Process"). However, when we proposed the federal standards for all appropriate inquiries, EPA determined that the ASTM E1527–2000 standard is inconsistent with applicable law.

In CERCLA section 101(35)(B), Congress included ten specific criteria to be used in promulgating the all appropriate inquiries rule. The 2000 version of the ASTM Phase I Environmental Site Assessment Process does not address all of the required criteria. For example, the ASTM International standard does not provide for interviews of past owners, operators, and occupants of a facility. The statute, however, states that the federally promulgated standard "shall include * * * interviews with past and present owners, operators, and occupants of the facility for the purpose of gathering information regarding the potential for contamination at the facility." CERCLA section 101(35)(B)(iii)(II). In addition, as outlined in the preamble to the proposed rule (69 FR 52541) the ASTM E1527–2000 standard also does not meet other statutory requirements. As a result, use of the ASTM E1527–2000 standard would be inconsistent with applicable law.

In today's final rule, EPA is referencing the updated standards and practices developed by ASTM International and known as Standard E1527–05 (entitled "Standard Practice for Environmental Site Assessments: Phase I Environmental Site Assessment Process"). The Agency has determined that this voluntary consensus standard is consistent with today's final rule and is compliant with the statutory criteria for all appropriate inquiries. Persons conducting all appropriate inquiries may use the procedures included in the ASTM E1527–05 standard to comply with today's final rule.

J. Executive Order 12898: Federal Actions To Address Environmental Justice in Minority Populations and Low-Income Populations

Executive Order 12898, "Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations" (February 11, 1994), is designed to address the environmental and human health conditions of minority and low-income populations. EPA is committed to addressing environmental justice concerns and has assumed a leadership role in environmental justice initiatives to enhance environmental quality for all citizens of the United States. The Agency's goals are to ensure that no segment of the population, regardless of race, color, national origin, income, or net worth bears disproportionately high and adverse human health and environmental impacts as a result of EPA's policies, programs, and activities. Our goal is to ensure that all citizens live in clean and sustainable communities. In response to Executive Order 12898, and to concerns voiced by many groups outside the Agency, EPA's Office of Solid Waste and Emergency Response (OSWER) formed an Environmental Justice Task Force to analyze the array of environmental justice issues specific to waste programs and to develop an overall strategy to identify and address these issues (OSWER Directive No. 9200.3–17). EPA's brownfields program has a particular emphasis on addressing concerns specific to environmental justices communities. Many of the communities and neighborhoods that are most significantly impacted by brownfields are environmental justice communities. EPA's brownfields program targets such communities for assessment, cleanup, and revitalization. The brownfields program has a long history of working with environmental justice communities and advocates through our technical assistance and grant programs. In addition to the monies awarded to such communities in the form of assessment and cleanup grants, the brownfields program also works with environmental justice communities through our job training grants program. The job training grants provide money to government entities to facilitate the training of persons living in or near brownfields communities to attain skills for conducting site assessments and cleanups.

Given that environmental justice communities are significantly impacted by brownfields, and the federal standards for all appropriate inquiries may play a primary role in encouraging the assessment and cleanup of brownfields sites, EPA made it a priority to obtain input from representatives of environmental justice interest groups during the development of today's rulemaking. The Negotiated Rulemaking Committee tasked with developing the all appropriate inquiries proposed rule included three representatives from environmental justice advocacy groups. Each representative played a significant role in the negotiations and in the development of the proposed rule. Today's final rule includes no significant changes to the proposed rule and in particular, includes no changes that will significantly or disproportionately impact environmental justice communities.

K. Congressional Review Act

The Congressional Review Act, 5 U.S.C. 801 *et seq.*, as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. EPA will submit a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the **Federal Register**. A major rule cannot take effect until 60 days after it is published in the **Federal Register**. This action is not a "major rule" as defined by 5 U.S.C. 804(2). This rule will be effective November 1, 2006.

List of Subjects in 40 CFR Part 312

Environmental protection, Administrative practice and procedure, Hazardous substances, Intergovernmental relations, Reporting and recordkeeping requirements.

Dated: October 21, 2005.

Stephen L. Johnson,

Administrator.

■ For reasons set out in the preamble, title 40, chapter I of the Code of Federal Regulations is amended by revising part 312 as follows:

PART 312—INNOCENT LANDOWNERS, STANDARDS FOR CONDUCTING ALL APPROPRIATE INQUIRIES

Subpart A—Introduction

Sec.

Subpart B—Definitions and References

Subpart C—Standards and Practices

Authority: Section 101(35)(B) of CERCLA, as amended, 42 U.S.C. 9601(35)(B).

PART 312—INNOCENT LANDOWNERS, STANDARDS FOR CONDUCTING ALL APPROPRIATE INQUIRIES

Subpart A—Introduction

§ 312.1 Purpose, applicability, scope and disclosure obligations.

(a) *Purpose.* The purpose of this section is to provide standards and practices for "all appropriate inquiries" for the purposes of CERCLA sections 101(35)(B)(i)(I) and 101(35)(B)(ii) and (iii).

(b) *Applicability.* The requirements of this part are applicable to:

(1) Persons seeking to establish:

(i) The innocent landowner defense pursuant to CERCLA sections 101(35) and 107(b)(3);

(ii) The bona fide prospective purchaser liability protection pursuant to CERCLA sections 101(40) and 107(r);

(iii) The contiguous property owner liability protection pursuant to CERCLA section 107(q); and

(2) persons conducting site characterization and assessments with the use of a grant awarded under CERCLA section 104(k)(2)(B).

(c) *Scope.* (1) Persons seeking to establish one of the liability protections under paragraph (b)(1) of this section must conduct investigations as required in this part, including an inquiry by an environmental professional, as required under § 312.21, and the additional inquiries defined in § 312.22, to identify

conditions indicative of releases or threatened releases, as defined in CERCLA section 101(22), of hazardous substances, as defined in CERCLA section 101(14).

(2) Persons identified in paragraph (b)(2) of this section must conduct investigations required in this part, including an inquiry by an environmental professional, as required under § 312.21, and the additional inquiries defined in § 312.22, to identify conditions indicative of releases and threatened releases of hazardous substances, as defined in CERCLA section 101(22), and as applicable per the terms and conditions of the grant or cooperative agreement, releases and threatened releases of:

(i) Pollutants and contaminants, as defined in CERCLA section 101(33);

(ii) Petroleum or petroleum products excluded from the definition of "hazardous substance" as defined in CERCLA section 101(14); and

(iii) Controlled substances, as defined in 21 U.S.C. 802.

(d) *Disclosure obligations.* None of the requirements of this part limits or expands disclosure obligations under any federal, state, tribal, or local law, including the requirements under CERCLA sections 101(40)(c) and 107(q)(1)(A)(vii) requiring persons, including environmental professionals, to provide all legally required notices with respect to the discovery of releases of hazardous substances. It is the obligation of each person, including environmental professionals, conducting the inquiry to determine his or her respective disclosure obligations under federal, state, tribal, and local law and to comply with such disclosure requirements.

Subpart B—Definitions and References

§ 312.10 Definitions.

(a) Terms used in this part and not defined below, but defined in either CERCLA or 40 CFR part 300 (the National Oil and Hazardous Substances Pollution Contingency Plan) shall have the definitions provided in CERCLA or 40 CFR part 300.

(b) When used in this part, the following terms have the meanings provided as follows:

Abandoned property means: property that can be presumed to be deserted, or an intent to relinquish possession or control can be inferred from the general disrepair or lack of activity thereon such that a reasonable person could believe that there was an intent on the part of the current owner to surrender rights to the property.

Adjoining properties means: any real property or properties the border of which is (are) shared in part or in whole with that of the subject property, or that would be shared in part or in whole with that of the subject property but for a street, road, or other public thoroughfare separating the properties.

Data gap means: a lack of or inability to obtain information required by the standards and practices listed in subpart C of this part despite good faith efforts by the environmental professional or persons identified under § 312.1(b), as appropriate, to gather such information pursuant to §§ 312.20(e)(1) and 312.20(e)(2).

Date of acquisition or purchase date means: the date on which a person acquires title to the property.

Environmental Professional means:

(1) a person who possesses sufficient specific education, training, and experience necessary to exercise professional judgment to develop opinions and conclusions regarding conditions indicative of releases or threatened releases (see § 312.1(c)) on, at, in, or to a property, sufficient to meet the objectives and performance factors in § 312.20(e) and (f).

(2) Such a person must:

(i) Hold a current Professional Engineer's or Professional Geologist's license or registration from a state, tribe, or U.S. territory (or the Commonwealth of Puerto Rico) and have the equivalent of three (3) years of full-time relevant experience; or

(ii) Be licensed or certified by the federal government, a state, tribe, or U.S. territory (or the Commonwealth of Puerto Rico) to perform environmental inquiries as defined in § 312.21 and have the equivalent of three (3) years of full-time relevant experience; or

(iii) Have a Baccalaureate or higher degree from an accredited institution of higher education in a discipline of engineering or science and the equivalent of five (5) years of full-time relevant experience; or

(iv) Have the equivalent of ten (10) years of full-time relevant experience.

(3) An environmental professional should remain current in his or her field through participation in continuing education or other activities.

(4) The definition of environmental professional provided above does not preempt state professional licensing or registration requirements such as those for a professional geologist, engineer, or site remediation professional. Before commencing work, a person should determine the applicability of state professional licensing or registration laws to the activities to be undertaken as part of the inquiry identified in § 312.21(b).

(5) A person who does not qualify as an environmental professional under the foregoing definition may assist in the conduct of all appropriate inquiries in accordance with this part if such person is under the supervision or responsible charge of a person meeting the definition of an environmental professional provided above when conducting such activities.

Relevant experience, as used in the definition of environmental professional in this section, means: participation in the performance of all appropriate inquiries investigations, environmental site assessments, or other site investigations that may include environmental analyses, investigations, and remediation which involve the understanding of surface and subsurface environmental conditions and the processes used to evaluate these conditions and for which professional judgment was used to develop opinions regarding conditions indicative of releases or threatened releases (see § 312.1(c)) to the subject property.

Good faith means: the absence of any intention to seek an unfair advantage or to defraud another party; an honest and sincere intention to fulfill one's obligations in the conduct or transaction concerned.

Institutional controls means: non-engineered instruments, such as administrative and/or legal controls, that help to minimize the potential for human exposure to contamination and/or protect the integrity of a remedy.

§ 312.11 References.

The following industry standards may be used to comply with the requirements set forth in §§ 312.23 through 312.31:

(a) The procedures of ASTM International Standard E1527–05 entitled "Standard Practice for Environmental Site Assessments: Phase I Environmental Site Assessment Process."

(b) [Reserved]

Subpart C—Standards and Practices

§ 312.20 All appropriate inquiries.

(a) "All appropriate inquiries" pursuant to CERCLA section 101(35)(B) must be conducted within one year prior to the date of acquisition of the subject property and must include:

(1) An inquiry by an environmental professional (as defined in § 312.10), as provided in § 312.21;

(2) The collection of information pursuant to § 312.22 by persons identified under § 312.1(b); and

(3) Searches for recorded environmental cleanup liens, as required in § 312.25.

(b) Notwithstanding paragraph (a) of this section, the following components of the all appropriate inquiries must be conducted or updated within 180 days of and prior to the date of acquisition of the subject property:

(1) Interviews with past and present owners, operators, and occupants (see § 312.23);

(2) Searches for recorded environmental cleanup liens (see § 312.25);

(3) Reviews of federal, tribal, state, and local government records (see § 312.26);

(4) Visual inspections of the facility and of adjoining properties (see § 312.27); and

(5) The declaration by the environmental professional (see § 312.21(d)).

(c) All appropriate inquiries may include the results of and information contained in an inquiry previously conducted by, or on the behalf of, persons identified under § 312.1(b) and who are responsible for the inquiries for the subject property, provided:

(1) Such information was collected during the conduct of all appropriate inquiries in compliance with the requirements of CERCLA sections 101(35)(B), 101(40)(B) and 107(q)(A)(viii);

(2) Such information was collected or updated within one year prior to the date of acquisition of the subject property;

(3) Notwithstanding paragraph (b)(2) of this section, the following components of the inquiries were conducted or updated within 180 days of and prior to the date of acquisition of the subject property:

(i) Interviews with past and present owners, operators, and occupants (see § 312.23);

(ii) Searches for recorded environmental cleanup liens (see § 312.25);

(iii) Reviews of federal, tribal, state, and local government records (see § 312.26);

(iv) Visual inspections of the facility and of adjoining properties (see § 312.27); and

(v) The declaration by the environmental professional (see § 312.21(d)).

(4) Previously collected information is updated to include relevant changes in the conditions of the property and specialized knowledge, as outlined in § 312.28, of the persons conducting the all appropriate inquiries for the subject property, including persons identified in § 312.1(b) and the environmental professional, defined in § 312.10.

(d) All appropriate inquiries can include the results of report(s) specified in § 312.21(c), that have been prepared by or for other persons, provided that:

(1) The report(s) meets the objectives and performance factors of this regulation, as specified in paragraphs (e) and (f) of this section; and

(2) The person specified in § 312.1(b) and seeking to use the previously collected information reviews the information and conducts the additional inquiries pursuant to §§ 312.28, 312.29 and 312.30 and the all appropriate inquiries are updated in paragraph (b)(3) of this section, as necessary.

(e) *Objectives.* The standards and practices set forth in this part for All Appropriate Inquiries are intended to result in the identification of conditions indicative of releases and threatened releases of hazardous substances on, at, in, or to the subject property.

(1) In performing the all appropriate inquiries, as defined in this section and provided in the standards and practices set forth this subpart, the persons identified under § 312.1(b)(1) and the environmental professional, as defined in § 312.10, must seek to identify through the conduct of the standards and practices set forth in this subpart, the following types of information about the subject property:

(i) Current and past property uses and occupancies;

(ii) Current and past uses of hazardous substances;

(iii) Waste management and disposal activities that could have caused releases or threatened releases of hazardous substances;

(iv) Current and past corrective actions and response activities undertaken to address past and on-going releases of hazardous substances;

(v) Engineering controls;

(vi) Institutional controls; and

(vii) 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 to the subject property.

(2) In the case of persons identified in § 312.1(b)(2), the standards and practices for All Appropriate Inquiries set forth in this part are intended to result in the identification of conditions indicative of releases and threatened releases of hazardous substances, pollutants, contaminants, petroleum and petroleum products, and controlled substances (as defined in 21 U.S.C. 802) on, at, in, or to the subject property. In performing the all appropriate inquiries, as defined in this section and provided in the standards and practices set forth in this subpart, the persons identified under § 312.1(b) and the environmental professional, as defined in § 312.10, must seek to identify through the conduct of the standards and practices set forth in this subpart, the following types of information about the subject property:

(i) Current and past property uses and occupancies;

(ii) Current and past uses of hazardous substances, pollutants, contaminants, petroleum and petroleum products, and controlled substances (as defined in 21 U.S.C. 802);

(iii) Waste management and disposal activities;

(iv) Current and past corrective actions and response activities undertaken to address past and on-going releases of hazardous substances pollutants, contaminants, petroleum and petroleum products, and controlled substances (as defined in 21 U.S.C. 802);

(v) Engineering controls;

(vi) Institutional controls; and

(vii) 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, pollutants, contaminants, petroleum and petroleum products, and controlled substances (as defined in 21 U.S.C. 802) to the subject property.

(f) *Performance factors.* In performing each of the standards and practices set forth in this subpart and to meet the objectives stated in paragraph (e) of this section, the persons identified under § 312.1(b) or the environmental professional as defined in § 312.10 (as appropriate to the particular standard and practice) must seek to:

(1) Gather the information that is required for each standard and practice listed in this subpart that is publicly available, obtainable from its source within reasonable time and cost constraints, and which can practicably be reviewed; and

(2) Review and evaluate the thoroughness and reliability of the information gathered in complying with each standard and practice listed in this subpart taking into account information gathered in the course of complying with the other standards and practices of this subpart.

(g) To the extent there are data gaps (as defined in § 312.10) in the information developed as part of the inquiries in paragraph (e) of this section that affect the ability of persons (including the environmental professional) conducting the all

appropriate inquiries to identify conditions indicative of releases or threatened releases in each area of inquiry under each standard and practice such persons should identify such data gaps, identify the sources of information consulted to address such data gaps, and comment upon the significance of such data gaps with regard to the ability to identify conditions indicative of releases or threatened releases of hazardous substances [and in the case of persons identified in § 312.1(b)(2), hazardous substances, pollutants, contaminants, petroleum and petroleum products, and controlled substances (as defined in 21 U.S.C. 802)] on, at, in, or to the subject property. Sampling and analysis may be conducted to develop information to address data gaps.

(h) Releases and threatened releases identified as part of the all appropriate inquiries should be noted in the report of the inquiries. These standards and practices however are not intended to require the identification in the written report prepared pursuant to § 312.21(c) of quantities or amounts, either individually or in the aggregate, of hazardous substances pollutants, contaminants, petroleum and petroleum products, and controlled substances (as defined in 21 U.S.C. 802) that because of said quantities and amounts, generally would not pose a threat to human health or the environment.

§ 312.21 Results of inquiry by an environmental professional.

(a) Persons identified under § 312.1(b) must undertake an inquiry, as defined in paragraph (b) of this section, by an environmental professional, or conducted under the supervision or responsible charge of, an environmental professional, as defined in § 312.10. Such inquiry is hereafter referred to as "the inquiry of the environmental professional."

(b) The inquiry of the environmental professional must include the requirements set forth in §§ 312.23 (interviews with past and present owners * * *), 312.24 (reviews of historical sources * * *), 312.26 (reviews of government records), 312.27 (visual inspections), 312.30 (commonly known or reasonably ascertainable information), and 312.31 (degree of obviousness of the presence * * * and the ability to detect the contamination * * *). In addition, the inquiry should take into account information provided to the environmental professional as a result of the additional inquiries conducted by persons identified in § 312.1(b) and in accordance with the requirements of § 312.22.

(c) The results of the inquiry by an environmental professional must be documented in a written report that, at a minimum, includes the following:

(1) An opinion as to whether the inquiry has identified conditions indicative of releases or threatened releases of hazardous substances [and in the case of inquiries conducted for persons identified in § 312.1(b)(2) conditions indicative of releases and threatened releases of pollutants, contaminants, petroleum and petroleum products, and controlled substances (as defined in 21 U.S.C. 802)] on, at, in, or to the subject property;

(2) An identification of data gaps (as defined in § 312.10) in the information developed as part of the inquiry that affect the ability of the environmental professional to identify conditions indicative of releases or threatened releases of hazardous substances [and in the case of inquiries conducted for persons identified in § 312.1(b)(2) conditions indicative of releases and threatened releases of pollutants, contaminants, petroleum and petroleum products, and controlled substances (as defined in 21 U.S.C. 802)] on, at, in, or to the subject property and comments regarding the significance of such data gaps on the environmental professional's ability to provide an opinion as to whether the inquiry has identified conditions indicative of releases or threatened releases on, at, in, or to the subject property. If there are data gaps such that the environmental professional cannot reach an opinion regarding the identification of conditions indicative of releases and threatened releases, such data gaps must be noted in the environmental professional's opinion in paragraph (c)(1) of this section; and

(3) The qualifications of the environmental professional(s).

(d) The environmental professional must place the following statements in the written document identified in paragraph (c) of this section and sign the document:

"[I, We] declare that, to the best of [my, our] professional knowledge and belief, [I, we] meet the definition of Environmental Professional as defined in § 312.10 of this part."

"[I, We] have the specific qualifications based on education, training, and experience to assess a property of the nature, history, and setting of the subject property. [I, We] have developed and performed the all appropriate inquiries in conformance with the standards and practices set forth in 40 CFR Part 312."

§ 312.22 Additional inquiries.

(a) Persons identified under § 312.1(b) must conduct the inquiries listed in paragraphs (a)(1) through (a)(4) below and may provide the information associated with such inquiries to the environmental professional responsible for conducting the activities listed in § 312.21:

(1) As required by § 312.25 and if not otherwise obtained by the environmental professional, environmental cleanup liens against the subject property that are filed or recorded under federal, tribal, state, or local law;

(2) As required by § 312.28, specialized knowledge or experience of the person identified in § 312.1(b);

(3) As required by § 312.29, the relationship of the purchase price to the fair market value of the subject property, if the property was not contaminated; and

(4) As required by § 312.30, and if not otherwise obtained by the environmental professional, commonly known or reasonably ascertainable information about the subject property.

§ 312.23 Interviews with past and present owners, operators, and occupants.

(a) Interviews with owners, operators, and occupants of the subject property must be conducted for the purposes of achieving the objectives and performance factors of § 312.20(e) and (f).

(b) The inquiry of the environmental professional must include interviewing the current owner and occupant of the subject property. If the property has multiple occupants, the inquiry of the environmental professional shall include interviewing major occupants, as well as those occupants likely to use, store, treat, handle or dispose of hazardous substances [and in the case of inquiries conducted for persons identified in § 312.1(b)(2) pollutants, contaminants, petroleum and petroleum products, and controlled substances (as defined in 21 U.S.C. 802)], or those who have likely done so in the past.

(c) The inquiry of the environmental professional also must include, to the extent necessary to achieve the objectives and performance factors of § 312.20(e) and (f), interviewing one or more of the following persons:

(1) Current and past facility managers with relevant knowledge of uses and physical characteristics of the property;

(2) Past owners, occupants, or operators of the subject property; or

(3) Employees of current and past occupants of the subject property.

(d) In the case of inquiries conducted at "abandoned properties," as defined in § 312.10, where there is evidence of potential unauthorized uses of the subject property or evidence of

uncontrolled access to the subject property, the environmental professional's inquiry must include interviewing one or more (as necessary) owners or occupants of neighboring or nearby properties from which it appears possible to have observed uses of, or releases at, such abandoned properties for the purpose of gathering information necessary to achieve the objectives and performance factors of § 312.20(e) and (f).

§ 312.24 Reviews of historical sources of information.

(a) Historical documents and records must be reviewed for the purposes of achieving the objectives and performance factors of § 312.20(e) and (f). Historical documents and records may include, but are not limited to, aerial photographs, fire insurance maps, building department records, chain of title documents, and land use records.

(b) Historical documents and records reviewed must cover a period of time as far back in the history of the subject property as it can be shown that the property contained structures or from the time the property was first used for residential, agricultural, commercial, industrial, or governmental purposes. For the purpose of achieving the objectives and performance factors of § 312.20(e) and (f), the environmental professional may exercise professional judgment in context of the facts available at the time of the inquiry as to how far back in time it is necessary to search historical records.

§ 312.25 Searches for recorded environmental cleanup liens.

(a) All appropriate inquiries must include a search for the existence of environmental cleanup liens against the subject property that are filed or recorded under federal, tribal, state, or local law.

(b) All information collected regarding the existence of such environmental cleanup liens associated with the subject property by persons to whom this part is applicable per § 312.1(b) and not by an environmental professional, may be provided to the environmental professional or retained by the applicable party.

§ 312.26 Reviews of Federal, State, Tribal, and local government records.

(a) Federal, tribal, state, and local government records or data bases of government records of the subject property and adjoining properties must be reviewed for the purposes of achieving the objectives and performance factors of § 312.20(e) and (f).

(b) With regard to the subject property, the review of federal, tribal, and state government records or data bases of such government records and local government records and data bases of such records should include:

(1) Records of reported releases or threatened releases, including site investigation reports for the subject property;

(2) Records of activities, conditions, or incidents likely to cause or contribute to releases or threatened releases as defined in § 312.1(c), including landfill and other disposal unit location records and permits, storage tank records and permits, hazardous waste handler and generator records and permits, federal, tribal and state government listings of sites identified as priority cleanup sites, and spill reporting records;

(3) CERCLIS records;

(4) Public health records;

(5) Emergency Response Notification System records;

(6) Registries or publicly available lists of engineering controls; and

(7) Registries or publicly available lists of institutional controls, including environmental land use restrictions, applicable to the subject property.

(c) With regard to nearby or adjoining properties, the review of federal, tribal, state, and local government records or databases of government records should include the identification of the following:

(1) Properties for which there are government records of reported releases or threatened releases. Such records or databases containing such records and the associated distances from the subject property for which such information should be searched include the following:

(i) Records of NPL sites or tribal- and state-equivalent sites (one mile);

(ii) RCRA facilities subject to corrective action (one mile);

(iii) Records of federally-registered, or state-permitted or registered, hazardous waste sites identified for investigation or remediation, such as sites enrolled in state and tribal voluntary cleanup programs and tribal- and state-listed brownfields sites (one-half mile);

(iv) Records of leaking underground storage tanks (one-half mile); and

(2) Properties that previously were identified or regulated by a government entity due to environmental concerns at the property. Such records or databases containing such records and the associated distances from the subject property for which such information should be searched include the following:

(i) Records of delisted NPL sites (one-half mile);

(ii) Registries or publicly available lists of engineering controls (one-half mile); and

(iii) Records of former CERCLIS sites with no further remedial action notices (one-half mile).

(3) Properties for which there are records of federally-permitted, tribal-permitted or registered, or state-permitted or registered waste management activities. Such records or data bases that may contain such records include the following:

(i) Records of RCRA small quantity and large quantity generators (adjoining properties);

(ii) Records of federally-permitted, tribal-permitted, or state-permitted (or registered) landfills and solid waste management facilities (one-half mile); and

(iii) Records of registered storage tanks (adjoining property).

(4) A review of additional government records with regard to sites identified under paragraphs (c)(1) through (c)(3) of this section may be necessary in the judgment of the environmental professional for the purpose of achieving the objectives and performance factors of § 312.20(e) and (f).

(d) The search distance from the subject property boundary for reviewing government records or databases of government records listed in paragraph (c) of this section may be modified based upon the professional judgment of the environmental professional. The rationale for such modifications must be documented by the environmental professional. The environmental professional may consider one or more of the following factors in determining an alternate appropriate search distance:

(1) The nature and extent of a release;

(2) Geologic, hydrogeologic, or topographic conditions of the subject property and surrounding environment;

(3) Land use or development densities;

(4) The property type;

(5) Existing or past uses of surrounding properties;

(6) Potential migration pathways (e.g., groundwater flow direction, prevalent wind direction); or

(7) Other relevant factors.

§ 312.27 Visual inspections of the facility and of adjoining properties.

(a) For the purpose of achieving the objectives and performance factors of § 312.20(e) and (f), the inquiry of the environmental professional must include:

(1) A visual on-site inspection of the subject property and facilities and improvements on the subject property,

including a visual inspection of the areas where hazardous substances may be or may have been used, stored, treated, handled, or disposed. Physical limitations to the visual inspection must be noted.

(2) A visual inspection of adjoining properties, from the subject property line, public rights-of-way, or other vantage point (e.g., aerial photography), including a visual inspection of areas where hazardous substances may be or may have been stored, treated, handled or disposed. Physical limitations to the inspection of adjacent properties must be noted.

(b) Persons conducting site characterization and assessments using a grant awarded under CERCLA section 104(k)(2)(B) must include in the inquiries referenced in § 312.27(a) visual inspections of areas where hazardous substances, and may include, as applicable per the terms and conditions of the grant or cooperative agreement, pollutants and contaminants, petroleum and petroleum products, and controlled substances as defined in 21 U.S.C. 802 may be or may have been used, stored, treated, handled or disposed at the subject property and adjoining properties.

(c) Except as noted in this subsection, a visual on-site inspection of the subject property must be conducted. In the unusual circumstance where an on-site visual inspection of the subject property cannot be performed because of physical limitations, remote and inaccessible location, or other inability to obtain access to the property, provided good faith (as defined in § 312.10) efforts have been taken to obtain such access, an on-site inspection will not be required. The mere refusal of a voluntary seller to provide access to the subject property does not constitute an unusual circumstance. In such unusual circumstances, the inquiry of the environmental professional must include:

(1) Visually inspecting the subject property via another method (such as aerial imagery for large properties), or visually inspecting the subject property from the nearest accessible vantage point (such as the property line or public road for small properties);

(2) Documentation of efforts undertaken to obtain access and an explanation of why such efforts were unsuccessful; and

(3) Documentation of other sources of information regarding releases or threatened releases at the subject property that were consulted in accordance with § 312.20(e). Such documentation should include comments by the environmental professional on the significance of the failure to conduct a visual on-site inspection of the subject property with regard to the ability to identify conditions indicative of releases or threatened releases on, at, in, or to the subject property, if any.

§ 312.28 Specialized knowledge or experience on the part of the defendant.

(a) Persons to whom this part is applicable per § 312.1(b) must take into account, their specialized knowledge of the subject property, the area surrounding the subject property, the conditions of adjoining properties, and any other experience relevant to the inquiry, for the purpose of identifying conditions indicative of releases or threatened releases at the subject property, as defined in § 312.1(c).

(b) All appropriate inquiries, as outlined in § 312.20, are not complete unless the results of the inquiries take into account the relevant and applicable specialized knowledge and experience of the persons responsible for undertaking the inquiry (as described in § 312.1(b)).

§ 312.29 The relationship of the purchase price to the value of the property, if the property was not contaminated.

(a) Persons to whom this part is applicable per § 312.1(b) must consider whether the purchase price of the subject property reasonably reflects the fair market value of the property, if the property were not contaminated.

(b) Persons who conclude that the purchase price of the subject property does not reasonably reflect the fair market value of that property, if the property were not contaminated, must consider whether or not the differential in purchase price and fair market value is due to the presence of releases or threatened releases of hazardous substances.

(c) Persons conducting site characterization and assessments with the use of a grant awarded under CERCLA section 104(k)(2)(B) and who know that the purchase price of the subject property does not reasonably reflect the fair market value of that property, if the property were not contaminated, must consider whether or not the differential in purchase price and fair market value is due to the presence of releases or threatened releases of hazardous substances, pollutants, contaminants, petroleum and petroleum products, or controlled substances as defined in 21 U.S.C. 802.

§ 312.30 Commonly known or reasonably ascertainable information about the property.

(a) Throughout the inquiries, persons to whom this part is applicable per § 312.1(b) and environmental professionals conducting the inquiry must take into account commonly known or reasonably ascertainable information within the local community about the subject property and consider such information when seeking to identify conditions indicative of releases or threatened releases, as set forth in § 312.1(c), at the subject property.

(b) Commonly known information may include information obtained by the person to whom this part applies in § 312.1(b) or by the environmental professional about releases or threatened releases at the subject property that is incidental to the information obtained during the inquiry of the environmental professional.

(c) To the extent necessary to achieve the objectives and performance factors of § 312.20(e) and (f), persons to whom this part is applicable per § 312.1(b) and the environmental professional must gather information from varied sources whose input either individually or taken together may provide commonly known or reasonably ascertainable information about the subject property; the environmental professional may refer to one or more of the following sources of information:

(1) Current owners or occupants of neighboring properties or properties adjacent to the subject property;

(2) Local and state government officials who may have knowledge of, or information related to, the subject property;

(3) Others with knowledge of the subject property; and

(4) Other sources of information (e.g., newspapers, Web sites, community organizations, local libraries and historical societies).

§ 312.31 The degree of obviousness of the presence or likely presence of contamination at the property, and the ability to detect the contamination by appropriate investigation.

(a) Persons to whom this part is applicable per § 312.1(b) and environmental professionals conducting an inquiry of a property on behalf of such persons must take into account the information collected under § 312.23 through 312.30 in considering the degree of obviousness of the presence of releases or threatened releases at the subject property.

(b) Persons to whom this part is applicable per § 312.1(b) and

environmental professionals conducting an inquiry of a property on behalf of such persons must take into account the information collected under § 312.23 through 312.30 in considering the ability to detect contamination by appropriate investigation. The inquiry of the environmental professional should include an opinion regarding additional appropriate investigation, if any.

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(30) The terms "territorial sea" and "contiguous zone" shall have the meaning provided in section 1362 of Title 33.

(31) The term "national contingency plan" means the national contingency plan published under section 1321(c) of Title 33 or revised pursuant to section 9605 of this title.

(32) The terms "liable" or "liability" under this subchapter shall be construed to be the standard of liability which obtains under section 1321 of Title 33.

(33) The term "pollutant or contaminant" shall include, but not be limited to, any element, substance, compound, or mixture, including disease-causing agents, which after release into the environment and upon exposure, ingestion, inhalation, or assimilation into any organism, either directly from the environment or indirectly by ingestion through food chains, will or may reasonably be anticipated to cause death, disease, behavioral abnormalities, cancer, genetic mutation, physiological malfunctions (including malfunctions in reproduction) or physical deformations, in such organisms or their offspring; except that the term "pollutant or contaminant" shall not include petroleum, including crude oil or any fraction thereof which is not otherwise specifically listed or designated as a hazardous substance under subparagraphs (A) through (F) of paragraph (14) and shall not include natural gas, liquefied natural gas, or synthetic gas of pipeline quality (or mixtures of natural gas and such synthetic gas).

(34) The term "alternative water supplies" includes, but is not limited to, drinking water and household water supplies.

(35)(A) The term "contractual relationship", for the purpose of section 9607(b)(3) of this title, includes, but is not limited to, land contracts, deeds, easements, leases, or other instruments transferring title or possession, unless the real property on which the facility concerned is located was acquired by the defendant after the disposal or placement of the hazardous substance on, in, or at the facility, and one or more of the circumstances described in clause (i), (ii), or (iii) is also established by the defendant by a preponderance of the evidence:

(i) At the time the defendant acquired the facility the defendant did not know and had no reason to know that any hazardous substance which is the subject of the release or threatened release was disposed of on, in, or at the facility.

(ii) The defendant is a government entity which acquired the facility by escheat, or through any other involuntary transfer or acquisition, or through the exercise of eminent domain authority by purchase or condemnation.

(iii) The defendant acquired the facility by inheritance or bequest.

In addition to establishing the foregoing, the defendant must establish that the defendant has satisfied the requirements of section 9607(b)(3)(a) and (b) of this title, provides full cooperation, assistance, and facility access to the persons that are authorized to conduct response actions at the facility (including the cooperation and access necessary for the installation, integrity, operation, and maintenance of any complete or partial response action at the facility), is in compliance with any land use restrictions established or relied on in connection with the response action at a facility, and does not impede the effectiveness or integrity of any institutional control employed at the facility in connection with a response action.

(B) Reason to know

(i) All appropriate inquiries

To establish that the defendant had no reason to know of the matter described in subparagraph (A)(i), the defendant must demonstrate to a court that—

(I) on or before the date on which the defendant acquired the facility, the defendant carried out all appropriate inquiries, as provided in clauses (ii) and (iv), into the previous ownership and uses of the facility in accordance with generally accepted good commercial and customary standards and practices; and

(II) the defendant took reasonable steps to—

(aa) stop any continuing release;

(bb) prevent any threatened future release; and

(cc) prevent or limit any human, environmental, or natural resource exposure to any previously released hazardous substance.

(ii) Standards and practices

Not later than 2 years after January 11, 2002, the Administrator shall by regulation establish standards and practices for the purpose of satisfying the requirement to carry out all appropriate inquiries under clause (i).

(iii) Criteria

In promulgating regulations that establish the standards and practices referred to in clause (ii), the Administrator shall include each of the following:

(I) The results of an inquiry by an environmental professional.

(II) Interviews with past and present owners, operators, and occupants of the facility for the purpose of gathering information re-

garding the potential for contamination at the facility.

(III) Reviews of historical sources, such as chain of title documents, aerial photographs, building department records, and land use records, to determine previous uses and occupancies of the real property since the property was first developed.

(IV) Searches for recorded environmental cleanup liens against the facility that are filed under Federal, State, or local law.

(V) Reviews of Federal, State, and local government records, waste disposal records, underground storage tank records, and hazardous waste handling, generation, treatment, disposal, and spill records, concerning contamination at or near the facility.

(VI) Visual inspections of the facility and of adjoining properties.

(VII) Specialized knowledge or experience on the part of the defendant.

(VIII) The relationship of the purchase price to the value of the property, if the property was not contaminated.

(IX) Commonly known or reasonably ascertainable information about the property.

(X) The degree of obviousness of the presence or likely presence of contamination at the property, and the ability to detect the contamination by appropriate investigation.

(iv) Interim standards and practices

(I) Property purchased before May 31, 1997

With respect to property purchased before May 31, 1997, in making a determination with respect to a defendant described in clause (i), a court shall take into account—

(aa) any specialized knowledge or experience on the part of the defendant;

(bb) the relationship of the purchase price to the value of the property, if the property was not contaminated;

(cc) commonly known or reasonably ascertainable information about the property;

(dd) the obviousness of the presence or likely presence of contamination at the property; and

(ee) the ability of the defendant to detect the contamination by appropriate inspection.

(II) Property purchased on or after May 31, 1997

With respect to property purchased on or after May 31, 1997, and until the Administrator promulgates the regulations described in clause (ii), the procedures of the American Society for Testing and Materials, including the document known as 'Standard E1527-97', entitled 'Standard Practice for Environmental Site Assessment: Phase 1 Environmental Site Assessment Process', shall satisfy the requirements in clause (i).

(v) Site inspection and title search

In the case of property for residential use or other similar use purchased by a nongovernmental or noncommercial entity, a facility inspection and title search that reveal no basis for further investigation shall be considered to satisfy the requirements of this subparagraph.

(C) Nothing in this paragraph or in section 9607(b)(3) of this title shall diminish the liability of any previous owner or operator of such facility who would otherwise be liable under this chapter. Notwithstanding this paragraph, if the defendant obtained actual knowledge of the release or threatened release of a hazardous substance at such facility when the defendant owned the real property and then subsequently transferred ownership of the property to another person without disclosing such knowledge, such defendant shall be treated as liable under section 9607(a)(1) of this title and no defense under section 9607(b)(3) of this title shall be available to such defendant.

(D) Nothing in this paragraph shall affect the liability under this chapter of a defendant who, by any act or omission, caused or contributed to the release or threatened release of a hazardous substance which is the subject of the action relating to the facility.

(36) The term "Indian tribe" means any Indian tribe, band, nation, or other organized group or community, including any Alaska Native village but not including any Alaska Native regional or village corporation, which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians.

(37)(A) The term "service station dealer" means any person—

(i) who owns or operates a motor vehicle service station, filling station, garage, or similar retail establishment engaged in the business of selling, repairing, or servicing motor vehicles, where a significant percentage of the gross revenue of the establishment is derived from the

fueling, repairing, or servicing of motor vehicles, and

(ii) who accepts for collection, accumulation, and delivery to an oil recycling facility, recycled oil that (I) has been removed from the engine of a light duty motor vehicle or household appliances by the owner of such vehicle or appliances, and (II) is presented, by such owner, to such person for collection, accumulation, and delivery to an oil recycling facility.

(B) For purposes of section 9614(c) of this title, the term "service station dealer" shall, notwithstanding the provisions of subparagraph (A), include any government agency that establishes a facility solely for the purpose of accepting recycled oil that satisfies the criteria set forth in subclauses (I) and (II) of subparagraph (A)(ii), and, with respect to recycled oil that satisfies the criteria set forth in subclauses (I) and (II), owners or operators of refuse collection services who are compelled by State law to collect, accumulate, and deliver such oil to an oil recycling facility.

(C) The President shall promulgate regulations regarding the determination of what constitutes a significant percentage of the gross revenues of an establishment for purposes of this paragraph.

(38) The term "incineration vessel" means any vessel which carries hazardous substances for the purpose of incineration of such substances, so long as such substances or residues of such substances are on board.

(39) Brownfield site

(A) In general

The term "brownfield site" means real property, the expansion, redevelopment, or reuse of which may be complicated by the presence or potential presence of a hazardous substance, pollutant, or contaminant.

(B) Exclusions

The term "brownfield site" does not include—

(i) a facility that is the subject of a planned or ongoing removal action under this subchapter;

(ii) a facility that is listed on the National Priorities List or is proposed for listing;

(iii) a facility that is the subject of a unilateral administrative order, a court order, an administrative order on consent or judicial consent decree that has been issued to or entered into by the parties under this chapter;

(iv) a facility that is the subject of a unilateral administrative order, a court order, an administrative order on consent or judicial consent decree that has been issued to or entered into by the parties, or a facility to which a permit has been issued by the United States or an authorized State under the Solid Waste Disposal Act (42 U.S.C. 6901 et seq.), the Federal Water Pollution Control Act (33 U.S.C. 1321), the Toxic Substances Control Act (15 U.S.C. 2601 et seq.), or the Safe Drinking Water Act (42 U.S.C. 300f et seq.);

(v) a facility that—

(I) is subject to corrective action under section 3004(u) or 3008(h) of the Solid Waste Disposal Act (42 U.S.C. 6924(u), 6928(h)); and

(II) to which a corrective action permit or order has been issued or modified to require the implementation of corrective measures;

(vi) a land disposal unit with respect to which—

(I) a closure notification under subtitle C of the Solid Waste Disposal Act (42 U.S.C. 6921 et seq.) has been submitted; and

(II) closure requirements have been specified in a closure plan or permit;

(vii) a facility that is subject to the jurisdiction, custody, or control of a department, agency, or instrumentality of the United States, except for land held in trust by the United States for an Indian tribe;

(viii) a portion of a facility—

(I) at which there has been a release of polychlorinated biphenyls; and

(II) that is subject to remediation under the Toxic Substances Control Act (15 U.S.C. 2601 et seq.); or

(ix) a portion of a facility, for which portion, assistance for response activity has been obtained under subtitle I of the Solid Waste Disposal Act (42 U.S.C. 6991 et seq.) from the Leaking Underground Storage Tank Trust Fund established under section 9508 of Title 26.

(C) Site-by-site determinations

Notwithstanding subparagraph (B) and on a site-by-site basis, the President may authorize financial assistance under section 9604(k) of this title to an eligible entity at a site included in clause (i), (iv), (v), (vi), (viii), or (ix) of subparagraph (B) if the President finds that financial assistance will protect human health and the environment, and either promote economic development or enable the creation of, preservation of, or addition to parks, greenways, undeveloped property, other recreational property, or other property used for nonprofit purposes.

(D) Additional areas

For the purposes of section 9604(k) of this title, the term "brownfield site" includes a site that—

(i) meets the definition of "brownfield site" under subparagraphs (A) through (C); and

(ii)(I) is contaminated by a controlled substance (as defined in section 802 of Title 21);

(II)(aa) is contaminated by petroleum or a petroleum product excluded from the definition of "hazardous substance" under this section; and

(bb) is a site determined by the Administrator or the State, as appropriate, to be—

(AA) of relatively low risk, as compared with other petroleum-only sites in the State; and

(BB) a site for which there is no viable responsible party and which will be assessed, investigated, or cleaned up by a person that is not potentially liable for cleaning up the site; and

(cc) is not subject to any order issued under section 6991b(h) of this title; or

(III) is mine-scarred land.

(40) Bona fide prospective purchaser

The term "bona fide prospective purchaser" means a person (or a tenant of a person) that acquires ownership of a facility after the date of the enactment of this paragraph and that establishes each of the following by a preponderance of the evidence:

(A) Disposal prior to acquisition

All disposal of hazardous substances at the facility occurred before the person acquired the facility.

(B) Inquiries

(i) In general

The person made all appropriate inquiries into the previous ownership and uses of the facility in accordance with generally accepted good commercial and customary standards and practices in accordance with clauses (ii) and (iii).

(ii) Standards and practices

The standards and practices referred to in clauses (ii) and (iv) of paragraph (35)(B) of this section shall be considered to satisfy the requirements of this subparagraph.

(iii) Residential use

In the case of property in residential or other similar use at the time of purchase by a nongovernmental or noncommercial entity, a facility inspection and title search that reveal no basis for further investigation shall be considered to satisfy the requirements of this subparagraph.

(C) Notices

The person provides all legally required notices with respect to the discovery or release of any hazardous substances at the facility.

(D) Care

The person exercises appropriate care with respect to hazardous substances found at the facility by taking reasonable steps to—

(i) stop any continuing release;

(ii) prevent any threatened future release; and

(iii) prevent or limit human, environmental, or natural resource exposure to any previously released hazardous substance.

(E) Cooperation, assistance, and access

The person provides full cooperation, assistance, and access to persons that are authorized to conduct response actions or natural resource restoration at a vessel or facility (including the cooperation and access necessary for the installation, integrity, operation, and maintenance of any complete or partial response actions or natural resource restoration at the vessel or facility).

(F) Institutional control

The person—

(i) is in compliance with any land use restrictions established or relied on in connection with the response action at a vessel or facility; and

(ii) does not impede the effectiveness or integrity of any institutional control employed at the vessel or facility in connection with a response action.

(G) Requests; subpoenas

The person complies with any request for information or administrative subpoena issued by the President under this chapter.

(H) No affiliation

The person is not—

(i) potentially liable, or affiliated with any other person that is potentially liable, for response costs at a facility through—

(I) any direct or indirect familial relationship; or

(II) any contractual, corporate, or financial relationship (other than a contractual, corporate, or financial relationship that is created by the instruments by which title to the facility is conveyed or financed or by a contract for the sale of goods or services); or

(ii) the result of a reorganization of a business entity that was potentially liable.

(41) Eligible response site

(A) In general

The term "eligible response site" means a site that meets the definition of a brownfield site in subparagraphs (A) and (B) of paragraph (39) of this section, as modified by subparagraphs (B) and (C) of this paragraph.

(B) Inclusions

The term "eligible response site" includes—

(i) notwithstanding paragraph (39)(B)(ix) of this section, a portion of a facility, for which portion assistance for response activity has been obtained under subtitle I of the Solid Waste Disposal Act (42 U.S.C. 6991 et seq.) from the Leaking Underground Storage Tank Trust Fund established under section 9508 of Title 26; or

(ii) a site for which, notwithstanding the exclusions provided in subparagraph (C) or paragraph (39)(B) of this section, the President determines, on a site-by-site basis and after consultation with the State, that limitations on enforcement under section 9628 of this title at sites specified in clause (iv), (v), (vi) or (viii) of paragraph (39)(B) of this section would be appropriate and will—

(I) protect human health and the environment; and

(II) promote economic development or facilitate the creation of, preservation of, or addition to a park, a greenway, undeveloped property, recreational property, or other property used for nonprofit purposes.

(C) Exclusions

The term "eligible response site" does not include—

(i) a facility for which the President—

(I) conducts or has conducted a preliminary assessment or site inspection; and

(II) after consultation with the State, determines or has determined that the site obtains a preliminary score sufficient for possible listing on the National Priorities List, or that the site otherwise qualifies for listing on the National Priorities List; unless the President has made a determination that no further Federal action will be taken; or

(ii) facilities that the President determines warrant particular consideration as identified by regulation, such as sites posing a threat to a sole-source drinking water aquifer or a sensitive ecosystem.

(Pub.L. 96–510, Title I, § 101, Dec. 11, 1980, 94 Stat. 2767; Pub.L. 96–561, Title II, § 238(b), Dec. 22, 1980, 94 Stat. 3300; Pub.L. 99–499, Title I, §§ 101, 114(b), 127(a), Title V, § 517(c)(2), Oct. 17, 1986, 100 Stat. 1615, 1652, 1692, 1774; Pub.L. 100–707, Title I, § 109(v), Nov. 23, 1988, 102 Stat. 4710; Pub.L. 103–429, § 7(e)(1), Oct. 31, 1994, 108 Stat. 4390; Pub.L. 104–208, Div. A, Title I, § 101(a) [Title II, § 211(b)], Title II, § 2502(b), Sept. 30, 1996, 110 Stat. 3009–41, 3009–464; Pub.L. 104–287, § 6(j)(1), Oct. 11, 1996, 110 Stat. 3400; Pub.L. 106–74, Title IV, § 427, Oct. 20, 1999, 113 Stat. 1095; Pub.L. 107–118, Title II, §§ 211(a), 222(a), 223, 231(a), Jan. 11, 2002, 115 Stat. 2360, 2370, 2372, 2375.)

[1] So in original. Probably should be "or".

[2] So in original. Probably should be followed by a closing parenthesis.

[3] So in original. Probably should be "mean".

[4] So in original.

HISTORICAL AND STATUTORY NOTES

References in Text

"This subchapter", referred to in text, originally read "this title", meaning Title I of Pub.L. 96–510, Dec. 11, 1980, 94 Stat. 2767, as amended, known as the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, which is principally classified to this subchapter [42 U.S.C.A. § 9601 et seq.]. See Tables for complete classification.

This chapter, referred to in pars. (5), (13), (20)(D), (G), (35)(C), (D), (39)(B)(iii), and (40)(G), originally read "this Act", meaning Pub.L. 96–510, Dec. 11, 1980, 94 Stat. 2767, as amended, known as the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, which is classified principally to this chapter [42 U.S.C.A. § 9601 et seq.]; See Tables for complete classification.

The Safe Drinking Water Act, referred to in pars. (7), (10), and (39)(B)(iv) is Pub.L. 93–523, Dec. 16, 1974, 88 Stat. 1660, as amended, which is classified principally to subchapter XII of chapter 6A of this title [42 U.S.C.A. § 300f et seq.]. Part C of the Safe Drinking Water Act is classified generally to part C of subchapter XII of chapter 6A of this title [42 U.S.C.A. § 300h et seq.]. See Tables for complete classification.

The Magnuson-Stevens Fishery Conservation and Management Act, referred to in pars. (8) and (16), is Pub.L. 94–265, Apr. 13, 1976, 90 Stat. 331, as amended, which is classified principally to chapter 38 (section 1801 et seq.) of Title 16, Conservation. The fishery conservation zone established by this Act, referred to in par. (16) was established by section 101 of this Act (16 U.S.C. 1811), which as amended generally by Pub.L. 99–659, title I, § 101(b), Nov. 14, 1986, 100 Stat. 3706, relating to U.S. sovereign rights and fishery

Sent via E-Mail & Regular Mail

July 27, 2009

Mr. Thomas Edgar
Brownfield Developers, Inc.
100 Misty Lane
Parsippany, NJ 07054

Re: *Proposal for a Phase I ESA to Meet Innocent Purchaser Defense*
Former Auto Dealership
67 Main Avenue
Parsippany, NJ
EWMA Proposal No. 999999

Dear Mr. Edgar:

We are pleased to submit our proposal for the Phase I Environmental Site Assessment (Phase I ESA) to be performed at the above-referenced property (Property) by Environmental Waste Management Associates, LLC (EWMA) in accordance with the ASTM standard practice for environmental site assessments (Designation: E 1527-05), including the All Appropriate Inquiry (AAI) standards and the Federal "innocent purchaser" land owner defense requirements. If it is necessary for the report to meet the New Jersey "innocent purchaser" land owner defense requirements, then please select the Preliminary Assessment (PA) Requirements option provided above the signatory line at the end of this proposal. The findings of the Phase I ESA will be presented in the form of a written report that will be available in final form within three (3) to four (4) weeks after the site visit. If an expedited turnaround time is required, additional charges may be incurred.

If you have a survey depicting the property boundaries, we request that you provide it to us prior to our site visit. If you have any conceptual plans for site redevelopment, please let us know, so our recommendations can be tailored to your specific needs.

Our estimate for the work to be performed at the above-referenced facility is as follows:

I. Phase I Environmental Site Assessment:

The goal of the Phase I ESA process is to identify recognized environmental condition(s). The term recognized environmental condition means the presence or likely presence of any hazardous substance or petroleum products on the Property under conditions that indicate an existing release, a past release, or a material threat of a release of any hazardous substances or petroleum products into structures on the Property or into the ground, the ground water, or surface water of the Property. The term includes hazardous substances or petroleum products even under conditions in compliance with laws. The term is not intended to include de minimus conditions that generally do not present a material risk of harm to

public health or the environment and that generally would not be the subject of an enforcement action if brought to the attention of appropriate governmental agencies.

EWMA's Phase I ESA Report will be based on information collected during a review of relevant environmental and historical data, a site inspection, and interviews with knowledgeable parties. EWMA's Phase I ESA will be conducted according to the Standard Practice for Phase I Environmental Site Assessments, ASTM Designation: E 1527-05.

ASTM Designation 1527-05 defines good commercial and customary practice in the United States for conducting an environmental site assessment of a parcel of commercial real estate with respect to the range of contaminants within the scope of the federal Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) (42 U.S.C. 9601) and petroleum products. As such, this practice is intended to permit a user to satisfy one of the requirements to qualify for the innocent landowner, contiguous property owner, or bona fide prospective purchaser limitations on CERCLA liability: that is, the practice that constitutes "all appropriate inquiry into the previous ownership and uses of the property consistent with good commercial or customary practice" as defined at 42 U.S.C. 9601(35)(B). Controlled substances are not included within the scope of this standard. Additionally, an evaluation of business environmental risk associated with a parcel of commercial real estate may necessitate investigation beyond that identified in this practice.

Note: According to ASTM Designation: E 1527-05, specific information must be obtained regarding the Property from the owner, the site manager, and the occupants of the Property. Additionally, if you are aware of any specialized knowledge or experience that is material to the identification of potential environmental concerns in connection with the property, it is your responsibility to provide EWMA with this information prior to the site visit. Informational gaps are required to be detailed and evaluated within the report as they relate to the environmental status of the Property.

a.) Environmental Records Review:

EWMA will obtain and review the latest information from federal, state and local agencies concerning the Property and sites with potential environmental contamination within the approximate minimum search distance specified in ASTM E 1527-05. Specifically, EWMA will review information from the following sources: The Federal National Priorities List (NPL); The Federal Comprehensive Environmental Response, Compensation and Liability Information System (CERCLIS); The Federal CERCLIS No Further Remedial Action Planned (CERCLIS-NFRAP); The Federal Resource Conservation and Recovery Act Corrective Action Report facilities list (RCRA-CORRACTS); The Federal RCRA non-CORRACTS Treatment, Storage, and Disposal (TSD) facilities list; The Federal RCRA Generators list; The Federal Emergency Response Notification System (ERNS) list; Facility Index System (FINDS); nuclear facilities; open dumps; State Registered Underground Storage Tanks (UST); State list of Leaking Underground Storage Tanks (LUST); The New Jersey Solid Waste Landfill (SWL) Report; The New Jersey Comprehensive Sites List Report; and The New Jersey Pollution Discharge Elimination System Report (NJPDES).

EWMA will review a current United States Geological Survey (USGS) 7.5 Minute Topographic Map showing the area on which the Property is located. EWMA will review USGS and/or State Geological

Survey surficial geology maps, ground water maps, bedrock geology maps and Soil Conservation Service maps (if readily available). EWMA will review historical aerial photographs and property tax files, provided that they are readily available from local government agencies. Additionally, EWMA will purchase and review Sanborn Fire Insurance Maps. In addition, if aerial photographs are not readily available from public sources, if necessary EWMA will purchase these materials at an additional cost.

EWMA will check additional environmental record sources for supplementary information from one or more of the following local agencies: Department of Health/Environmental Division; Fire Department; Planning Department; Building Department/Inspection Department; Local/Regional Pollution Control Agency; Local/Regional Water Quality Agency; and Local Electric Utility Companies.

If historical information suggests that the property was operated as an industrial establishment during any time period after December 31, 1983, EWMA will investigate the status of the property with regard to the New Jersey Industrial Site Recovery Act (ISRA), NJSA 13:K-6 et seq. In addition, if physical evidence suggests environmental activity on adjacent properties, EWMA will attempt to determine if any of those properties have been investigated and/or remediated under the oversight of any of the State of New Jersey Department of Environmental Protection's (NJDEP) site remediation programs. At this time NJDEP does not maintain a comprehensive list that would provide this information. Therefore, the only source for information pertaining to adjacent properties may be the aforementioned local government agencies.

b.) Site Inspection:

EWMA will conduct one (1) site inspection of the Property. Prior to the site visit, the client must provide EWMA with a clear and accurate description of the Property. During the inspection, EWMA will visually and physically observe the Property and any structure(s) located on the Property. The site inspection will include the periphery of the Property, as well as the periphery of all structures on the Property, and accessible areas inside all structures (lobbies, hallways, utility rooms, recreation areas, maintenance and repair areas, boiler rooms and a representative sample of occupant spaces). EWMA will identify the following uses and conditions at the Property to the extent that they may be visually and physically observed during the visit.

(1.) current use(s) of the Property
(2.) past use(s) of the Property
(3.) current operations on adjoining properties
(4.) condition of adjoining properties
(5.) current/past uses in the surrounding area
(6.) topographical conditions
(7.) general description of structures
(8.) roads
(9.) potable water supply
(10.) sewage disposal system
(11.) hazardous substances used on-site
(12.) storage tanks
(13.) odors
(14.) pits, ponds, or lagoons
(15.) drums
(16.) hazardous substance containers
(17.) unidentified substance containers
(18.) polychlorinated biphenyls
(19.) heating/cooling systems
(20.) stains or corrosion
(21.) drains or sumps
(22.) stained soil or pavement
(23.) stressed vegetation
(24.) solid waste

c.) ASTM Non-Scope Issues:

There may be evidence of suspected potential environmental hazards or conditions at the property that are beyond the scope of the standard ASTM site assessment practice (non-scope considerations). Non-scope issues, if present, may be business environmental risks. The term "business environmental risk" means a risk that can have a material environmental or environmentally-driven impact on the business associated with the current or planned use of a parcel of commercial real estate, not necessarily limited to those environmental issues required to be investigated according to ASTM Designation: E 1527-05.

Non-scope issues include such items as: (1) asbestos; (2) radon; (3) lead paint; (4) lead in drinking water; (5) wetlands; (6) regulatory compliance; (7) cultural and historical resources; (8) industrial hygiene; (9) health & safety; (10) ecological resources; (11) endangered species; (12) indoor air quality; and (13) high voltage power lines. The identification of these issues requires additional assessment, or the implementation of a site-specific sampling investigation. At the client's request, EWMA will provide a separate cost proposal to conduct an assessment of these non-scope issues.

d.) Interviews:

EWMA may conduct interviews with current or past owners, occupants, neighbors, property managers, or government officials to obtain information regarding the site history and existing environmental conditions. Persons or agencies with relevant information about the Property may be contacted in writing, via telephone or interviewed in person. EWMA will identify the source of any relevant information that is included in the final written report.

e.) Evaluation and Report Preparation:

The final Phase I ESA report will include documentation to support the findings, opinions, and conclusions. All sources, including those that revealed no findings, will be documented to facilitate reconstruction of the research at a later date. All evidence that was used to identify recognized environmental conditions will be described in detail and photographic documentation will be provided. EWMA will state the findings, opinions and conclusions and either make recommendations for specific additional actions (such as liability/risk evaluations, Phase II testing, remediation techniques, etc.) or state that no further action is warranted.

II. Estimated Project Costs:

The Phase I Environmental Site Assessment, in accordance with ASTM standards, and the Federal "innocent purchaser" land owner defense, research materials that must be purchased by EWMA, and report preparation will be billed as one **Lump Sum of $2,750.00**. * Please return the attached Phase I ESA questionnaire with authorization to proceed.

* **Note:** If it is necessary for the report to meet the New Jersey "innocent purchaser" land owner defense, then please select the option provided above the signatory line at the end of this proposal. An additional charge of $2,000.00 will apply for the report to include all elements of the Preliminary Assessment (PA) Requirements pursuant to the NJDEP *Technical Requirements for Site Remediation*

(TRSR) NJAC 7:26E-1.1 et seq. The additional PA charge is based on a standard inspection with a limited number of areas of environmental concern (AOCs). If numerous AOCs requiring documentation are discovered, and/or if the inspection of the Property requires more than one (1) ten (10)-hour day to complete, additional professional services will be incurred. Any additional necessary professional services will be covered within a change order proposal, which will be prepared following the site inspection.

* **Note:** Per the ASTM and All Appropriate Inquiry (AAI) standards, it is the client's responsibility to perform a Lien Search. If requested, a Lien Search of the Property can be provided for an additional lump sum of $230.00. The turnaround time is based upon the date of the Phase I investigation site visit.

III. Terms and Conditions:

The reports developed by EWMA in conjunction with the outlined scope of work, including text, recommendations, conclusions, analytical results, site plans, and data reports are for the sole use of the client. Distribution to, use or reliance by third parties is not permitted without the prior written consent of EWMA. Additionally, per the ASTM standard, the report will be valid for 180 days.

Due to the variability of local procedures, EWMA has not included in its cost estimate any miscellaneous administrative fees or charges required by local or state governmental agencies. If applicable, these fees will be charged directly to the client.

In the event any of EWMA's employees are required to testify as a fact witness in a litigation, the client will be responsible for payment to EWMA for the employee's preparation time, travel time, deposition time and trial time.

This proposal is valid for a period of sixty (60) days from the date it is written. After a period of sixty (60) days, EWMA will not be held to the terms and prices quoted herein. Additionally, once this proposal is accepted by the client, the scope of work outlined in this proposal is subject to periodic rate increases that may be implemented by EWMA. Such rate increases will be effective on the implementation date of the rate increases.

EWMA, at its discretion, may require adequate proof of financial surety. All invoices are due and payable in full immediately upon presentation. Failure to pay may result is suspension of the work until all outstanding balances are paid in full. Any payment due which is not received within 30 days will be subject to a service charge of 1.5% monthly until paid. If collection proceedings are necessary, client shall be responsible for the costs of collection.

The work performed pursuant to this proposal will be undertaken in a professional manner in accordance with prevailing industry standards. EWMA shall not be liable for direct, indirect, incidental, special or consequential damages or liability caused by pollutants remaining on the property or adjacent property due to acts or omissions by EWMA or its subcontractors unless such damages or liabilities are caused by EWMA's or its subcontractors' failure to act in a professional manner in accord with prevailing industry standards. EWMA's liability for such failure to act shall not exceed the value of this contract measured

by the fees paid by client or due under this contract and fees previously paid or due for work performed at the property or in connection therewith.

This Agreement and the right and duties of the parties, shall be governed by and construed in accordance with the laws of the State of New Jersey. The parties consent to the jurisdiction of the State courts of the State of New Jersey, and agree that venue shall be proper in any such courts to the exclusion of courts in any other State or Country. The parties further agree that such designated forum is proper and convenient. The parties hereby unconditionally and irrevocably waive any and all right to trial by jury in any suit, counterclaim, or cross-claim arising in connection with, out of, or otherwise relating to this Agreement.

We hope that this proposal will meet your needs and look forward to working with you on this project to a satisfactory completion. We trust that you find this proposal acceptable and indicate so by signing in the space provided below. In addition, EWMA requires a retainer in the amount of $600.00, to be returned with the signed proposal prior to the initiation of work. This retainer will be carried throughout the course of the work and will be applied to the final invoice. Full payment of all invoices may be required prior to submission of a final report.

If you have any questions or need additional information, please contact me at our Parsippany office.

Very truly yours,
EWMA

Daniele Cervino, Senior Vice President Sales

Please Select If Necessary: ____ PA Requirements for NJ Innocent Purchaser ($2,500.00)
____ Lien Search ($230.00)

ACKNOWLEDGED AND ACCEPTED:

By: _____ Dated: _____

Note: Please return the attached Phase I ESA Questionnaire with the authorization to proceed.

S:\Salesmkt\Sample Reports and Proposals\Sample Phase 1 ESA w Optional NJ Innocent Purchaser.doc

Environmental Services Agreement For Guaranteed Fixed-Price Cleanup

By and Between

Environmental Waste Management Associates, LLC
100 Misty Lane
P.O. Box 5430
Parsippany, New Jersey 07054

-and-

_____

Dated: _____,
EWMA Proposal No. _____

TABLE OF CONTENTS

SPECIMEN

ENVIRONMENTAL SERVICES AGREEMENT FOR GUARANTEED FIXED-PRICE CLEANUP

This Agreement, effective this ___ day of _____ 2002, by and between

Environmental Waste Management Associates, LLC
100 Misty Lane
P.O. Box 5430
Parsippany, New Jersey 07054 ("EWMA")

-and-

(Customer)

WHEREAS, EWMA is in the business of providing environmental services, including analysis and remediation of hazardous substances and wastes, surface and subsurface investigations; environmental engineering; environmental consulting and design; and emergency services reasonably required to mitigate oil and hazardous substances released into the environment; and

WHEREAS, Customer owns real estate described in Section 1.16 (herein referred to as the "Project Site"); and

WHEREAS, the Customer desires to engage EWMA to perform the environmental services set forth in this Environmental Services Agreement for Guaranteed Fixed-Price Cleanup (herein referred to as the "Agreement") and EWMA desires to perform such services in accordance with the terms and conditions of this Agreement; and

WHEREAS, the Customer seeks to transfer and assign responsibility it may have under Environmental Laws to EWMA for the remediation of specified Pre-Existing Pollution Conditions (described in Appendices A and B hereto) at the Project Site as well as specified Pre-Existing Pollution Conditions (also described in Appendix A hereto) emanating from the Project Site, if any, and from compliance liability it may have for these Pollution Conditions under Environmental Laws.

NOW, THEREFORE, for valuable consideration and intending to be legally bound, the parties agree as follows:

ARTICLE I. DEFINITIONS

1.1 "Acceptable No Further Action Letter" means the issuance of a No Further Action Letter pursuant to Environmental Laws, in accordance with the terms hereof, which may be subject to Engineering and Institutional Controls as those and the following terms are defined herein, including Unlimited Duration CEAs, and Fixed Duration CEAs with

Voluntary Additional Work or compliance monitoring, but not Interim CEAs or Fixed Duration CEAs with Mandatory Additional Work other than compliance monitoring.

1.2 "Applicable Law" means each and every federal, state, local municipal or other governmental statute, law, ordinance, rule, regulation or legally enforceable policy, including, without limitation, Environmental Laws.

1.3 "BSCRA" means the Brownfield and Contaminated Site Remediation Act, N.J.S.A. 58:10B-1 et seq., and the regulations promulgated pursuant thereto.

1.4 "CEA" means Classification Exception Area, Well Restriction Area or both, as those terms are defined in the BCSRA or WPCA.

1.5 "Engineering Controls" shall have the meaning defined in the BCSRA and ISRA, namely, any mechanism to contain or stabilize contamination or ensure the effectiveness of a remedial action. Engineering Controls may include, without limitation, caps, covers, dikes, trenches, leachate collection systems, signs, fences and physical access controls.

1.6 "Environmental Laws" means all federal, state and local laws, ordinances, rules and regulations governing Hazardous Substances, including, without limitation BCSRA, ISRA, WPCA, and the groundwater quality standards.

1.7 "Fixed Duration CEA with Mandatory Additional Work" means a CEA with a specified time for establishing compliance with the groundwater quality standards, which requires further investigation or remediation at the expiration of the specified time for establishing compliance. Mandatory additional work does not include biennial compliance monitoring.

1.8 "Fixed Duration CEA with Voluntary Additional Work" means a CEA with a specified time for establishing compliance with the groundwater quality standards, but which does not require any further investigation or remediation at the expiration of the specified time for establishing compliance, instead giving the party responsible for compliance the option to enter the voluntary cleanup program to do whatever investigation and remediation is required to demonstrate that the groundwater meets the groundwater quality standards.

1.9 "Groundwater quality standards" shall have the meaning defined in N.J.A.C. 7:9-6.1 et seq.

1.10 "Hazardous Substances" means any and all elements, compounds, substances, materials or wastes defined as hazardous or toxic, or as a pollutant or contaminant, in any of the Applicable Laws.

1.11 "Hazardous Substances Condition" means any discharge, release, emission, leak, spill or migration of Hazardous Substances, including any and all sources of such a discharge, release, emission, leak, spill or migration of Hazardous Substances.

1.12 "Interim CEA" means a CEA issued on a temporary basis where the party performing the investigation and remediation has not yet had a RAW approved. The Interim CEA remains in place at least until the RAW is approved.

1.13 "Institutional Controls" shall have the meaning defined in the BCSRA, ISRA, and WPCA, namely, a mechanism used to limit human activities at or near a contaminated site, or to ensure the effectiveness of the remedial action over time, when contaminants remain at a contaminated site in levels or concentration above the applicable remediation standard that would allow unrestricted use of that property. Institutional Controls may include, without limitation, structure, land, and natural resources use restriction, deed notices, and CEAs.

1.14 "ISRA" means the Industrial Site Recovery Act, N.J.S.A. 13:1K-6 et seq., and the regulations promulgated pursuant thereto.

1.15 "ISRA Compliance" means the issuance of a No Further Action Letter pursuant to ISRA, in accordance with the terms hereof, which may be subject to Engineering and Institutional Controls as defined herein, including Unlimited Duration CEAs and Fixed Duration CEAs with Voluntary Additional Work, but not Interim CEAs or Fixed Duration CEAs with Mandatory Additional Work.

1.16 "Limited Restricted Use Remedial Action" shall have the meaning defined in the BCSRA, namely, any remedial action that requires the continued use of Institutional Controls but does not require the use of an Engineering Control.

1.17 "NJDEP" means the New Jersey Department of Environmental Protection.

1.18 "No Further Action Letter" means a letter issued by the NJDEP indicating that no further investigation or remediation is required to comply with Environmental Laws.

1.19 "Project Site" means **Enter Property Description Here**.

1.20 "Pre-Existing Pollution Conditions" means the presence, migration, discharge, dispersal, release or escape of any Pollutants (as defined in the Cleanup Cost Cap/Pollution Legal Liability Select policy) on, under or emanating from the Project Site, in all cases provided that such conditions are: (i) not naturally present conditions; (ii) present above background levels for a constituent naturally occurring in the environment at the Project Site; and (c) in existence at the time this Agreement is executed.

1.21 "Public Authority" includes the United States Environmental Protection Agency, the New Jersey Department of Environmental Protection ("NJDEP"), and any other state, local or regional agency which has jurisdiction or authority under Applicable Law over any Hazardous Substances Condition.

1.22 "RAW" means Remedial Action Workplan, as defined in Environmental Laws, including NJDEP Technical Requirements for Site Remediation, N.J.A.C. 7:26E.

1.23 "Unlimited Duration CEA" is a CEA used when NJDEP closes a case by approving a CEA with no time limit and no mandatory investigation or remediation, other than biennial compliance monitoring, despite the fact that groundwater does not meet groundwater quality standards: the NJDEP indicates in the letter that the party responsible for compliance could remove the CEA by entering the voluntary cleanup program and doing whatever investigation and remediation are required to demonstrate that the groundwater meets the groundwater quality standards.

1.24 "Unrestricted Use Remedial Action" shall have the meaning defined in the BCSRA, namely, any remedial action that does not require the continued use of Engineering Controls or Institutional Controls in order to meet the established health risk or environmental standards.

1.25 "Work" means the activities described in Appendix A.

1.26 "WPCA" means the Water Pollution Control Act, N.J.S.A. 58:10A-1 et seq., and the regulations promulgated pursuant thereto.

ARTICLE II. EWMA'S RESPONSIBILITIES AND WARRANTIES

2.1 EWMA will provide all supervision, labor, materials, tools and equipment necessary for the performance and completion of the Work, unless otherwise specified herein or modified by written agreement of the parties.

2.2 Customer hereby transfers and assigns to EWMA, and EWMA hereby agrees to accept and assume, subject to the terms of this Agreement: (1) full responsibility for the performance of the Work, including remediation of all specified Pre-Existing Pollution Conditions (described in Appendix A hereto) and to obtain an Acceptable No Further Action Letter for such conditions; and (2) all liability for losses or expenses arising out of the specified Pre-Existing Pollution Conditions or arising out of the Work, as limited by the CCC/PLL Policy described in Article V, Section 5.4.

2.3 EWMA shall be responsible for the payment of all taxes covering the services to be performed, including without limitation, the payment of all applicable taxes covering its employees. To the extent that EWMA shall be responsible for the collection or payment of any taxes, including without limitation, such sales, use or similar tax, such tax is deemed to be included in EWMA's contract price.

2.4 EWMA shall properly maintain, as required by Applicable Law, necessary safeguards for the protection of the general public, EWMA's employees and subcontractors for the performance of EWMA's activities as described herein.

2.5 EWMA shall keep such records as may be necessary to reflect in reasonable detail: (1) costs and expenses incurred by EWMA hereunder; (2) the Work performed at the Project Site, including, when applicable, all testing, sampling, investigatory, remediation, transporting or disposal services performed or subcontracted by EWMA and

documentation of proper chain of custody of all samples and photographs, if any, pursuant to reasonable standards of chain of custody. All such records will be provided to Customer upon its request or as required by Applicable Laws.

2.6 EWMA shall provide insurance for the Work as provided in Article V hereof.

2.7 To the extent reasonably possible, all actions taken by EWMA pursuant to this Contract shall be accomplished without unreasonable interference with, or inconvenience to, the ongoing operations at the Project Site.

2.8 EWMA shall prepare and maintain a complete record of any material transported from the Project Site, including: (1) a waste manifest for all Hazardous Substances for which a waste manifest is required by Applicable Laws and (2) an Origin and Destruction document for all Hazardous Substances for which a waste manifest is not required by Applicable Laws. EWMA shall utilize the Customer's EPA identification number where applicable and Customer shall cooperate with EWMA to obtain, and if necessary shall sign, any other documentation necessary under Applicable Laws to identify Customer as the generator of material generated by EWMA's activities hereunder.

2.9 EWMA shall be responsible for repairing any damage to the Project Site, and all roadways and rights-of-way leading to or from the Project Site, arising out of EWMA's performance of the Work to a condition substantially the same as that before the damage. EWMA shall not be responsible for any damage to or injury to unmarked underground structures or utilities.

2.10 EWMA shall pay for all necessary registrations, permits, licenses, government oversight fees and other charges required for the Work to be performed in accordance with this Agreement, to the extent such costs are included in EWMA's quoted prices for the Work, except those which are excluded in Section 4.1(d).

2.11 EWMA will obtain and maintain in force all registrations, permits, licenses and approvals which are necessary under Applicable Law in order for EWMA to properly undertake the Work. Customer shall execute all documents necessary for EWMA to obtain and maintain such registrations, permits, licenses and approvals.

2.12 EWMA represents that it has received copies of all documents regarding the Pre-Existing Hazardous Substances Conditions listed in Appendix B.

2.13 EWMA shall perform and/or supervise the Work and assure it is conducted in a workman like manner, and in accordance with professional and industry standards prevailing at the time the Work is performed and in accordance with all applicable laws. EWMA shall diligently pursue the completion of the Work, including making a diligent effort to obtain a response from any Public Authority who is overseeing, or must approve, any aspect of the Work.

ARTICLE III. CUSTOMER'S RESPONSIBILITIES & WARRANTIES

3.1 Customer warrants that there are no outstanding judicial or administrative orders and no litigation or proceeding pending before any court or Public Authority, relating to the Project Site or the Customer, which in any way affects the performance of theWork, except as set forth in Appendix B.

3.2 Customer agrees that it will apply for and maintain an EPA Identification Number for the transport and disposal of hazardous materials.

3.3 Customer shall be responsible to provide access to the Project Site, without unreasonable delay and to ensure, to the extent possible, that access to EWMA's work areas is limited in a manner that prevents interference with EWMA's activities, provided that EWMA shall provide the Customer with commercially reasonable notice of the times it requires access and the activities it intends to perform.

3.4 Customer will promptly inform EWMA of the presence of any Hazardous Substances Conditions at the Project Site about which it obtains knowledge. Customer represents that it has provided to EWMA all documents listed on Appendix B, which is all documents known to Customer concerning Hazardous Substance Conditions at the Project Site and that Customer knows of no other Hazardous Substance Conditions at the Project Site. In the event other Hazardous Substance Conditions are discovered by Customer after the date of this Agreement, Customer shall promptly inform EWMA and provide copies of any documents relating to such conditions.

3.5 Customer acknowledges that EWMA does not and will not have or acquire any legal, equitable, or economic interest in the Project Site and that EWMA shall have no liability or obligation in respect thereto other than the obligation to provide the services as called for under this Agreement.

3.6 Any increased costs of developing the Project Site which arise from the presence of Pre-Existing Pollution Conditions shall be the responsibility of the Customer.

ARTICLE IV. COMPENSATION

Customer agrees to pay EWMA up to a maximum aggregate amount of **Total Not-to-Exceed Dollar Amount ($Amount)** for all costs, direct or indirect, to comply with all the terms in this Agreement, including, without limitation, the Remedial Action Cost for performance of the Work described in Appendix A and to address the known Preexisting Pollution Condition in Appendix B and the cost of the insurance policy premium under Section 5.4 hereof (the "Not-to-Exceed Cost"). The only costs not included with EWMA's obligations under the Not-to-Exceed Cost shall be those specifically excluded in this Agreement. Terms of payment shall be as follows:

(a) Upon entry into this Agreement, Customer shall pay an initial payment of **$0.00** to be applied to initial invoices. Customer shall pay the sum of **Enter Sum of Initial Payment Here** to **Enter Name of Escrow Agent Here** ("Escrow Agent") to be held in escrow and deposited into a non-interest bearing trust account (the "EWMA Escrow"). EWMA shall provide Customer and Escrow Agent with invoices for activities it has conducted pursuant to this Agreement. Escrow Agent will use diligent efforts to provide payment for such invoices to EWMA within thirty (30) days provided that the activities were performed and billed in accordance with this Agreement. In the event EWMA's invoice exceeds the amount set forth in the Remedial Action Cost Estimate, or includes activities not set forth within the Remedial Action Cost Estimate, Escrow Agent shall use diligent efforts to pay the invoice amount within thirty (30) days, except to the extent the amounts in excess of the Remedial Action Cost Estimate could not reasonably have been used in an attempt to accomplish the Work. Customer shall have the burden to prove that the activities to which an invoice pertains could not reasonably have been used in an attempt to accomplish the Work.

(b) In the event EWMA deems it necessary to perform activities other than those to address the known Preexisting Pollution Conditions in Appendix B such as unknown preexisting pollution conditions are discovered after the date of this Agreement or new conditions arise subsequent to the date of this Agreement, it shall submit a change order proposal to Customer. Customer shall have ten days after receipt of any change order proposal to object to such change order proposal. Customer shall agree to pay the cost of EWMA's services charged on a time and materials basis pursuant to the rates in Appendix C.

(c) Upon NJDEP's issuance of an Acceptable No Further Action Letter for the Work if the Actual Cost charged by EWMA is less than the Not-to-Exceed Cost, Escrow Agent shall pay in accordance with the terms of the Escrow Agreement (A) any unpaid Actual Costs; and (B) fifty percent (50%) of the difference between the Actual Cost and the Not-to-Exceed Cost (this amount shall be the "EWMA Bonus") to EWMA within fifteen (15) days of the release of the final payment of Actual Costs from the Escrow Account.

(d) Notwithstanding the provisions of Sections 4.1(a), (b), (c), in no event shall EWMA be paid more than the Not-to-Exceed Cost for its performance of this Agreement. In the event the cost to complete the Work exceeds the Not-to-Exceed Cost, EWMA shall complete the Work at its sole cost and expense. Customer shall be solely responsible for: **(1) all NJDEP oversight costs and costs of all necessary registrations, permits, and licenses for the work;** (2) utility charges; (3) Natural Resource Damages, to the extent that they are not insured by the CCC/PLL Policy; (4) any Hazardous Substances which are not part of the Pre-Existing Pollution Conditions (as defined in Appendix B), to the extent the cost of removal or remediation is not insured by the CCC/PLL Policy; and (5) any Hazardous Substances Conditions which are not the responsibility of the Customer under Environmental Laws, including those which arise from an off-site source (i.e., not on the Project Site).

4.1 In the event EWMA or its representatives are subpoenaed to testify in any litigation concerning or related to its performance under this Agreement, Customer shall compensate EWMA for preparing for and providing such testimony at EWMA's normal hourly rates for consulting services, including reasonable costs, with no premiums being charged because the services relate to litigation. However, if the litigation concerns or is related to a breach by EWMA of any of its obligations under this Agreement, Customer shall not be obligated to compensate EWMA for preparing for and providing such testimony to the extent that it relates to such breach, unless the decision in the litigation indicates that EWMA did not breach its obligations under this Agreement as alleged.

4.2 Customer agrees that all invoices are to be submitted for payment to:

Enter Name & Address of Customer Here

With copy to:

Enter Additional Names & Addresses, as Necessary

ARTICLE V. EWMA INSURANCE

5.1 EWMA shall carry, at its own expense, during the term of this Agreement, the minimum insurance coverages set forth below:

Coverage	Limits
(a) Worker's Compensation	Statutory
(b) Employer's Liability	$5,000,000 each occurrence/aggregate
(c) General Liability (Bodily Injury & Property Damage)	$1,000,000 each occurrence/aggregate
(d) Automobile Liability (Bodily Injury & Property Damage)	$1,000,000 each occurrence/aggregate
(e) Professional Liability, including Pollution coverage	$2,000,000 each occurrence/$4,000,000 aggregate
(f) Errors and Omissions	$2,000,000 each occurrence/aggregate

5.2 General Liability Insurance shall include coverage for completed operations, contractual liability and independent contractor coverage under this Agreement. Prior to beginning work at the Project Site, EWMA shall promptly furnish to Customer an insurance certificate naming Customer and such other parties in interest specified by Customer as an

additional insured. The providing of insurance as set forth herein shall not be construed as EWMA's assumption of any liability arising out of any act or omission of Customer. Customer shall be included as additional insured with respect to negligence or acts of EWMA, its employees, agents and subcontractors, and any breach of this Agreement by EWMA, and not with respect to negligence or acts of Customer or such other parties in interest specified by Customer

5.3 EWMA shall require all subcontractors to obtain, maintain and keep in force during the time in which they are engaged in performing Work hereunder equivalent insurance coverage and furnish Customer acceptable evidence of such insurance prior to the time any such subcontractor becomes involved in the performance of the Work. EWMA shall use diligent efforts to have Customer named as an additional insured by all such subcontractors.

5.4 After entry into this Agreement, EWMA will submit the necessary documents to apply for an AIG Cleanup Cost Cap/Pollution Legal Liability Insurance Policy ("CCC/PLL Policy"). The Customer will allow EWMA a reasonable time frame in which to obtain underwriting approval on the CCC/PLL policy from AIG. In the event EWMA is unable to obtain underwriting approval from AIG within thirty (30) days after signing of this Agreement, EWMA and the Customer will have the option to cancel the terms of this Agreement. In the event that EWMA obtains such CCC/PLL Policy, the Customer shall pay the cost of the policy premium to EWMA or its insurance broker, for remittance to the Insurer, prior to binding. Customer shall not be directly responsible for the payment of any deductibles or self-insured retentions. Additionally, EWMA shall use its best efforts to (i) have the underwriters name (A) the Customer and (B) **Enter other Additional Named Insureds (if any) Here** and (C) any future owner of the subject property(ies) of which the Project Site(s) is(are) a part as Additional Named Insured on the CCC/PLL Policy; and (ii) to obtain coverage for Natural Resource Damages related to the Pre-Existing Pollution Conditions described in the documents listed in Appendix B.

ARTICLE VI. INDEMNIFICATION

6.1 EWMA agrees to indemnify, defend and save harmless Customer, its subsidiaries, affiliates, directors, officers, agents, employees and subcontractors from and against any and all liabilities, claims, demands, penalties, causes of action, costs and expenses of every nature whatsoever arising from EWMA's breach of this Agreement or the negligent acts or omissions, or willful misconduct, of EWMA or its agents, representatives, employees, or subcontractors, except to the extent such liabilities, demands, penalties, causes of action, costs and expenses are caused by, or result from (a) Customer's breach of its obligations under this Agreement; or (b) the negligent acts or omissions, or willful misconduct, of Customer.

6.2 Customer shall indemnify, defend and hold harmless EWMA, its subsidiaries, affiliates, directors, officers, agents, employees and subcontractors from and against any and all liabilities, claims, demands, penalties, causes of action, costs and expenses of every nature whatsoever arising from Customer's breach of this Agreement or the negligent acts or

omissions, or willful misconduct, of Customer or its agents, representatives, employees or subcontractors, except to the extent that such liabilities, claims, demands, penalties, causes of action, costs and expenses are caused by, or result from, (a) EWMA's breach of its obligations under this Agreement or (b) the negligent acts or omissions, or willful misconduct, of EWMA, its directors, officers, agents, employees or subcontractors.

ARTICLE VII. CONFIDENTIAL INFORMATION

7.1 EWMA shall, and EWMA shall have its directors, officers, employees, agents and subcontractors treat as confidential and proprietary, and not disclose to others during or subsequent to the terms of this Agreement (except as is necessary to perform Work under this Agreement and then only on a confidential basis satisfactory to both parties), any information, whether verbal or written, of any description whatsoever (including any technical information, experience or data) regarding the plans, programs, costs, equipment, operations which may come within the knowledge of EWMA, its directors, officers, employees, agents or subcontractors in the performance of the Work and this Agreement, without securing the prior written consent of the Customer.

7.2 EWMA shall be permitted to use a generic description of the Work, its financial, management and technical approach, and the results of its performance hereunder for marketing and sales purposes provided that EWMA does not identify the Client, Project Site, Developer or exact location of the site.

7.3 Except for Section 7.2 above, EWMA shall not release, or cause or allow the release of, any information concerning the existence of this Agreement and its Attachments, without securing the prior written consent of the Customer. Notwithstanding the foregoing, Customer hereby agrees that EWMA may release information concerning this Agreement and its attachments to its insurance carriers, including any insurance carrier from which EWMA seeks to obtain CCC/PLL insurance.

7.4 In the event that EWMA or its directors, officers, employees, agents or subcontractors shall be required by subpoena, court, or administrative order or other legal process to disclose any of the information deemed by this Agreement to be confidential and/or proprietary, EWMA shall give immediate written notice to the Customer. Upon receipt of same, the Customer expressly reserves the right to interpose all objections it may have to the disclosure of such information. The obligation of this Article VII shall survive the termination or expiration of this Agreement.

7.5 Notwithstanding the foregoing confidentiality provisions of this ArticleVII, if Customer interposes any objections to the disclosure of information as provided in Article VII hereof, but does not obtain a protective order regarding disclosure of same by EWMA, EWMA may furnish the information which it is legally required to disclose.

ARTICLE VIII. WORK ON PROJECT SITE

8.1 EWMA shall, and EWMA shall have its directors, officers, employees, agents or subcontractors, while working on the Project Site, comply with any reasonable written safety procedures applicable to employees and subcontractors at the Project Site.

ARTICLE IX. INSPECTIONS, PERMITS, ETC.

9.1 EWMA shall provide to Customer copies of all applicable written registrations, permits, licenses, approvals or other communications issued by any Public Authority to EWMA or its subcontractors for performance of the Work under this Agreement.

ARTICLE X. EXCUSE OF PERFORMANCE

10.1 The performance of this Agreement, except for the payment of money for services already rendered, may be suspended by either party in the event performance of this Agreement is prevented by a cause or causes beyond the control of either party. Such causes shall include, but not be limited to: acts of God; acts of war; riot; fire; explosion; accident; flood; or sabotage; injunctions or restraining orders; labor trouble, strike, lockout or injunction (provided that neither party shall be required to settle a labor dispute against its own best judgment). The failure of any Public Authority to issue any registration, permits, licenses or approvals required or necessary for performance of the Work after the party required to obtain such registration, permit, license or approval has used its best efforts to obtain same, or any suspension or revocation of any such registration, permit, license or approval may suspend performance of this Agreement, but the party obligated to obtain same shall be in breach of this Agreement if it failed to use best efforts.

10.2 The party asserting a right to suspend performance under this Agreement must, within a reasonable time after it has knowledge of the effective cause, notify the other party of the cause for suspension, the performance suspended, and the anticipated duration of the suspension.

10.3 Upon receipt of notice as provided in Section 10.2, advising the other party of a suspension of performance, the parties shall endeavor to agree on one of the following alternatives:

a. Demobilization of affected personnel and equipment from the Project Site with remobilization to the Project Site occurring at a mutually agreeable time after the end of the suspending event; or

b. Placement of affected personnel and equipment in a standby mode until the end of the suspending event.

If the parties agree to either option (a), or (b) above, the parties shall attempt to agree to schedule adjustment and adjustment to compensation as set forth in Article IV.

10.4 The party asserting a right to suspend performance hereunder shall advise the other party when the suspending event has ended, at which time the parties shall agree to a date when performance shall be resumed. If the duration of the suspension of performance exceeds

eighteen (18) months, EWMA shall have the right to an adjustment of the Not-to-Exceed Cost, provided the Not-to-Exceed Cost shall only be increased to the extent EWMA can demonstrate that EWMA's costs to perform the Work (other than increases in time and materials costs as provided in Subsection 4.1(b)) have increased during the duration of the suspension of performance for reasons beyond EWMA's control.

ARTICLE XI. – TERMINATION

11.1 The Customer may terminate this Agreement for cause only for the following reasons:

a. The work is not being performed in substantial compliance with the provisions of this Agreement;

b. Any material representation or warranty of EWMA is untrue or incomplete;

c. EWMA fails to comply with Applicable Laws or with the Customer's reasonable requirements or procedures in performing the Work; or

d. EWMA declares bankruptcy or becomes insolvent, there is a material risk of bankruptcy or insolvency.

11.2 EWMA may terminate this Agreement only if the Customer materially fails to perform its obligations hereunder and such failure directly results in EWMA's inability to perform the Work. Notice of such termination shall be provided to the Customer in writing with at least thirty (30) days advance notice.

11.3 In the event that EWMA terminates this Agreement, EWMA shall assign all of its rights in any subcontracts to the Customer if requested by the Customer to do so. EWMA shall be entitled to payment for all work completed in accordance with the requirements of this Agreement up to and including the effective date of the termination. EWMA will also be paid for all non-cancelable commitments to third parties unless the Customer contractually assumes the obligations and indemnifies EWMA for any costs or claims associated with the future compliance by the Customer with the terms thereof.

ARTICLE XII. INDEPENDENT CONTRACTOR

12.1 EWMA agrees that EWMA and its subcontractors shall perform the Work herein as independent contractors and not as employees or agents of the Customer, and all persons employed by EWMA or by its subcontractors in connection with the Work shall be EWMA's employees or employees of such subcontractors, as the case may be, and not employees or agents of Customer.

ARTICLE XIII. STANDARD OF CARE

13.1 EWMA warrants that the services to be provided by EWMA under this Agreement will be performed in accordance with the highest professional and industrial standards prevailing at the time such services are rendered.

ARTICLE XIV. – ADDITIONAL GENERAL PROVISIONS

14.1 Waiver. Any waiver by either party of any provision or condition of this Agreement shall not be construed or deemed to be a waiver of any other provision or condition of this Agreement, nor a waiver of a subsequent breach of the same provision or condition, unless such waiver be so expressed in writing and signed by the party to be bound. The provisions of this Section 14.1 cannot be orally waived.

14.2 Construction. The validity, interpretation and performance of this Agreement shall be governed and construed in accordance with the laws of New Jersey. All paragraph headings herein are for convenience only and are in no way to be construed as part of this Agreement or as a limitation of the scope of the particular sections to which they may refer.

14.3 Severability. If any section, subsection, sentence or clause of this Agreement shall be finally adjudged illegal, invalid or unenforceable, such illegality, invalidity or unenforceability shall not affect the legality, validity or enforceability of this Agreement as a whole or of any section, subsection, sentence or clause hereof not so adjudged.

14.4 Successors and Assigns. The covenants and agreements contained in this Agreement shall apply to, inure to the benefit of and be binding upon the parties hereto and upon their respective successors and assigns; provided, however, neither party shall assign its rights and obligations under this Agreement without prior written consent. Any purported assignment without such consent shall be null and void and without force and effect. In the event that Customer assigns its rights under this Agreement, Customer shall remain liable for payments required hereunder in the event its assignee fails to make such payments.

14.5 Notice. Any notice, communication, statement or invoice required or permitted to be given or sent hereunder shall be in writing and deemed to have been sufficiently given when: (i) delivered in person; (ii) by registered or certified mail, postage prepaid, return receipt requested, or (iii) by a nationally recognized overnight delivery service, to the addresses of the respective parties as follows:

Customer:

Enter Name and Address Here

With copy to:

Enter Name and Address Here (if applicable)

EWMA

SPECIMEN

Environmental Waste Management Assoc., LLC
100 Misty Lane
P.O. Box 5340
Parsippany, NJ 07054

Either party may, by notice to the other, change the addresses and names given above.

14.6 Entire Agreement. This Agreement with its attachments represents the entire understanding and agreement between the parties hereto and supersedes any and all prior and contemporaneous agreements, whether written or oral, that may exist between the parties.

14.7 The Agreement Documents. The Agreement Documents consist of this Agreement and the Attachments. The Agreement Documents do not include any other documents unless specifically enumerated in this Agreement or through an amendment hereto.

14.8 Counterparts. This Agreement may be signed in one or more counterparts, each of which shall be deemed an original.

In Witness Whereof, the parties have caused this Agreement to be executed by their duly authorized representatives as of the day and year as set forth below.

ATTEST: **Name of Customer**

_____ By: _____
Name:_____
Title:_____

ATTEST: Environmental Waste Management Associates, LLC

_____ By: _____
Name:_____
Title:_____

Appendix A – Description of the Work

Appendix B – Environmental Documents Provided to Document Pre-Existing Pollution Conditions

Appendix C – EWMA's Rates

GREENWICH INSURANCE COMPANY
STAMFORD, CONNECTICUT

(A Stock Insurance Company Herein Called the Company)

POLLUTION AND REMEDIATION LEGAL LIABILITY POLICY

THIS IS A "CLAIMS-MADE AND REPORTED" POLICY. THE POLICY REQUIRES THAT A CLAIM BE MADE UPON THE INSURED AND REPORTED TO THE COMPANY DURING THE POLICY PERIOD OR EXTENDED REPORTING PERIOD, IF ANY. IN ADDITION, THIS POLICY MAY HAVE PROVISIONS OR REQUIREMENTS DIFFERENT FROM OTHER POLICIES YOU MAY HAVE PURCHASED. PLEASE READ CAREFULLY.

THIS POLICY CONTAINS PROVISIONS WHICH LIMIT THE AMOUNT OF LEGAL DEFENSE EXPENSE THE COMPANY IS RESPONSIBLE TO PAY IN CONNECTION WITH CLAIMS. LEGAL DEFENSE EXPENSE SHALL BE APPLIED AGAINST ANY RETENTION AMOUNT AND IS SUBJECT TO THE LIMITS OF LIABILITY STATED IN ITEM 3.A. OF THE DECLARATIONS.

In consideration of the payment of the Policy Premium stated in Item 6. of the Declarations and in reliance upon the statements contained in the Application and any other supplemental materials and information submitted herewith, and subject to all the terms and conditions of this Policy, and the Limits of Liability and Retention Amount(s) stated in the Declarations, the Company agrees with the INSURED as follows:

I. INSURING AGREEMENT

A. Coverage A - POLLUTION LEGAL LIABILITY

The Company will pay on behalf of the INSURED for LOSS from POLLUTION CONDITIONS on, at, under or emanating from the location(s) stated in the Pollution Legal Liability Schedule, which the INSURED has or will become legally obligated to pay as a result of a CLAIM first made against the INSURED during the POLICY PERIOD, provided that the INSURED reports the CLAIM to the Company, in writing, during the POLICY PERIOD or, if applicable, the Automatic or Optional Extended Reporting Period.

B. Coverage B - REMEDIATION LEGAL LIABILITY

The Company will pay on behalf of the INSURED for REMEDIATION EXPENSE from POLLUTION CONDITIONS on, at, under or emanating from the location(s) stated in the Remediation Legal Liability Schedule where, during the POLICY PERIOD, a CLAIM is first made against the INSURED or POLLUTION CONDITIONS are first discovered; provided that the INSURED notifies the Company of the CLAIM or POLLUTION CONDITIONS, in writing, during the POLICY PERIOD, or, if applicable, the Automatic or Optional Extended Reporting Period.

C. **Coverage C - LEGAL DEFENSE EXPENSE**

The Company will pay on behalf of the INSURED for LEGAL DEFENSE EXPENSE to defend a CLAIM for LOSS or for REMEDIATION EXPENSE under Coverage A – POLLUTION LEGAL LIABILITY, Coverage B – REMEDIATION LEGAL LIABILITY or Coverage D – CONTINGENT TRANSPORTATION COVERAGE, to which this Policy applies. The Company shall have the right and the duty to defend the INSURED against any CLAIM seeking damages for a LOSS, or for REMEDIATION EXPENSE. The Company will have no duty to defend the INSURED against any CLAIM for LOSS or for REMEDIATION EXPENSE to which this Policy does not apply.

D. **Coverage D - CONTINGENT TRANSPORTATION COVERAGE**

The Company will pay on behalf of the INSURED for LOSS or REMEDIATION EXPENSE as a result of a CLAIM first made against the INSURED during the POLICY PERIOD and reported to the Company, in writing, during the POLICY PERIOD or, if applicable, the Automatic or Optional Extended Reporting Period, from POLLUTION CONDITIONS arising from the INSURED's product or waste during the course of TRANSPORTATION by a CARRIER during the POLICY PERIOD.

II. DEFINITIONS

A. **AUTOMOBILE** means a land motor vehicle, trailer, semi-trailer, MOBILE EQUIPMENT, or off-road motor vehicle, including any machinery or apparatus attached thereto. As used in this definition, MOBILE EQUIPMENT means any of the following types of land vehicles, including any attached machinery or equipment:

1. bulldozers, farm machinery, forklifts and other vehicles designed for use principally off public roads;
2. vehicles maintained for use solely on premises owned or rented by the INSURED;
3. vehicles that travel on crawler treads;
4. vehicles, whether self-propelled or not, maintained primarily to provide mobility to permanently mounted:
   (a) power cranes, shovels, loaders or drills; or
   (b) road construction or resurfacing equipment such as graders, scrapers or rollers,
5. vehicles not described in (1), (2), (3) or (4) above that are not self-propelled and are maintained primarily to provide mobility to permanently attached equipment of the following types:
   (a) air compressors, pumps and generators, including spraying, welding, building cleaning, geophysical exploration, lighting and well servicing equipment, or
   (b) cherry pickers and similar devices used to raise or lower workers;
6. vehicles not described in (1), (2), (3), (4) or (5) above maintained primarily for purposes other than the transportation of persons or cargo.

However, self-propelled vehicles with the following types of permanently attached equipment are not MOBILE EQUIPMENT:

(a) Equipment designed primarily for:
   (i) snow removal;
   (ii) road maintenance, but not construction or resurfacing;
   (iii) street cleaning;
(b) cherry pickers and similar devices mounted on automobile or truck chassis and used to raise or lower workers, and
(c) air compressors, pumps and generators, including spraying, welding, building cleaning, geophysical exploration, lighting and well servicing equipment.

B. **BODILY INJURY** means physical injury, sickness, disease, mental anguish, emotional distress, shock or building related illness sustained by any person, including death resulting therefrom, caused by POLLUTION CONDITIONS.

C. **CARRIER** means a person or entity, other than the INSURED or any subsidiary or affiliate company of the INSURED, engaged by or on behalf of the INSURED, and in the business of transporting property for hire by AUTOMOBILE, WATERCRAFT or rolling stock.

D. **CLAIM(S)** means a demand, notice or assertion of a legal right alleging liability or responsibility on the part of the INSURED, arising out of POLLUTION CONDITIONS, and shall include but not necessarily be limited to lawsuits or petitions filed against the INSURED.

E. **FIRST NAMED INSURED** means the person or entity stated in Item 1. of the Declarations.

F. **INSURED** means the FIRST NAMED INSURED, any Additional INSURED and any Additional Named INSURED endorsed onto the Policy, and any present or former director, officer, partner, employee, LEASED WORKER or TEMPORARY WORKER thereof while acting within the scope of his/her duties as such.

G. **INSURED CONTRACT(S)** means contract(s) designated in the INSURED CONTRACT(S) Schedule.

H. **LEASED WORKER** *means a person leased to the INSURED by a labor leasing firm under an* agreement between the INSURED and the labor leasing firm, to perform duties related to the conduct of the INSURED's business. LEASED WORKER does not include TEMPORARY WORKER.

I. **LEGAL DEFENSE EXPENSE** means legal costs, charges and expenses incurred in the investigation, adjustment or defense of CLAIMS, or in connection with the payment of any REMEDIATION EXPENSE, and shall include any necessary expert fees paid to experts retained by defense counsel.

LEGAL DEFENSE EXPENSE does not include salary charges of regular employees or officials of the Company, fees and expenses of supervisory counsel retained by the Company, or the time and expense incurred by the INSURED in assisting in the investigation or resolution of a CLAIM or in connection with REMEDIATION EXPENSE, including but not limited to the costs of the INSURED's in-house counsel.

J. **LOSS** means monetary judgment, award or settlement of compensatory damages arising from:

a. BODILY INJURY; or
b. PROPERTY DAMAGE

K. **LOW-LEVEL RADIOACTIVE WASTE AND MATERIAL** means waste or material that contains radioactivity and is not classified as high-level waste or material, transuranic waste or spent nuclear fuel. LOW-LEVEL RADIOACTIVE WASTE AND MATERIAL includes 1) test specimens of fissionable material irradiated for research and development only, and not for production of power or plutonium, *provided the concentration of transuranic waste is less than 100 nCi/g; and* (2) mixed waste containing both radioactive and hazardous components as defined by the Atomic Energy Act and the Resource Conservation and Recovery Act.

L. **POLICY PERIOD** means the period stated in Item 2. of the Declarations, or any shorter period arising as a result of cancellation.

M. **POLLUTION CONDITIONS** means the discharge, dispersal, release, seepage, migration, or escape of any solid, liquid, gaseous or thermal pollutant, irritant or contaminant, including but not limited to smoke, vapors, soot, fumes, acids, alkalis, toxic chemicals, hazardous materials, waste materials, including medical, infectious and pathological wastes, electromagnetic fields, and LOW LEVEL RADIOACTIVE WASTE AND MATERIAL, into or upon land, or structures thereupon, the atmosphere, or any watercourse or body of water including groundwater.

N. **PROPERTY DAMAGE** means:

1. physical injury to or destruction of tangible property, including the resulting loss of use thereof, and including the personal property of third parties; or
2. loss of use of such property that has not been physically injured or destroyed; or
3. diminished third party property value

provided that such physical injury or destruction, loss of use, and diminished third party property value are caused by POLLUTION CONDITIONS. PROPERTY DAMAGE does not include REMEDIATION EXPENSE.

O. **REMEDIATION EXPENSE** means expenses incurred to investigate, remove, dispose of, treat or neutralize POLLUTION CONDITIONS, including any monitoring and testing costs associated with such investigation, removal, disposal, treatment or neutralization, and including REPLACEMENT COSTS, to the extent required by (1) Federal, State, Local or Provincial Laws, Regulations or Statutes, or any subsequent amendments thereof, enacted to address POLLUTION CONDITIONS, and/or (2) a legally executed state voluntary program governing the cleanup of POLLUTION CONDITIONS.

P. **TEMPORARY WORKER** means a person who is furnished to the INSURED to substitute for a permanent employee on leave or to meet seasonal or short-term workload conditions.

Q. **WATERCRAFT** means any vessel or other contrivance used or capable of being used as a means of transportation upon water, whether self-propelled or otherwise, including barges and tugs.

R. **REPLACEMENT COSTS** means costs necessarily incurred by the INSURED to repair or replace real or personal property damaged during the course of REMEDIATION EXPENSE in order to restore the property to the condition it was in prior to the REMEDIATION EXPENSE. These costs shall not exceed the actual cash value of such real or personal property prior to the REMEDIATION EXPENSE. For the purposes of this definition, actual cash value means replacement cost reduced by physical depreciation and obsolescence.

S. **TRANSPORTATION** means the movement by a CARRIER of the INSURED's product or waste generated by the INSURED, after a CARRIER leaves the location(s) stated in the Pollution Legal Liability or Remediation Legal Liability Schedule until the INSURED's waste or product is delivered or unloaded by the CARRIER.

III. TERRITORY

This Policy only applies to CLAIMS made or brought in the United States, its territories or possessions or in Canada.

IV. EXCLUSIONS

This Insurance does not apply to LOSS, REMEDIATION EXPENSE, LEGAL DEFENSE EXPENSE or any other coverages afforded under this Policy or any endorsements attached thereto:

1. **Known Condition(s)**
arising from POLLUTION CONDITIONS existing prior to the inception of this Policy, and reported to any officer, director, partner, or employee responsible for environmental affairs of the INSURED, which were not disclosed in writing to the Company in the application or related materials prior to the inception of this Policy or prior to the location being endorsed onto this Policy. Only conditions described in the documents listed in the Known Condition(s) Document Schedule are disclosed to the Company.

2. **Multiplied Damages/Fines/Penalties**
based upon or arising out of civil, administrative or criminal fines or penalties, assessments, punitive, exemplary or multiplied damages.

3. **Employer's Liability/Workers' Compensation**
based upon or arising out of injury to: (a) any employee, director, officer, partner, LEASED WORKER or TEMPORARY WORKER of the INSURED if such injury occurs during and in the course of said employment, or during the performance of duties related to the conduct of the INSURED's business, or arising out of any Workers' Compensation, unemployment compensation, unemployment compensation or disability benefits law or similar law; and (b) the spouse, child, parent, brother or sister of such employee, director, officer, partner, LEASED WORKER or TEMPORARY WORKER of the INSURED as a consequence of (a) above.

4. **Contractual Liability**
based upon or arising as a result of liability of others assumed by the INSURED under any contract or agreement unless the liability would exist in the absence of a contract or agreement. This exclusion does not apply to liability of others assumed by the INSURED in INSURED CONTRACT(S), if any, stated in the INSURED CONTRACT(S) Schedule.

5. **Insured's Property/Bailee Liability**
with respect to PROPERTY DAMAGE only, to property owned, leased or operated by, or in the care, custody or control of the INSURED, even if such PROPERTY DAMAGE is incurred to avoid or mitigate LOSS or REMEDIATION EXPENSE which may be covered under this Policy. This exclusion does not apply to REPLACEMENT COSTS.

6. **Vehicles**
based upon or arising out of the ownership, maintenance, use, operation, loading or unloading of any AUTOMOBILE, aircraft, WATERCRAFT, rolling stock or all other forms of transportation, including any cargo carried thereby, beyond the legal boundaries of location(s) owned, leased or operated by the INSURED and stated in either the Pollution Legal Liability Schedule or the Remediation Legal Liability Schedule. This exclusion does not apply to Coverage D – Contingent Transportation Coverage.

7. **Divested Property**
based upon or arising from POLLUTION CONDITIONS on, at, under or emanating from the location(s) stated in either the Pollution Legal Liability Schedule or the Remediation Legal Liability Schedule, where the actual discharge, dispersal, release, seepage, migration or escape of POLLUTION CONDITIONS begins subsequent to the time such location(s) are sold, given away, or abandoned by the INSURED, or condemned.

8. Nuclear Hazard:

a. based upon or arising from POLLUTION CONDITIONS

(1) with respect to which an INSURED under this Policy is also an INSURED under a nuclear energy liability Policy issued by Nuclear Energy Liability Insurance Association, Mutual Atomic Energy Liability Underwriters or Nuclear Insurance Association of Canada, or would be an INSURED under any such Policy but for its termination upon exhaustion of its limits of liability; or

(2) resulting from the HAZARDOUS PROPERTIES of NUCLEAR MATERIAL and with respect to which

(a) any person or organization is required to maintain financial protection pursuant to the Atomic Energy Act of 1954, or any law amendatory thereof, or

(b) the INSURED is, or had this Policy not been issued would be, entitled to indemnity from the United States of America, or any agency thereof, under any agreement entered into by the United States of America, or any agency thereof, with any person or organization; or

b. based upon or arising from POLLUTION CONDITIONS resulting from the HAZARDOUS PROPERTIES of NUCLEAR MATERIAL, if

(1) the NUCLEAR MATERIAL

(a) is at any NUCLEAR FACILITY owned by, or operated by or on behalf of, an INSURED or

(b) has been discharged or dispersed therefrom; or

(2) the NUCLEAR MATERIAL is contained in SPENT FUEL or WASTE at any time possessed, handled, used, processed, stored, transported or disposed of by or on behalf of an INSURED; or

(3) the BODILY INJURY or PROPERTY DAMAGE arises out of the furnishing by an INSURED of services, materials, parts or equipment in connection with the planning, construction, maintenance, operation or use of any NUCLEAR FACILITY, but if such facility is located within the United States of America, its territories or possessions or Canada, this exclusion 8. b. (3) applies only to PROPERTY DAMAGE to such NUCLEAR FACILITY and any property thereat.

c. As used in this exclusion:

(1) "HAZARDOUS PROPERTIES" includes radioactive, toxic or explosive properties;

(2) "NUCLEAR MATERIAL" means SOURCE MATERIAL, SPECIAL NUCLEAR MATERIAL or BYPRODUCT MATERIAL;

(3) "SOURCE MATERIAL", "SPECIAL NUCLEAR MATERIAL" and "BYPRODUCT MATERIAL" have the meanings given them in the Atomic Energy Act of 1954 or in any law amendatory thereof;

(4) "SPENT FUEL" means any fuel element or fuel component, solid or liquid, which has been used or exposed to radiation in a NUCLEAR REACTOR;

(5) "WASTE" means any waste material

(a) containing BYPRODUCT MATERIAL; and

(b) resulting from the operation by any person or organization of any NUCLEAR FACILITY included within the definition of NUCLEAR FACILITY under paragraph (6) (a) or (6) (b) thereof;

(6) "NUCLEAR FACILITY" means:

(a) any NUCLEAR REACTOR,

(b) any equipment or device designed or used for separating the isotopes of uranium or plutonium, processing or utilizing SPENT FUEL, or handling, processing or packaging WASTE,

(c) any equipment or device used for the processing, fabricating or alloying of SPECIAL NUCLEAR MATERIAL, if at any time the total amount of such material in the custody of the INSURED at the premises where such equipment or device is located consists of or contains more than 25 grams of plutonium or uranium 233 or any combination thereof, or more than 250 grams of uranium 235,

(d) any structure, basin, excavation, premises or place prepared or used for the storage or disposal of WASTE, and includes the site on which any of the foregoing is located, all operations conducted on such site and all premises used for such operations;

(7) "NUCLEAR REACTOR" means any apparatus designed or used to sustain nuclear fission in a self-supporting chain reaction or to contain a critical mass of fissionable material;

(8) "PROPERTY DAMAGE" includes all forms of radioactive contamination of property.

9. Products Liability
based upon or arising out of goods or products manufactured, sold, handled, distributed, altered or repaired by the INSURED or by others trading under the INSURED's name including any container thereof, any failure to warn, or any reliance upon a representation or warranty made at any time with respect thereto, but only if the POLLUTION CONDITIONS occur away from the location(s) owned, operated, or leased by the INSURED and after physical possession of such has been relinquished to others.

10. Intentional Acts
arising from POLLUTION CONDITIONS that result from intentional disregard of, or the deliberate, willful or dishonest non-compliance with any statute, regulation, ordinance, administrative complaint, notice letter or instruction by any governmental agency or representative on the part of any officer, director, partner, or employee responsible for environmental affairs of the INSURED.

11. Hostile Acts
based upon or arising out of any consequence, whether direct or indirect, of war, invasion, act of foreign enemy, hostilities (whether war be declared or not), civil war, rebellion, revolution, insurrection or military or usurped power.

12. Lead Based Paint and Asbestos
based upon or arising out of the existence, required removal or abatement of lead based paint or asbestos, in any form, including but not limited to products containing asbestos, asbestos fibers, asbestos dust, and asbestos containing materials.

13. Underground Storage Tank(s)
based upon or arising out of the existence of any underground storage tank(s) and associated piping. This exclusion does not apply to underground storage tank(s) or associated piping:

(a) either closed, abandoned in place or removed, in accordance with all applicable federal, state, or provincial regulations, prior to the inception date of this Policy; or

(b) listed in the Underground Storage Tank(s) and Associated Piping Schedule, if any; or

(c) the existence of which is unknown by any officer, director, partner or employee responsible for environmental affairs of the INSURED.

14. Natural Radioactive Material(s)
based upon or arising out of the existence, required removal or abatement of naturally occurring radioactive material(s), including but not limited to radon.

V. EXTENDED REPORTING PERIOD

A. Automatic Extended Reporting Period

1. The FIRST NAMED INSURED shall be entitled to an Automatic Extended Reporting Period for no additional premium in the event of the termination of this insurance by cancellation or non-renewal. The Automatic Extended Reporting Period shall apply to CLAIMS first made against the INSURED during the sixty (60) days immediately following the effective date of such cancellation or non-renewal, but only by reason of POLLUTION CONDITIONS existing as of or prior to the applicable termination or expiration date and otherwise covered by this insurance. The Automatic Sixty (60) Day Extended Reporting Period does not apply where: (1) POLLUTION CONDITIONS are discovered subsequent to the applicable termination or expiration date; (2) the Policy is terminated for fraud or non-payment of premium; or (3) the INSURED has purchased other insurance to replace the insurance covered under the Policy.

2. It is further agreed that if a CLAIM is made against the INSURED during the POLICY PERIOD and reported to the Company, in writing, by the INSURED within sixty (60) days of the expiration date of this Policy, then the CLAIM shall be considered to have been reported to the Company on the last day of the POLICY PERIOD. This provision shall apply only where a new policy has been issued to the INSURED by the Company for a POLICY PERIOD which immediately follows this Policy.

B. Optional Extended Reporting Period

The FIRST NAMED INSURED shall be entitled to purchase an Optional Extended Reporting Period upon cancellation or non-renewal of the Policy subject to the following terms and conditions:

For policy terms in effect less than three-hundred and sixty-five (365) days, the FIRST NAMED INSURED shall be entitled to purchase an Optional Extended Reporting Period upon payment of an additional premium of not more than 200% of the full Policy Premium stated in Item 6 of the Declarations.

For policy terms equal to or greater than three-hundred and sixty-five (365) days, the FIRST NAMED INSURED shall be entitled to purchase an Optional Extended Reporting Period upon payment of an additional premium of not more than 100% of the full Policy Premium stated in Item 6. of the Declarations. The Optional Extended Reporting Period shall be effective for three (3) consecutive three-hundred and sixty-five (365) day periods commencing immediately following the effective date of cancellation or non-renewal. The FIRST NAMED INSURED must elect to purchase this Optional Extended Reporting Period in writing within thirty (30) days from the cancellation or non-renewal of the Policy. The Automatic Extended Reporting Period of sixty (60) days will be merged into this period and is not in addition to this period. The Optional Extended Reporting Period shall apply to CLAIMS first made against the INSURED during the Optional Extended Reporting Period, but only by reason of POLLUTION CONDITIONS existing as of or prior to the date of cancellation or non-renewal of this Policy, and otherwise covered by

this Policy. The Optional Extended Reporting Period does not apply where: (1) POLLUTION CONDITIONS are discovered subsequent to the applicable termination or expiration date; (2) the Policy is terminated for fraud or non-payment of premium; or (3) the INSURED has purchased other insurance to replace the insurance covered under the Policy. It is a condition precedent to the operation of the rights granted under this clause that payment of the appropriate premium shall be made not later than thirty (30) days after expiration in the case of non-renewal or prior to cancellation in the case of cancellation.

For purposes of this Section, the quotation of different terms and conditions by the Company shall not be construed as non-renewal.

VI. LIMIT OF LIABILITY AND RETENTION

A. This Policy will pay 100% of all covered LOSS, REMEDIATION EXPENSE, LEGAL DEFENSE EXPENSE or any other coverages afforded by endorsement attached to this Policy in excess of the applicable Retention Amount stated in Item 3.b. of the Declarations and subject to the Limits of Liability stated in Item 3.a. of the Declarations and the other terms and conditions of this Policy.

B. The Retention Amount is to be borne by the INSURED and is not to be insured unless the Company has expressed its prior consent in writing to the FIRST NAMED INSURED. All LOSS, REMEDIATION EXPENSE or LEGAL DEFENSE EXPENSE or any other coverages afforded by endorsement arising out of the same or related POLLUTION CONDITIONS at any one location shall be considered a single LOSS, REMEDIATION EXPENSE or LEGAL DEFENSE EXPENSE, or other coverage as specified. The applicable Limits of Liability and Retention Amount(s) stated in the Declarations shall apply.

C. The Company's total liability for all LOSS, REMEDIATION EXPENSE or LEGAL DEFENSE EXPENSE or any other coverages afforded by endorsement during the POLICY PERIOD, Automatic Extended Reporting Period or Optional Extended Reporting Period, if applicable, shall not exceed the Limit of Liability stated in Item 3.a. of the Declarations.

D. Noncumulation of Limits of Liability for Multiple CLAIMS That Are Reported in Different POLICY PERIODS: Any LOSS, REMEDIATION EXPENSE or LEGAL DEFENSE EXPENSE or other coverages afforded by endorsement incurred and reported to the Company, in writing, over more than one POLICY PERIOD, and resulting from the same or related POLLUTION CONDITIONS, shall be considered a single LOSS, REMEDIATION EXPENSE, or LEGAL DEFENSE EXPENSE, or other coverage as specified. The LOSS, REMEDIATION EXPENSE, or LEGAL DEFENSE EXPENSE or other coverages afforded by endorsement will be subject to the same Limits of Liability and Retention Amount(s) in effect at the time of the first reported LOSS, REMEDIATION EXPENSE, or LEGAL DEFENSE EXPENSE or other coverage as specified.

VII. REPORTING, DEFENSE, SETTLEMENT AND COOPERATION

A. As a condition precedent to the coverage hereunder, in the event of BODILY INJURY, PROPERTY DAMAGE, POLLUTION CONDITIONS, or any CLAIM, written or oral notice containing particulars sufficient to identify the INSURED and also reasonable obtainable information with respect to the time, place and circumstances thereof, and the names and addresses of the injured and of available witnesses, shall be given by or for the INSURED to the Company or any of its authorized agents as soon as practicable. In the event of oral notice, the INSURED agrees to furnish a written report as soon as practicable.

B. As a condition precedent to the coverage hereunder, if a CLAIM is made against the INSURED, the INSURED shall forward to the Company every demand, notice, summons, order or other process received by the INSURED or the INSURED's representative as soon as practicable.

C. No costs, charges or expenses shall be incurred, nor payments made, obligations assumed or remediation commenced without the Company's consent which shall not be unreasonably withheld. This provision does not apply to costs incurred by the INSURED on an emergency basis, where any delay on the part of the INSURED would cause injury to persons or damage to property, or increase significantly the cost of responding to a CLAIM. The INSURED shall notify the Company immediately thereafter. The Company shall have the right to designate legal counsel for the investigation, adjustment and defense of CLAIMS. The Company shall consult with the INSURED in conjunction with the selection of counsel. The INSURED shall not admit liability or settle any CLAIM without the Company's consent. If the Company recommends a settlement of a CLAIM:

1. for an amount within the Retention and the INSURED refuses such settlement, the Company shall not be liable for any LOSS, REMEDIATION EXPENSE, LEGAL DEFENSE EXPENSE or other coverages afforded by endorsement in excess of the Retention; or
2. for a total amount in excess of the Retention and the INSURED refuses such settlement, the Company's liability for LOSS, REMEDIATION EXPENSE, LEGAL DEFENSE EXPENSE or other coverages afforded by endorsement shall be limited to that portion of the recommended settlement and the costs, charges and expenses as of the INSURED's refusal which exceed the Retention and fall within the Limit of Liability.

D. The Company shall have the right and the duty to assume the investigation, adjustment or defense of any CLAIM. In case of the exercise of this right, the INSURED, on demand of the Company, shall promptly reimburse the Company for any element of LOSS, REMEDIATION EXPENSE, LEGAL DEFENSE EXPENSE or other coverages afforded by endorsement falling within the INSURED's Retention.

E. The INSURED shall cooperate with the Company and upon the Company's request shall submit to examination and interrogation by a representative of the Company, under oath if required, and shall attend hearings, depositions and trials and shall assist in affecting settlement, securing and giving evidence, obtaining the attendance of witnesses and in the conduct of suits, as well as in the investigation and/or defense, all without charge to the Company. The INSURED shall further cooperate with the Company and do whatever is necessary to secure and affect any rights of indemnity, contribution or apportionment which the INSURED may have.

VIII. TRANSFER OF LEGAL DEFENSE DUTIES

A. If the Company believes that the Limit of Liability stated in Item 3.a. of the Declarations has been or soon will be exhausted in defending CLAIMS or that the Company has paid out or will soon pay out the Aggregate Limit of Liability stated in Item 3.a. of the Declarations, the Company will so notify the FIRST NAMED INSURED in writing as soon as possible. The Company will advise that its duty to defend CLAIMS seeking damages subject to those limits has terminated, subject to payment of the limits, and that it will no longer handle the defense of any CLAIM for which notice is given after the date it sends out such notice. The Company will take immediate and appropriate steps to transfer control of any existing defense prior to exhaustion of the limits to the FIRST NAMED INSURED. The FIRST NAMED INSURED agrees to reimburse the Company for any costs which the Company bears in connection with the transfer of the defense.

B. The Company will take appropriate steps necessary to defend the CLAIM during the transfer of the defense and avoid any unfavorable legal action provided that the FIRST NAMED INSURED cooperates in the transfer of the duties of the defense.

C. The exhaustion of the applicable Limit of Liability by the payment of LOSS, REMEDIATION EXPENSE, LEGAL DEFENSE EXPENSE or other coverages afforded by endorsement will not be affected by the Company's failure to comply with any of the provisions of this section.

IX. CONDITIONS

A. **INSPECTION AND AUDIT** -- The Company shall be permitted but not obligated to inspect, sample and monitor on a continuing basis the INSURED's property or operations and any scheduled location, at any time. Neither the Company's right to make inspections, sample and monitor nor the actual undertaking thereof nor any report thereon shall constitute an undertaking, on behalf of the INSURED or others, to determine or warrant that property or operations are safe, healthful or conform to acceptable engineering practice or are in compliance with any law, rule or regulation. Access for the inspection and audit will be coordinated through the broker or agent of the FIRST NAMED INSURED.

B. **CANCELLATION** -- This Policy may be canceled by the FIRST NAMED INSURED by surrender thereof to the Company or any of its authorized agents or by mailing to the Company written notice stating when thereafter the cancellation shall be effective. This Policy may be canceled by the Company by mailing to the FIRST NAMED INSURED at the address shown in this Policy, written notice stating when not less than sixty (60) days [ten (10) days for non-payment of premium] thereafter such cancellation shall be effective. The mailing of notice as aforesaid shall be sufficient proof of notice. The time of surrender or the effective date and hour of cancellation stated in the notice shall become the end of the POLICY PERIOD. Delivery of such written notice either by the FIRST NAMED INSURED or by the Company shall be equivalent to mailing.

If the FIRST NAMED INSURED cancels, earned premium shall be computed in accordance with the customary short rate table and procedure. If the Company cancels, earned premium shall be computed pro rata. Premium adjustment may be made either at the time cancellation is affected or as soon as practicable after cancellation becomes effective, but payment or tender of unearned premium is not a condition of cancellation.

C. **DECLARATIONS AND REPRESENTATIONS** -- By acceptance of this Policy, the INSURED agrees that the statements contained in the Declarations and any other supplemental materials and information submitted herewith are the INSURED's agreements and representations, that they shall be deemed material, that this Policy is issued in reliance upon the truth of such representations and that this Policy embodies all agreements existing between the INSURED and the Company or any of its agents relating to this insurance.

D. **ACTION AGAINST COMPANY** -- No action shall lie against the Company unless, as a condition precedent thereto, there shall have been full compliance with all of the terms of this Policy, nor until the amount of the INSURED's obligation to pay shall have been finally determined either by judgment against the INSURED after actual trial or by written agreement of the INSURED, the claimant and the Company.

Any person or organization or the legal representative thereof who has secured such judgment or written agreement shall thereafter be entitled to recover under this Policy to the extent of the insurance afforded by this Policy. No person or organization shall have any right under this Policy to join the Company as a party to any action against the INSURED to determine the INSURED's liability, nor shall the Company be impleaded by the INSURED or his legal representative. Bankruptcy or insolvency of the INSURED or of the INSURED's estate shall not relieve the Company of any of its obligations hereunder.

E. **ASSIGNMENT** -- This Policy shall be void as to the assignee or transferee, if assigned or transferred without written consent of the Company. Such written consent shall not be unreasonably withheld or delayed by the Company.

F. **SUBROGATION** -- In the event of any payment under this Policy, the Company shall be subrogated to all the INSURED's rights of recovery against any person or organization and the INSURED shall execute and deliver instruments and papers and do whatever else is necessary to secure such rights. The INSURED shall do nothing to prejudice such rights.

G. **CHANGES** -- Notice to any agent or knowledge possessed by any agent or by any other person shall not affect a waiver or a change in any part of this Policy or estop the Company from asserting any right under the terms of this Policy; nor shall the terms of this Policy be waived or changed, except by endorsement issued to form a part of this Policy.

H. **SOLE AGENT** -- The FIRST NAMED INSURED stated in Item 1. of the Declarations shall act on behalf of all INSURED(s) for the payment or return of premium, receipt and acceptance of any endorsement issued to form a part of this Policy, giving and receiving notice of cancellation or non-renewal and the exercise of the rights provided in Section V. Extended Reporting Period, B. Optional Extended Reporting Period.

I. **OTHER INSURANCE** -- Subject to Section VI., Limits of Liability and Retention, this insurance shall be in excess of the Retention Amount stated in the Declarations and any other valid and collectible insurance available to the INSURED, whether such other insurance is stated to be primary, pro rata, contributory, excess, contingent or otherwise, unless such other insurance is written only as specific excess insurance over the limits of liability provided in this Policy.

J. **HEADINGS** -- The descriptions in the headings of this Policy are solely for convenience and form no part of the Policy terms and conditions.

K. **JURISDICTION AND VENUE** -- It is agreed that in the event of the failure of the Company to pay any amount claimed to be due hereunder, the Company and the INSURED will submit to the jurisdiction of the State of New York and will comply with all the requirements necessary to give such court jurisdiction. Nothing in this clause constitutes or should be understood to constitute a waiver of the Company's right to remove an action to a United States District Court.

L. **CHOICE OF LAW** -- All matters arising hereunder including questions related to the validity interpretation, performance and enforcement of this Policy shall be determined in accordance with the law and practice of the State of New York (notwithstanding New York's conflicts of law rules).

M. **SEVERABILITY** -- Except with respect to Limits of Liability and any rights and duties assigned in this Policy to the FIRST NAMED INSURED, this insurance applies as if each INSURED were the only INSURED and separately to each INSURED against whom a CLAIM is made.

New Environmental Insurance Products to Mitigate Environmental Risks

By Howard Tollin and Daniele Cervino

Given the scarcity of suitable land for development in some parts of the country, it has become necessary to remediate areas with identified pollution. Recent federal and state brownfield laws have provided significant tax credits and other financial incentives for developers to clean up and redevelop properties with historical contamination issues. This is particularly true where changes in the character of a neighborhood have resulted in the possibility of future uses that differ from those of past periods. For example, housing shortages have resulted in a rezoning in many neighborhoods from commercial to residential use. As a result, lenders receive an increasing number of loan applications for commercial properties with potential or actual environmental impairments.

Borrowers and lenders regularly use environmental insurance to provide cost certainty to the estimated clean-up costs for a known pollution condition.

Most lenders have become familiar with the use of environmental insurance as the means to provide protection to both them and their borrower from the consequences of defaulting on the loan due to a pollution condition. A pollution condition is typically defined as the discharge, dispersal, release or escape of any solid, liquid, gaseous or thermal irritant or contaminant—such as smoke, vapors, soot, fumes, acids, alkalis, toxic chemicals, medical waste and waste materials—into or on land, a structure on land, the atmosphere or body of water. Because such pollution conditions affect the ability of the borrower to repay the loan, environmental due diligence and insurance products are now deemed a necessary part of risk management. Borrowers and lenders regularly use environmental insurance to provide cost certainty to the estimated clean-up costs for a known pollution condition and to provide protection to the borrower and lender for unforeseen circumstances that can typically arise with redevelopment projects.

New environmental insurance products have taken the place of contractual escrows or environmental indemnity agreements in many complex commercial lending transactions. They can provide additional protection that addresses a wide range of environmental uncertainties and improves credit ratings for large securitizations. The new insurance products can also be used to manage and quantify risks prior to foreclosure. Environmental liability insurance policies replaced general comprehensive liability policies that contained absolute pollution exclusion since the late 1980s as the mechanism for covering environmental liabilities and remediation costs. Environmental liability insurance includes coverage for liability for known losses, for example, expected remediation costs (known as cleanup cost cap coverage), and liability for unknown losses or claims, for example, preexisting unknown or known pollution that has not yet resulted in a claim (that is, a third-party claim for property damage or bodily injury) caused by pollution and legal defense costs.

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Secured Creditor Policies

On properties that do not appear to have any potential environmental issues, some lenders have purchased a policy, often called a secured creditor portfolio policy, that enables them to insure the loan against environmental liabilities without requiring Phase I and/or Phase II reports. The coverage under these policies will either pay the lender the loan balance or the cleanup costs, whichever is less, if there is a default on the loan associated with a pollution condition. The secured creditor policy was designed to protect the lender from financial losses due to defaults caused by environmental conditions. The policy coverage can be customized depending upon whether the transaction is for a single-site, portfolio or securitizations. Some lending institutions use this policy as an alternative for a Phase I site assessment for seemingly green properties.

The secured creditor policy was designed to protect the lender from financial losses due to defaults caused by environmental conditions.

For a property with known or potential historical contamination issues, that loan will be denied inclusion into the portfolio policy. For a property loan not qualified for the portfolio policy, lenders may request that the borrower pay for a secured creditor policy for the individual property that would provide protection to the lender if there were a default on the loan. These portfolio and individual lender policies were more attractive in their first iteration when the lender was repaid the loan balance regardless of the amount of cleanup costs. This market has tightened considerably over the last few years due to significant loss history. Secured creditor policies protect only the lender and not the borrower. Insurers have further narrowed the coverage available under these policies. Borrowers have been faced with purchasing the secured creditor policy for the lender and purchasing a separate pollution liability policy (discussed below) to protect themselves against claims. The economics of the transaction, however, may not warrant that the borrower purchase both policies, particularly when there is an alternative solution. Many lenders are now requiring the borrower to purchase a pollution liability policy on which the lender is named an additional named insured, rather than requiring the purchase of the secured creditor policy.

Pollution Liability Policy

The pollution liability policy is an effective tool to protect the borrower and lender from an environmental exposure that threatens the repayment of the loan. Coverage under a pollution liability policy can be afforded for on-site and off-site cleanup of pollution conditions, claims by third parties for on-site and off-site bodily injury and property damage, claims by third parties for on-site cleanup of disposal sites used during the cleanup of hazardous materials, costs of defending claims and lawsuits, and business interruption losses.

Often, the borrower is the purchaser of a brownfield property that is being redeveloped. The risk of a default on a loan because of a pollution condition may be attributable to the borrower facing liability for an unknown preexisting condition that was present and undetected before purchasing the property or for a known pollution condition that was being remediated. In addition, the borrower may become liable for a new pollution condition that arises after taking ownership of the property. The pollution liability policy generally covers unknown conditions. Sources of potential liability on a redevelopment project, which can be covered by a pollution liability policy, include the following:

- An unknown pollution condition is discovered while remediating a known pollution condition, or a pollution condition is discovered during redevelopment of the site.
- Regulators determine that additional cleanup is needed for a prior pollution condition, or cleanup standards change that dictate more stringent cleanup standards.
- Neighbors file third-party claims alleging that pollution has migrated from the subject property and has damaged their land.
- Tenants allege bodily injury or property damage as a result of exposure to toxic substances on the subject property.
- Owners of neighboring properties claim that the values of their real estate have been harmed by

the presence of pollution on the subject property (stigma or diminution of values).
- Natural resource damage claims are filed by trustees of state or federal governments where permanent irreversible environmental damage is alleged.

If the borrower is covered for these risks, it is less likely that the borrower will default on the loan due to a pollution condition. The lender should also be included as an additional named insured on the pollution liability policy for any claims against the lender, whether or not attributable to a default or foreclosure on the loan. Upon foreclosure, the policy can be assigned to the lender. Pollution liability policies are typically written for terms of five to 10 years, with sufficient limits of liability that are deemed necessary by the borrower and lender to protect the property's value and loan amount.

Coverage under a pollution liability policy can be afforded for on-site and off-site cleanup of pollution conditions.

Cost Overrun Insurance

Many brownfield property transactions have some required cleanup, and a remedial action plan to address the contamination may or may not be approved by a regulatory agency. The cost cap insurance policy provides protection against unexpected cost overruns in executing the remedial action work plan. The policy can provide limits from 100 percent to 200 percent of the estimated cleanup costs and typically contains two insuring agreements. One is for known pollutants; the other is for unknown preexisting pollutants discovered during plan implementation. Cost overrun insurance can provide the lender with comfort that there are sufficient funds in place to clean up the property, which significantly decreases the likelihood of a default due to insufficient funding of the cleanup obligation.

The insurer agrees to pay cleanup costs in excess of a self-insured retention that the insured incurs for the cleanup of pollutants identified in the remedial plan. The policy pays for cleanup costs in excess of the self-insured retention that the insured incurs for the cleanup of pollutants.

The attachment point for coverage in the cost cap policy is established by adding a buffer or self-insured retention (SIR) to the expected cleanup costs. Buffers typically range from 10 to 100 percent of expected cleanup costs. For cleanups where the expected costs are less than $1 million, the buffers tend to be larger than for cleanups where higher remediation costs are anticipated. Since the buffer may represent an additional amount that must be borne by a borrower, it may be necessary to have the borrower escrow the amount of the cleanup costs and buffer that comprise the total SIR.

One of the important terms is the definition of "cleanup costs." This is usually specified in an endorsement to the policy, which should be the detailed estimate of costs provided by the contractor performing the remediation. The insured should have its engineers who are responsible for the execution of the remedial plan prepare the estimate of costs.

Another important endorsement is the identification of the "scheduled contractor." This endorsement should identify the firm that has contracted to perform the approved remedial action plan. This can be changed in the event of a default by the contractor.

The coverage under a cost cap policy ends when the remedial action plan has been completed or at expiration of the policy period. All cost overruns must be incurred during the policy period to be covered, since these are claims-made policies and not occurrence-based policies.

Insured Guaranteed Fixed-Price Remediation

One factor that should be viewed favorably by a lender is when the borrower has arranged to have the remediation work done under an insured guaranteed maximum cost contract. Under such a contract, the remediation firm bears the costs in excess of the amount that is specified as the guaranteed maximum that is not covered by the insurance included in the contract. The contractor may further guarantee the cleanup to the satisfaction of the regulators notwithstanding policy period or cost limitations in the cost cap policy. Contractors that are willing to offer these

contracts will typically add a buffer or contingency cost to their own estimates of the costs so they are less likely to experience cost overruns. Insurers will consider this in determining if any buffers are required in establishing the self-insured retention for the policy.

The cost cap provides protection against known pollution conditions and incidental unknown conditions that are discovered in the course of executing the remedial action plan. Pollution liability insurance should be purchased at the same time cost overrun insurance is purchased for environmental risks not attributable to the cleanup. Certain contractors, including Environmental Waste Management Associates, will offer a guarantee and have a combined form policy that provides both cost cap and pollution liability coverage to provide a comprehensive risk mitigation package for the lender and the borrower.

In the event of a loan default or foreclosure, environmental insurance policies protect a lender from a wide range of environmental exposures arising from pollution conditions at the property used as collateral for a loan.

UNIFORM ENVIRONMENTAL COVENANTS ACT

drafted by the

NATIONAL CONFERENCE OF COMMISSIONERS

ON UNIFORM STATE LAWS

and by it

APPROVED AND RECOMMENDED FOR ENACTMENT
IN ALL THE STATES

at its

MEETING IN ITS ONE-HUNDRED-AND-TWELFTH YEAR
WASHINGTON, DC

AUGUST 1-7, 2003

WITH PREFATORY NOTE AND COMMENTS

October 26, 2004

DRAFTING COMMITTEE ON UNIFORM ENVIRONMENTAL COVENANTS ACT

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UNIFORM ENVIRONMENTAL COVENANTS ACT

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UNIFORM ENVIRONMENTAL COVENANTS ACT

Prefatory Note

Environmental covenants - whether called "institutional controls", "land use controls" or some other term - are increasingly being used as part of the environmental remediation process for contaminated real property. An environmental covenant typically is used when the real property is to be cleaned up to a level determined by the potential environmental risks posed by a particular use, rather than to unrestricted use standards. Such risk-based remediation is both environmentally and economically preferable in many circumstances, although it will often allow the parties to leave residual contamination in the real property. An environmental covenant is then used to implement this risk-based cleanup by controlling the potential risks presented by that residual contamination.

Two principal policies are served by confirming the validity of environmental covenants. One is to ensure that land use restrictions, mandated environmental monitoring requirements, and a wide range of common engineering controls designed to control the potential environmental risk of residual contamination will be reflected on the land records and effectively enforced over time as a valid real property servitude. This Act addresses a variety of common law doctrines - the same doctrines that led to adoption of the Uniform Conservation Easement Act - that cast doubt on such enforceability.

A second important policy served by this Act is the return of previously contaminated property, often located in urban areas, to the stream of commerce. The environmental and real property legal communities have often been unable to identify a common set of principles applicable to such properties. The frequent result has been that these properties do not attract interested purchasers and therefore remain vacant, blighted and unproductive. This is an undesirable outcome for communities seeking to return once important commercial sites to productive use.

Large numbers of contaminated sites are unlikely to be successfully recycled until regulators, potentially responsible parties, affected communities, prospective purchasers and their lenders become confident that environmental covenants will be properly drafted, implemented, monitored and enforced for so long as needed. This Act should encourage transfer of ownership and property re-use by offering a clear and objective process for creating, modifying or terminating environmental covenants and for recording these actions in recorded instruments which will be reflected in the title abstract of the property in question.

Of course, risk-based remediation must effectively control the potential risk presented by the residual contamination that remains in the real property and thereby protect human health and the environment. When risk-based remediation imposes restrictions on how the property may be used after the cleanup, requires continued monitoring of the site, or requires construction of permanent containment or other remedial structures on the site, environmental covenants are crucial tools to make these restrictions and requirements effective. Yet environmental covenants

can do so only if their legal status under state property law and their practical enforceability are assured, as this proposed Uniform Act seeks to do.

At the time this Act was promulgated, approximately half the states had laws providing for land use restrictions in conjunction with risk-based remedies. Those existing laws vary greatly in scope – some simply note the need for land use restrictions, while others create tools similar to many of the legal structures envisioned by this Act. Most such acts apply only to cleanups under a state program.

In contrast, this Act includes a number of provisions absent from most existing state laws, including the Act's applicability to both federal and state-led cleanups. For example, this Act expressly precludes the application of traditional common law doctrines that might hinder enforcement. It ensures that a covenant will survive despite tax lien foreclosure, adverse possession, and marketable title statutes. The Act also provides detailed provisions regarding termination and amendment of older covenants, and includes important provisions on dealing with recorded interests that have priority over the new covenant. Further, it offers guidance to courts confronted with a proceeding that seeks to terminate such a covenant through eminent domain or the doctrine of changed circumstances.

This Act benefitted greatly during the drafting process from broad stakeholder input. As a result, the Act contains unique provisions designed to protect a variety of interests commonly absent in existing state laws. For example, the Act confers on property owners that grant an environmental covenant the right to enforce the covenant and requires their consent to any termination or modification. This should mitigate an owner's future liability concerns for residual contamination and encourage the sale and reuse of contaminated properties. And, following traditional real property principles, the Act validates the interests of lenders who hold a prior mortgage on the contaminated property, absent voluntary subordination.

It is important to emphasize that environmental covenants are but one tool in a larger context of environmental remediation regulation; remediation is typically overseen by a government agency enforcing substantial statutory and regulatory requirements. The covenant should be the crucial end result of that process - it may be used to ensure that the activity and use limitations imposed in the agency's remedial decision process remain effective, and thus protect the public from residual contamination that remains, while also permitting re-use of the site in a timely and economically valuable way.

Environmental remediation projects may be done in a widely diverse array of contamination fact patterns and regulatory contexts. For example, the remediation may be done at a large industrial operating or waste disposal site. In such a situation, the cleanup could be done under federal law and regulation, such as the Comprehensive Environmental Response Compensation and Liability Act ("CERCLA") or the Resource Conservation and Recovery Act ("RCRA"). Generally speaking, CERCLA and RCRA would also apply to remediation done at Department of Defense or Department of Energy sites that are anticipated to be transferred out of federal ownership.

In other situations, state law and regulation will be an effective regulatory framework for remediation projects. State law is given a role to play in the federal environmental policy discussed above. Beyond this, state law may be the primary source of regulatory authority for many remediation projects. These may include larger sites and will often include smaller, typically urban, sites. In addition, many states authorize and supervise voluntary cleanup efforts, and these also may find environmental covenants a useful policy tool. With both state and federal environmental remediation projects, the applicable cleanup statutes and regulations will provide the basis for the restrictions and controls to be included in the resulting environmental covenants.

This Act does not supplant or impose substantive clean-up standards, either generally or in a particular case. The Act assumes those standards will be developed in a prior regulatory proceeding. Rather, the Act is intended to validate site-specific, environmental use restrictions resulting from an environmental response project that proposes to leave residual contamination in the ground in any of the different situations described above. Once the governing regulatory authority and the property owner have determined to use a risk-based approach to cleanup to protect the public from residual contamination, this Act supplies the legal infrastructure for creating and enforcing the environmental covenant under state law.

This Act does not require issuance of regulations. However, many state and federal agencies have developed implementation tools, including model covenants, statements of best practices, and advisory groups that include members of the real property and environmental practice bars as well as business and environmental groups. Developing and sharing such implementation tools and the advice of such advisory groups should support the effective implementation of the Act and is encouraged.

This Act does not address or change the larger context of environmental remediation regulation discussed above, and a number of aspects of that regulation should be noted here.

First, many contaminated properties are subject to the concurrent regulatory jurisdiction of both federal and state agencies. This Act does not address the exercise of such concurrent jurisdiction, and it is not intended to limit the jurisdiction of any state agency.

A specific issue arises with federal property that is not anticipated to be transferred to a non-federal owner. This Act takes no position regarding the question of whether remediation of such property is subject to State regulatory jurisdiction. In contrast, where federal property is transferred to a non-federal owner, state agencies will clearly have jurisdiction over environmental covenants on the transferred property where state environmental law so provides.

Second, potential purchasers of property subject to an environmental covenant should be aware that both state and federal environmental law other than this Act may authorize reopening the environmental remediation determination, even after the relevant statutory standards have been met on that site. While such reopeners are rare, they may be possible to respond either to

newly-discovered contamination or new scientific knowledge of the risk posed by existing contamination. As a consequence, under existing environmental law, the then-current owner may have remediation liability. While the dampening effect of such potential liability on the willingness of potential purchasers to buy contaminated property is clear, the issue remains important in the eyes of some interest groups. Federal law now provides protection for bona fide purchasers of such property under specified circumstances, and the law of some states may also afford some protection. However, this Act does not provide any such bona fide purchaser protection.

For these and other reasons, it is important that prospective purchasers of contaminated properties - particularly those successors who may buy some years after a clean-up has been completed - have actual knowledge of covenants at the time of purchase. Environmental covenants recorded pursuant to this Act will provide constructive notice of the covenant and in many circumstances recording will provide actual notice. However, to ensure that such persons have actual notice, a state or a local recording authority may wish to highlight the existence of environmental covenants in their communities with maps showing the location of properties subject to environmental covenants, similar to the kinds of maps commonly found in local land records offices to show the location of zoning districts or flood plains.

Legislative Notes

Non Participating Owner. This Act contemplates a situation where a risk based clean-up is agreed to by the regulatory agency and the parties responsible for the clean-up, potentially including the fee owner and the owners of other interests in the property. As a consequence of that agreement, the Act assumes those parties will each negotiate the terms of and then sign the covenant.

The Act assumes the owners of appropriate interests in contaminated property will be willing to sign the covenant. Cooperation is not always possible, however. State and federal regulatory systems make a number of parties, in addition to the current owner of a fee simple or some other interests, potentially liable for the cost of remediation of contaminated real property. As a result, a remediation project may proceed even though an owner is no longer present or interested in the property. In those circumstances, the remediation project would be conducted pursuant to regulatory orders and could be financed either by other liable parties or by public funds. However, an environmental covenant may still be a useful tool in implementing the remediation project even in these situations.

When an owner is either unavailable or unwilling to participate in the environmental response project, it may be appropriate to condemn and take a partial interest in the real property in order to be able to record a valid servitude on it. Under the law of some states, states have the power to take that owner's interest by condemnation proceedings, paying the value of the interest taken, and then enter an environmental covenant as an owner. Where there is substantial contamination, the property may have little or no market value. In some states the court would

take the cost of remediation into account in establishing the fair market value of the interest taken. See, e.g., Northeast Ct. Economic Alliance, Inc. v. ATC Partnership, 256 Conn. 813, 776 A.2d 1068 (2001). Although effective implementation of this Act may require that the state have a power of condemnation, this Act does not provide a substantive statutory basis for that power, and the state must therefore rely on other state law. Each state considering adoption of this Act should ensure that such a condemnation power is available for this purpose.

Similarly, while this Act provides substantive law governing creation, modification, and termination of environmental covenants, it does not include special administrative procedures for these and does not change the remedial decision making process. Rather, the Act presumes that the state's general administrative law or any specific procedure governing the environmental response project would apply to these activities.

"Actual" versus "Constructive" Notice of Contamination. The primary goal of the Act is to present to the states a statute that fully integrates environmental covenants into the traditional real property system. It seeks to ensure the long-term viability of those covenants by, among other means, providing constructive notice of those covenants to the world through resort to the land recording system.

Beyond that goal, it is very important to provide actual knowledge of the remaining contaminated conditions that the environmental covenants are designed to control. A broad range of stakeholders–children and adults that might inadvertently gain access to the contamination, tenants on the property, owners, abutting neighbors, prospective buyers, lenders, government officials, title insurance companies, public health providers and others–will have a real personal and financial stake in knowing what properties in their communities suffer from contamination and the extent of the risks they confront. The fact that this law may provide legally sufficient knowledge of those conditions is no substitute for real information regarding those conditions.

The challenge of providing that information is beyond the scope of this Act. However, in analogous situations–the location of zoning districts, flood plain boundaries, utility easements, and dangerous street conditions, for example–governments have devised techniques to make the public aware of those conditions on a continuing basis. Techniques such as maps in recorders' offices, on-site signage and monuments and, increasingly, computer databases accessible to the public are examples of possible solutions. All such devices have fiscal implications and are best addressed on a local basis. Over the long term, however, the public will likely be well served by innovative solutions to these issues.

Legislative Policy. Finally, this Act does not include a section of policy and legislative findings, although some states may choose to use such a section. If such a section is desired, the Colorado Statute, C.S.R.A. §25-15-317, may be an appropriate model.

UNIFORM ENVIRONMENTAL COVENANTS ACT

SECTION 1. SHORT TITLE.

This [act] may be cited as the Uniform Environmental Covenants Act.

SECTION 2. DEFINITIONS.

In this [act]:

(1) "Activity and use limitations" means restrictions or obligations created under this [act] with respect to real property.

(2) "Agency" means the [insert name of state regulatory agency for environmental protection] or any other state or federal agency that determines or approves the environmental response project pursuant to which the environmental covenant is created.

(3) "Common interest community" means a condominium, cooperative, or other real property with respect to which a person, by virtue of the person's ownership of a parcel of real property, is obligated to pay property taxes or insurance premiums, or for maintenance, or improvement of other real property described in a recorded covenant that creates the common interest community.

(4) "Environmental covenant" means a servitude arising under an environmental response project that imposes activity and use limitations.

(5) "Environmental response project" means a plan or work performed for environmental remediation of real property and conducted:

(A) under a federal or state program governing environmental remediation of real property, including [insert references to state law governing environmental remediation];

(B) incident to closure of a solid or hazardous waste management unit, if the closure is conducted with approval of an agency; or

(C) under a state voluntary clean-up program authorized in [insert reference to appropriate state law].

(6) "Holder" means the grantee of an environmental covenant as specified in Section 3(a).

(7) "Person" means an individual, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, public corporation, government, governmental subdivision, agency, or instrumentality, or any other legal or commercial entity.

(8) "Record", used as a noun, means information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form.

(9) "State" means a state of the United States, the District of Columbia, Puerto Rico, the United States Virgin Islands, or any territory or insular possession subject to the jurisdiction of the United States.

Comment

1. The following are examples of subsection (1) activity and use limitations:

(1) a prohibition or limitation of one or more uses of or activities on the real property, including restrictions on residential use, drilling for or pumping groundwater, or interference with activity and use limitations or other remedies,
(2) an activity required to be conducted on the real property, including monitoring, reporting, or operating procedures and maintenance for physical controls or devices,
(3) any right of access necessary to implement the activity and use limitations, and
(4) any physical structure or device required to be placed on the real property.

The specific activity and use limitations in any covenant will depend on the nature of the proceeding in the environmental response project that led to the covenant. For example, in a major environmental response project where the administrative process was conducted by either

a state or federal agency, the activity and use limitations would generally be identified in the record of decision and then implemented in the environmental covenant pursuant to this Act. In contrast, in a voluntary clean-up supervised by privately licensed professionals, as authorized in some states, the activity and use limitations would not be developed by the agency during an administrative proceeding but by the parties themselves and their contracted professionals.

Nothing in this Act prevents the use of privately negotiated use restrictions which are recorded in the land records, without agency involvement: the validity of such covenants, however, is not governed by this Act but by other law of the enacting state. *See* Section 5(d).

2. The governmental body with responsibility for the environmental response project in question is the agency under this Act. Generally, this agency will supply the public supervision necessary to protect human health and the environment in creating and modifying the environmental covenant.

In addition, as noted in Comment 1, the definition of "environmental response project" contemplates the possibility that the project may be undertaken pursuant to a voluntary clean-up program, where the actual determination of the sufficiency of the proposed clean-up is made by a private professional party, rather than an agency. In this case, the definition contemplates that an agency - typically, the state environmental agency - will nevertheless be asked to consent to the environmental covenant by signing it. Section 4 of the Act makes clear that the covenant is not valid under this Act unless an agency signs it. Section 3 of the Act makes clear that the mere signature of the agency, without more, means only that the agency has "approved" the covenant in order to satisfy the definitional requirements of definition (2) and the mandated contents of Section 4. That signature imposes no duties or obligations on the agency.

3. The agency, for purposes of this Act, may be either a federal government entity or the appropriate state regulatory agency for environmental protection.

Further, in some cases, the appropriate federal agency may be the Environmental Protection Agency, the Department of Defense as 'lead agency' under federal law, or another body.

4. Section 4 of the Act makes clear that an environmental covenant is valid if only one agency signs it. However, in many circumstances, both a federal and a state agency may have jurisdiction over the environmental contamination that led to the environmental response project. In this situation, the best practice may be for both federal and state agencies with jurisdiction over the contaminated property to sign the environmental covenant.

5. Definition (4) states that an environmental covenant is a "servitude"; the term generally refers to either a burden or restriction on the use of real property, or to a benefit that flows from the ownership of land, that in either case "runs with the land" - that is, the benefit or the burden passes to successive owners of the real property.

The law of servitudes is a long established body of real property law. The term is defined in §1.1 of the Restatement (3d) of Servitudes as follows: "(1) A servitude is a legal device that creates a right or an obligation that runs with land or an interest in land." The Restatement goes on to provide that the forms of servitudes which are subject to that Restatement are "easements, profits, and covenants."

This Act emphasizes that an environmental covenant is a servitude in order to implicate this full body of real property law and to sustain the validity and enforceability of the covenant. By first characterizing the environmental covenant as a servitude, the Act expressly avoids the argument that an environmental covenant is simply a personal common law contract between the agency and the owner of the real property at the time the covenant is signed, and thus is not binding on later owners or tenants of that land.

6. The definition of "environmental covenant" also provides that the servitude is created to implement an environmental response project. An environmental response project may determine, in some circumstances, to leave some residual contamination on the real property. This may be done because complete cleanup is technologically impossible, or because it is either ecologically or economically undesirable. In this situation, the environmental response project may impose activity and use limitations to control residual risk that results from contamination remaining in real property. An environmental covenant is then recorded on the land records as required by Section 8 to ensure that the activity and use limitations are both legally and practically enforceable.

7. An "environmental response project" covered by definition (5) may be undertaken pursuant to authorization by one of several different statutes. Definition (5)(a) specifically covers remediation projects required under state law. However, the definition is written broadly to also encompass both current federal law, future amendments to both state and federal law, as well as new environmental protection regimes should they be developed. Without limiting this breadth and generality, the Act intends to reach environmental response projects undertaken pursuant to any of the following specific federal statutes:

(1) Subchapter III or IX of the federal "Resource Conservation and Recovery Act of 1976", 42 U.S.C. sec. 6921 to 6939e and 6991 to 6991i, as amended;

(2) Section 7002 or 7003 of the federal "Resource Conservation and Recovery Act of 1976", 42 U.S.C. sec. 6972 and 6973, as amended;

(3) "Comprehensive Environmental Response, Compensation, and Liability Act of 1980", 42 U.S.C. sec. 9601 to 9647, as amended;

(4) "Uranium Mill Tailings Radiation Control Act of 1978", 42 U.S.C.sec.7901 et seq., as amended;

(5) "Toxic Substances Control Act", 15 U.S.C. 2601 to 2692, as amended;

(6) "Safe Drinking Water Act", 42 U.S.C. 300f to 300j-26, as amended;

(7) "Atomic Energy Act", 42 U.S.C. 2011 et. sec., as amended.

8. Definition (5)(C) extends the Act's coverage to voluntary remediation projects that are undertaken under state law. Environmental covenants that are part of voluntary remediation projects may serve both the goal of environmental protection and the goal of facilitating reuse of the real property. However, approval of these projects by a governmental body or other authorized party ensures that the project serves these goals. Even though preparation of the clean-up plan and supervision of the work may be undertaken by private parties, this Act requires that covenants undertaken as part of a formal voluntary clean-up program must be approved by the agency as evidenced by the agency's signature on the covenant, in order to be effective under this Act.

9. Some states authorize properly certified private parties to supervise remediation to pre-existing standards and certify the cleanup. For example, in Connecticut and Massachusetts, these are "licensed site professionals". *See*, e.g., M.G.L. ch. 21A §19; 310 CMR 40.1071; C.G.S. §§22a-133o, 22a-133y. Supervision and certification by statutorily-authorized parties is intended to accomplish the same public function as supervision and certification by the governmental entity. Thus, these environmental response projects are also covered by this definition.

10. Under definition (5)(C), environmental response projects may include specific agreements between an owner and the agency for remediation that go beyond prevailing requirements. Alternatively, an owner may choose to contract with a potential purchaser for additional use restrictions in an instrument that does not purport to come within this Act; *see* Section 5(d). Because the owner may have residual liability for the site, even after remediation and transfer to a third party for redevelopment, the owner may require further restrictions as a condition of creating the environmental covenant and eventual reuse of the real property.

11. The definition of "holder" is in definition (6). As the practice of using environmental covenants continues to grow, new entities may emerge to serve as holders. This Act does not intend to limit this process. A holder may be any person under the broad definition of this Act, including an affected local government, the agency, or an owner. The identity of an individual holder must be approved by the agency and an owner as part of the process of creating an environmental covenant, as specified in Section 4. A holder is authorized to enforce the covenant under Section 11. A holder has the rights specified in Section 4 of this Act and may be given additional rights or obligations in the environmental covenant.

Section 3(a) makes clear that a holder's interest is an interest in real property. Some environmental enforcement agencies are not authorized by their enabling legislation to own an interest in real property after the environmental remediation is completed. As a consequence, those agencies may not be entitled to serve as holders under the Act. In those cases where an agency wishes to be certain that a viable holder exists, a private entity may serve this purpose, acting, for example by contract, in accordance with the agency's direction.

More generally, the nature of a holder's interest in the real property may influence

whether its rights and duties with respect to the real property are likely to lead to potential liability for future environmental remediation, should such remediation become necessary. Under CERCLA, an "owner" is liable for remediation costs; *see* 42 U.S.C.A. 9607(a)(1). Unfortunately, the definition of "owner" in the statute is circular and unhelpful in evaluating whether a holder is potentially liable under it. 42 U.S.C.A. 9601(20).

In general, a holder's right to enforce the covenant under Section 11 should be considered comparable to the rights covered in an easement and, thus, should not lead to a determination that the holder is liable as an "owner" under CERCLA. The two cases that have considered this question have found that the parties which held the easements were not CERCLA "owners". Long Beach Unified School District v. Dorothy B. Godwin California Living Trust, 32 F.3d 1364 (9th Cir. 1994); Grand Trunk RR. V. Acme Belt Recoating, 859 F. Supp. 1125 (W.D. MI 1994). In each case, the court reasoned that the circular definition of owner meant that the term's most common meaning would prevail. The common law's distinction between an easement holder and the property owner was then applied to find the easement holder not to be an "owner" for purposes of this statute. In each of these cases, the party that held the easement had not contributed to contamination on the property. The amendments to CERCLA Section 9601(35), Small Business Liability Relief and Brownfields Revitalization Act, Pub. L. No. 107-118, 115 Stat. 2360 (2002) (HR 2869, 107th Cong. 1st Session), added the term "easement" to the definition of parties which are in a "contractual relationship" under CERCLA. However, this does not affect whether the easement holder will be held to be a CERCLA "owner".

Where the holder or another person has more extensive rights than enforcement, a careful analysis will be required. The CERCLA liability cases typically emphasize that a party that exercises the degree of control over a site equivalent to the control typically exercised by an owner of the site will be held liable as an "owner". Under this approach, for example, lessees have been held liable as owners when their control over the site approximated that which an owner would have. *See*, e.g., Delaney v. Town of Carmel, 55 F. Supp. 2d 237 (S.D.N.Y. 1999); U.S. v. A & N Cleaners and Launderers, 788 F. Supp. 1317 (S.D.N.Y. 1990); U.S. v. S.C. Dept. of Health and Env. Control, 653 F. Supp. 984 (D.C.S.C. 1984.) Accordingly, a holder contemplating extensive control over the site should consider potential "owner" liability carefully.

CERCLA liability also extends to an "operator" of the site (42 U.S.C.A. 9607(a)(1)), and the case law interpreting this definition emphasizes that a party is liable as an operator if it has a high degree of control over the operating decisions and day to day management at the site. Thus, for example, a party that held an easement could be liable as an operator if its degree of control met this standard. A holder will, in general, have only control authority over the site related to effective enforcement of the environmental covenant and does not typically need more extensive day to day control. However, this will not likely be true in all cases.

SECTION 3. NATURE OF RIGHTS; SUBORDINATION OF INTERESTS.

(a) Any person, including a person that owns an interest in the real property, the agency, or a municipality or other unit of local government, may be a holder. An environmental covenant may identify more than one holder. The interest of a holder is an interest in real property.

(b) A right of an agency under this [act] or under an environmental covenant, other than a right as a holder, is not an interest in real property.

(c) An agency is bound by any obligation it assumes in an environmental covenant, but an agency does not assume obligations merely by signing an environmental covenant. Any other person that signs an environmental covenant is bound by the obligations the person assumes in the covenant, but signing the covenant does not change obligations, rights, or protections granted or imposed under law other than this [act] except as provided in the covenant.

(d) The following rules apply to interests in real property in existence at the time an environmental covenant is created or amended:

(1) An interest that has priority under other law is not affected by an environmental covenant unless the person that owns the interest subordinates that interest to the covenant.

(2) This [act] does not require a person that owns a prior interest to subordinate that interest to an environmental covenant or to agree to be bound by the covenant.

(3) A subordination agreement may be contained in an environmental covenant covering real property or in a separate record. If the environmental covenant covers commonly owned property in a common interest community, the record may be signed by any person authorized by the governing board of the owners' association.

(4) An agreement by a person to subordinate a prior interest to an environmental

covenant affects the priority of that person's interest but does not by itself impose any affirmative obligation on the person with respect to the environmental covenant.

Comment

Subsection (a) confirms that the holder holds an interest in real property, thus distinguishing that right from a personal or contractual right that does not run with the land. The definition of 'holder' in Section 2, departing from traditional real property concepts, makes clear that the holder may be the agency or the owner, thus making it possible for the owner to be both grantor and grantee.

Subsection (a) also makes clear that if the agency chooses to be the holder, the agency will thereby hold an interest in the real property. Otherwise, subsection (b) provides that the agency's interest in the covenant as a consequence of signing the covenant or having a right to enforce it under this Act is not an interest in real property.

Subsection (c) validates and confirms any contractual obligations that an agency may assume in an environmental covenant. So, for example, if the agency were to agree to authorize certain activities on the property, to undertake periodic inspections of the site or to provide notice of particular actions to specified persons, those undertakings and obligations would be enforceable against the agency in accordance with their terms by parties adversely affected by any breach.

At the same time, subsection (c) also makes clear that the mere act of signing the covenant in order to signify the agency's 'approval' of the covenant, which is required by the Act as a condition of its effectiveness under this Act, is not an assumption of obligations and the agency has not thereby exposed itself to any liability. The agency manifests its approval of an environmental covenant by signing it.

Subsection (d) restates and clarifies traditional real property rules regarding the effect of an environmental covenant on prior recorded interests. The basic rule remains that pre-existing prior valid and effective interests – "First in time, first in right" – remain valid. As § 7.1 of the Restatement (3d) of Property: Mortgages states:

> "A valid foreclosure of a mortgage terminates all interests in the foreclosed real estate that are junior [that is, later in time] to the mortgage being foreclosed....Foreclosure does not terminate interests ...that are senior...."

At the same time, it is not uncommon for interested parties to re-order the priorities among them by agreement in order to accommodate the economic interests of various parties. The usual device used to re-order priorities is a so-called 'subordination' agreement. Again, this section tracks the outcome suggested in The Restatement (3d) of Property: Mortgages. Section 7.7 of the Restatement provides in pertinent part that:

> A mortgage, by a declaration of its mortgagee, [that is, the lender] may be made subordinate in priority to another interest in the mortgaged real estate, whether existing or to be created in the future....A subordination that would materially prejudice the mortgagor [that is, the owner of the real estate] or the person whose interest is advanced in priority is ineffective without the consent of the person prejudiced.

The impact of the newly recorded environmental covenant on the priorities of other lien holders is sufficiently important that the Act emphasizes this issue both in this section and in Sections 8(b) and 9(c). In all these instances, the Act provides that the usual rules of priorities are preserved, except in the case of foreclosure of tax liens.

Thus, in preparing an environmental covenant, it might be advisable for the agency to identify all prior interests, determine which interests may interfere with the covenant protecting human health and the environment, and then take steps to avoid the possibility of such interference. The agency may do this by , for example, having the parties obtain appropriate subordination of prior interests, as a condition to the agency's approval of the environmental covenant.

The combined effect of Sections 3, 8 and 9 creates a curious "circular" lien problem, where (1) foreclosure of a 2003 municipal tax lien would terminate a 2000 pre-existing mortgage (the usual outcome), but (2) that same foreclosure would not affect the environmental covenant created in 2002 under this Act; while (3) foreclosure of the 2000 pre-existing mortgage would terminate the 2002 environmental covenant (again, the usual rule), but (4) not the 2003 municipal tax lien (also, the usual rule). Circular liens, however, are not unique to this situation.

SECTION 4. CONTENTS OF ENVIRONMENTAL COVENANT.

(a) An environmental covenant must:

(1) state that the instrument is an environmental covenant executed pursuant to

[insert statutory reference to this [act].]

(2) contain a legally sufficient description of the real property subject to the covenant;

(3) describe the activity and use limitations on the real property;

(4) identify every holder;

(5) be signed by the agency, every holder, and unless waived by the agency every owner of the fee simple of the real property subject to the covenant; and

(6) identify the name and location of any administrative record for the environmental response project reflected in the environmental covenant.

(b) In addition to the information required by subsection (a), an environmental covenant may contain other information, restrictions, and requirements agreed to by the persons who signed it, including any:

(1) requirements for notice following transfer of a specified interest in, or concerning proposed changes in use of, applications for building permits for, or proposals for any site work affecting the contamination on, the property subject to the covenant;

(2) requirements for periodic reporting describing compliance with the covenant;

(3) rights of access to the property granted in connection with implementation or enforcement of the covenant;

(4) a brief narrative description of the contamination and remedy, including the contaminants of concern, the pathways of exposure, limits on exposure, and the location and extent of the contamination;

(5) limitation on amendment or termination of the covenant in addition to those

contained in Sections 9 and 10; and

(6) rights of the holder in addition to its right to enforce the covenant pursuant to Section 11.

(c) In addition to other conditions for its approval of an environmental covenant, the agency may require those persons specified by the agency who have interests in the real property to sign the covenant.

Comment

1. Subsection (a)(2) of this section requires that the covenant contain a "legally sufficient description" of the "real property" subject to the covenant. While these terms are familiar to real property practitioners, it may be useful to describe precisely what is required by this section.

First, a description of the real property that is "legally sufficient" will depend upon the practice of the enacting state. The purpose of such a requirement, for the real property practitioner, will be to assure that the particular parcel subject to the covenant will be properly indexed in the land records and thus readily located during the course of a title search. This, in turn, will enable a buyer, lender or other interest holder to be confident of what they own or hold as security.

The most commonly used legal descriptions of land are: (1) a metes and bounds description - that is, a description that begins with reference to a known point on the surface of the earth, followed by references to distances and angles from that point to other monuments or terminals that mark the outer boundaries of the parcel; (2) reference to a recorded map or survey, that contains a "picture" of the metes and bounds description; (3) reference to a particular parcel number on a governmental grid system; and (4) a coordinates reference system, derived from a Global Positioning System or other mapping tool. These, and other generally obsolete forms of legal description [e.g., "starting at the black oak tree in the pasture, then running along a stone wall to Bloody Creek, then generally south and west along the creek to a dirt road, then back to the tree where you started, being the same 50 acres, more or less, conveyed to my father by Lisman"] may all serve the same purpose, and would meet the requirement of being "legally sufficient."

In contrast, as described in Comment 11 below, more precise measurements may be very

useful for identifying precisely the "geospatial" location of sub-surface contaminants.

Second, the "real property" that is subject to the covenant may be narrowly or broadly defined, depending on the wishes of the parties. It may be, for example, that only a 3 acre portion of a 5,000 acre ranch is contaminated; in such a case, it may be unnecessary to describe all 5000 acres of real property as being subject to the covenant.

Alternatively, in a remote location, it may be that the 3 acre contaminated parcel owned by one person may be reached only by crossing a private road located on a 5000 acre ranch owned by another person. In such a case, a careful property description will want to include reference to the easement or other access right across the land owned by another person.

It is important to recognize, however, that real property is a three-dimensional concept (or a four-dimensional concept when one considers time as a dimension). A legal description of a particular parcel of real property which has only perimeter boundaries and no upper and lower boundaries encompasses both the surface of the earth within those boundaries, the airspace above the surface, all the dirt and minerals below the surface and all spaces within that volume of space that may be filled with water. Thus, in appropriate cases, a title searcher will need to be sensitive to cases where interests in the "real property" or "real property" have been sold or leased which leave the owner with less than all of the real property. A ten-year lease of the entire parcel, for example, represents a time-defined "boundary" to the owner's interest in the real property in question. An agency seeking to identify all the interests in the parcel in order to secure their approval of a covenant will therefore want to ensure that a title search identifies all these interests.

2. This Act does not provide the standards for environmental remediation nor the specific activity and use limitations to be used at a particular site. Those will be provided by the state or federal agency based on other state and federal law governing mandatory and voluntary cleanups. This Act contemplates that those standards will then be incorporated into the environmental response project, which, in turn, will call for activity and use restrictions that can be implemented through creation of an environmental covenant. This section addresses creation of the environmental covenants.

3. Ordinarily, an environmental covenant will be created only by agreement between the agency and the owner. If there is a holder other than the agency or the owner, both the agency and the owner must approve the holder, and the holder must agree to the terms of the covenant. The agency may refuse to agree to an environmental covenant if it does not effectively implement the activity and use limitations specified in the environmental response project.

Where no owner is available or willing to participate in the environmental response project, it may be necessary for the agency to condemn and take an interest sufficient to record an environmental covenant on the property where it has the power to do so. This Act does not contain independent condemnation authority for the agency. Alternatively, in some states, there

may be a basis for an agency to require an owner to cooperate with the implementation of the covenant as a regulatory matter.

4. This Act recognizes that there may be situations in which there is more than one fee simple owner. For example, Husband and Wife may own Blackacre as tenants in common, joint tenants, or tenants of the entirety. In all of these configurations of ownership, both Husband and Wife are owners of Blackacre and both must sign an environmental covenant unless the agency waives this requirement.

Similarly, it is common practice in mining states, such as Kentucky, West Virginia, Pennsylvania, for the fee ownership of the mineral interests to be conveyed separate and apart from the fee ownership of the remaining parcel. Thus, under the conventional real property practices of these states, there may be two separate fee ownership interests in the same "parcel" of real property, and each owner must sign the environmental covenant unless this requirement is waived. It may be that those two owners of different interests in the same parcel have an agreement between them prohibiting separate conveyances of interests in the land without permission of the other. However, if that agreement does not appear of record, it would not run with the land, would likely not be binding on the agency [in the absence of the agency's actual knowledge] and thus not affect the validity of a covenant signed by one of the owners with respect to that owner's interest in the real estate.

5. In addition to the parties specified in Section 4(a)(5), other persons may wish to sign the environmental covenant and, in any event, the agency may require their signature as a condition of approving the covenant. (See Section 4(c)). Under current law, persons other than the owner may be liable for cleanup of the contamination, including contingent future liability if further cleanup is needed or personal injury claims are brought. These could be parties which previously used the property or whose waste was disposed of on the property. Such a person may have liability for some or all of the cost of the environmental response project and may thus have a compelling interest in signing the covenant so as to be informed of future enforcement, modification and termination.

6. Section 4(a)(5) also authorizes the agency to waive the requirement that the covenant be signed by the owner of the fee simple. The Act contemplates that such waivers should be rare because in most situations the covenant can be effective only if the fee owner's interest is subject to the covenant. However, in some circumstances the fee owner may have transferred most or all of the economic value of the property to the holder of another interest, either permanently or for the time period during which the covenant's restrictions are needed. Consider, for example, the situation in which the contamination remaining presents environmental risks for only twenty years and the property is subject to a ninety-nine year lease. In this case, it is critical that the owner of the leasehold interest be a party to the covenant so its interest will be subject to it. However, in this situation, the fee owner's participation is not essential for the covenant to protect human health and the environment. If the fee owner is unavailable or unwilling to participate, the agency might choose to waive its signature. Of course, such a situation, when

the likely duration of the covenant is both short and clearly known, is likely to be exceptional.

7. A holder is the grantee of the environmental covenant and the Act requires that there be a holder for a covenant to be valid and enforceable. Under Section 5(b)(9), the grantee may also be the grantor, who is the owner of the property and who might remain a holder upon sale of the property, or the agency. In addition to enforcement rights, the holder may be given specific rights or obligations with respect to future implementation of the environmental covenant. These could include, for example, the obligation to monitor groundwater or maintain a cap or containment structure on the property. Such rights and obligations will be specified in the environmental covenant and, like any obligations, would be enforceable against the holder if the holder failed to satisfy its obligations.

8. Section 4(a)(5) requires an agency to sign the covenant. In some states it may be necessary to amend the state agency's enabling statute to empower it to so sign.

9. Section 4(a)(6) requires the covenant to disclose the "name and location of any administrative record" for the underlying environmental response project. Typically, this information will require a docket or file number, identifying names of the parties, and an indication of the agency office in which the record of decision or other administrative record has been retained. In those cases where a state-wide registry is maintained, the registry also requires this information. In the case of voluntary clean-ups, of course, there may not be an administrative record.

Section (4) (b) is a permissive provision intended by the breadth of its provisions ("...may contain other information ...agreed to by the persons who signed it...") to encourage the agency and the other parties to include provisions in the particular covenant that are tailored to the specific needs of that project. This may well be accomplished in order to maximize the likelihood that the covenant, when properly implemented and monitored, will protect human health and the environment.

Persons dealing with this Act must recognize that no statute and no commentary can fully contemplate all the possibilities that are likely to arise in implementation of this Act. This issue permeates this subsection. In (b)(1), for example, the text contemplates the possibility that the agency may, in a particular case, require an owner or other persons to notify the agency before, among other things, that party applies for "...building permits." The suggested language is not intended to exclude notice of any other type of work permit that might trigger a violation of an environmental covenant, such as, for example, drilling or excavation permits.

10. Section 4(b)(4) suggests that, in an appropriate case, the agency may wish to provide a summary of the contamination on the site and the remedial solutions that have been identified. From a public health perspective, this may be very useful. The reference to "pathways of exposure" requires a statement that, for example, the contaminant might be of danger if it comes in contact with skin, if breathed, or only if ingested.

11. Section 4(b)(4) also suggests that, in an appropriate case, the agency may require the covenant to contain not only a legally sufficient description of the real property subject to the covenant (as mandated under section 4(a)(2)) but also the 'location of the contamination."

One way of identifying such location is by the concept of "geospatial" location as defined by the Federal Geographic Data Committee of the U.S. Geological Survey. Such an identification would define the location with geospatial data, which the Committee defines as follows:

> Geospatial Data: Information that identifies the geographic location and characteristics of natural or constructed features and boundaries on the Earth. This information may be derived from, among other things, remote sensing, mapping, and surveying technologies. Statistical data may be included in this definition....

Depending on the nature of the contamination and the size of the parcel subject to the covenant, a description of the "geospatial location" of the contamination and the legal boundary description of the real property parcel on which those contaminants are located may be very different, and the kinds of information required to usefully describe the "location" of the contamination may also differ. As a simple example, it may be appropriate to use grid coordinates and projected elevations below ground level to define the upper and lower levels of a groundwater contamination plume, together with sensing or other data that projects the mobility of that plume over time, in order to accurately provide useful information that a simple metes and bounds description could not convey.

12. Subsection (b)(5) contemplates that the environmental covenant may impose additional restrictions on amendment or termination beyond those required by this Act. For example, in some circumstances the owner or another party who may have contingent residual liability for further cleanup of the real property subject to the environmental covenant, may seek further restrictions in the covenant to protect against this contingent liability.

13. Subsection (c) confirms that the agency is under no obligation to approve a particular environmental covenant by signing it. This may be particularly significant in those cases where the agency was unable to secure subordination of prior interests in the real property which is proposed to be subject to the covenant. If a prior security or other interest is not subordinated to the environmental covenant, and then is foreclosed at some later time, under traditional real property law that foreclosure would extinguish or limit an environmental covenant. Since such an outcome is antithetical to the policies underlying this Act, the Act contemplates that the agency may, before agreeing to the covenant, require subordination of these interests. At the time of creation of the environmental covenant, the agency must determine whether the prior interest presents a

realistic threat to the covenant's ability to protect the environment and human health. Section 3 of the Act makes clear that by subordinating its interest, an owner of a prior interest does not change its liability with respect to the property subject to the environmental covenant. Any such liability of a subordinating party would arise by operation of other law and not under this Act.

Subsection (c) contemplates that there are many circumstances that might cause an agency, in the exercise of its regulatory discretion as defined in other law, either to refuse to sign a covenant in the form presented, or to agree to sign it only upon satisfaction of specified conditions. The listing of the following examples is intended to be illustrative, not exhaustive.

Example 1: As a condition of signing the covenant, the agency requires the owner to provide an abstract of title of the property to be subjected to the covenant. If the owner declines to do so, the agency may reasonably be expected to decline to approve the covenant, since it will have insufficient evidence of the priority of its new covenant.

Example 2: The owner provides the title abstract, which discloses that the property to be subjected to the covenant is presently subject to a first mortgage for $5 million. The agency's decision to condition its approval on the first lender's willingness to subordinate to the covenant would plainly be appropriate.

Example 3: The agency's policies require that an independent company regularly engaged in the business of monitoring and enforcing environmental covenants on behalf of the agency be named as 'holder' in the covenant. The owner's refusal to agree to such a provision would justify an agency's refusal to approve the covenant.

SECTION 5. VALIDITY; EFFECT ON OTHER INSTRUMENTS.

(a) An environmental covenant that complies with this [act] runs with the land.

(b) An environmental covenant that is otherwise effective is valid and enforceable even if:

(1) it is not appurtenant to an interest in real property;

(2) it can be or has been assigned to a person other than the original holder;

(3) it is not of a character that has been recognized traditionally at common law;

(4) it imposes a negative burden;

(5) it imposes an affirmative obligation on a person having an interest in the real property or on the holder;

(6) the benefit or burden does not touch or concern real property;

(7) there is no privity of estate or contract;

(8) the holder dies, ceases to exist, resigns, or is replaced; or

(9) the owner of an interest subject to the environmental covenant and the holder are the same person.

(c) An instrument that creates restrictions or obligations with respect to real property that would qualify as activity and use limitations except for the fact that the instrument was recorded before the effective date of this [act] is not invalid or unenforceable because of any of the limitations on enforcement of interests described in subsection (b) or because it was identified as an easement, servitude, deed restriction, or other interest. This [act] does not apply in any other respect to such an instrument.

(d) This [act] does not invalidate or render unenforceable any interest, whether designated as an environmental covenant or other interest, that is otherwise enforceable under the law of this state.

Comment

1. Subsection (a), when considered with the common law, makes clear that environmental covenants will be binding not only on the persons who originally negotiate them but also on subsequent owners of the property and others who hold an interest in the property, such as tenants, so long as those owners and others have actual or constructive knowledge of the covenant.

To be binding on future owners who may not have actual knowledge of the covenant, the Act requires that the covenant comply with all provisions of the Act.

Section 8(a) of this Act requires the covenant to be recorded. The Act then states the usual real property rule that a recorded instrument "runs with the land" and binds all who have an interest in it.

2. Recording requirements are an important means by which the law protects 'bona fide purchasers' - BFP's - who acquire property without knowledge of its conditions. Even in the absence of recording a document on the land records, the common law has long held that those who have actual knowledge of the document take title subject to the document. The BFP, on the other hand, is bound at common law only by an instrument affecting the real property to the extent the BFP has constructive knowledge of the document.

Importantly, a BFP is charged with constructive knowledge of the land records. In some respects, one of the fundamental tensions between traditional real property law and environmental law is the change in this rule, by which environmental law seeks to impose liability on "innocent" purchasers of contaminated property who take without knowledge of the property's condition and may have no practical means of learning of its condition. To the extent this Act tracks traditional real property practice by requiring recorded covenants, this tension may be considerably lessened.

3. Subsection (b) and its comments are modeled on Section 4 of the Uniform Conservation Easement Act. One of the Environmental Covenant Act's basic goals is to remove common law defenses that could impede the use of environmental covenants. This section addresses that goal by comprehensively identifying these defenses and negating their applicability to environmental covenants.

This Act's policy supports the enforceability of environmental covenants by precluding applicability of doctrines, including older common law doctrines, that would limit enforcement. That policy is broadly consistent with the Restatement of the Law Third of Property (Servitudes), including §2.6 and chapter 3. For specific doctrines see §§ 2.4 (horizontal privity), 2.5 (benefitted or burdened estates), 2.6 (benefits in gross and third party benefits), 3.2 (touch and concern doctrine), 3.3 (rule against perpetuities), and 3.5 (indirect restraints on alienation).

Subsection (b)(1) provides that an environmental covenant, the benefit of which is held in gross, may be enforced against the grantor or his successors or assigns. By stating that the covenant need not be appurtenant to an interest in real property, it eliminates the requirement in force in some states that the holder of an easement must own an interest in real property (the "dominant estate") benefitted by the easement.

Subsection (b)(2) also clarifies existing law by providing that a covenant may be enforced by an assignee of the holder. Section 10(c) of this Act specifies that assignment to a new holder will be treated as a modification and Section 10 governs modification of environmental covenants.

Subsection (b)(3) addresses the problem posed by the existing law's recognition of servitudes that served only a limited number of purposes and that law's reluctance to approve so-called "novel incidents". This restrictive view might defeat enforcement of covenants serving the environmental protection ends enumerated in this Act. Accordingly, subsection (b)(3) establishes that environmental covenants are not unenforceable solely because they do not serve purposes or fall within the categories of easements traditionally recognized at common law or other applicable law.

Subsection (b)(4) deals with a variant of the foregoing problem. Some applicable law recognizes only a limited number of "negative easements" – those preventing the owner of the burdened real property from performing acts on his real property that he would be privileged to perform absent the easement. Because a far wider range of negative burdens might be imposed by environmental covenants, subsection (b)(4) modifies existing law by eliminating the defense that an environmental covenant imposes a "novel" negative burden.

Subsection (b)(5) addresses the opposite problem – the potential unenforceability under existing law of an easement that imposes affirmative obligations upon either the owner of the burdened real property or upon the holder. Under some existing law, neither of those interests was viewed as a true easement at all. The first, in fact, was labeled a "spurious" easement because it obligated an owner of the burdened real property to perform affirmative acts. (The spurious easement was distinguished from an affirmative easement, illustrated by a right of way, which empowered the easement's holder to perform acts on the burdened real property that the holder would not have been privileged to perform absent the easement.)

Achievement of environmental protection goals may require that affirmative obligations be imposed on the burdened real property owner or on the covenant holder or both. For example, the grantor of an environmental covenant may agree to use restrictions and may also agree to undertake affirmative monitoring or maintenance obligations. In addition, the covenant might impose specific engineering or monitoring obligations on the holder, which may be a for profit corporation, a charitable corporation or trust holder. In all these cases, the environmental covenant would impose affirmative obligations and Subsection (b)(5) makes clear that the covenant would not be unenforceable solely because it is affirmative in nature.

Subsections (b)(6) and (b)(7) preclude the touch and concern and privity of estate or contract defenses, respectively. They have traditionally been asserted as defenses against the enforcement of covenants and equitable servitudes.

Subsection (b) (8) addresses the possibility that the holder may have died or for other reason fails to exist. Failure of the holder ought not invalidate the covenant and Sections 10(c) and (d) authorize replacement of a holder in various circumstances.

Subsection (b) (9) addresses the case where an owner of a contaminated parcel

may agree to remedy an existing condition and may further agree to serve as holder in order to perform the necessary tasks. Under this Act, the owner may be willing to do so because Section 4 of the Act requires that a holder be named and the owner may not be inclined to create an interest in a stranger. Under these circumstances, the owner's name would appear as both the grantor and the grantee in the land records, and this outcome ought not invalidate the covenant.

Subsection (b) identifies the principal common law doctrines that have been applied to defeat covenants such as those created by this Act. Drafters in individual states may wish to consider whether references to other common law or statutory impediments of a similar nature ought to be added to this subsection.

Subsection (c) addresses the treatment of instruments recorded before the date of this Act that seek to accomplish the purposes of environmental covenants under this Act. It seeks to validate such instruments, in a limited way, by specifying that the defenses covered in subsection (b), or the fact that the instrument was identified as something other than an environmental covenant, will not make prior covenants unenforceable. Beyond negating these specific defenses, however, this Act does not apply to those prior covenants. If the parties to a prior covenant wish to have the other benefits of this Act for that covenant, they must re-execute the covenant in a manner which satisfies the requirements of this Act.

Section (d) is a general savings clause for other interests in real property and other agreements concerning environmental remediation which are not covered under this Act. It disavows the intent to invalidate any interest created either before or after the Act which does not comply with the Act but which otherwise may be valid under the state's law. Nor does the Act intend, in any way, to validate or invalidate an action taken by a person to remediate contamination that is taken without formal governmental oversight or approval. A recorded instrument that does not satisfy the requirements of this Act does not come within the scope of this Act; it does not enjoy the protections of this Act and must be evaluated under other law of the state.

For example, the Act is clear that its requirements apply only to land use restrictions placed on real property pursuant to an "environmental response project" as that term is defined in the Act. If private parties choose to use conventional deed restrictions or other devices to place further activity and use restrictions on a parcel, nothing in this Act would affect that contractual arrangement either to insulate it from attack as invalid under that state's other law or to invalidate it under this law.

SECTION 6. RELATIONSHIP TO OTHER LAND-USE LAW.

This [act] does not authorize a use of real property that is otherwise prohibited by

zoning, by law other than this [act] regulating use of real property, or by a recorded instrument that has priority over the environmental covenant. An environmental covenant may prohibit or restrict uses of real property which are authorized by zoning or by law other than this [act].

Comment

This section clarifies that this Act does not displace other restrictions on land use laws, including zoning laws, building codes, sanitary sewer or subdivision requirements and the like. Restrictions under those laws apply unchanged to real property covered by an environmental covenant.

Where other law, including either a state or federal environmental response project, requires structures or activities in order to perform the environmental remediation, the status of those requirements is likely to be determined by that other law and not by this Act. Thus, for example, where the environmental covenant is implementing an environmental response project under federal CERCLA law, a federal appellate court has held that the federal law authorizing the environmental response project preempts a conflicting city ordinance. U.S. v. City and County of Denver, 100 F.3d 1509 (10th Cir. 1996).

Clearly, the large and complex body of zoning and land use law and the law of environmental regulation supplement the provisions of this Act. In appropriate cases, a court will be called upon to articulate the interrelationship of this Act and those laws, and the Act does not attempted to articulate all those outcomes. On the other hand, certain obvious examples may be helpful in understanding this interplay.

First, the Act contemplates that an environmental covenant might, for example, prohibit residential use on a parcel subject to a covenant. Under conventional real property principles, without references to this Act, such a prohibition or restriction in an environmental covenant will be valid even if other real property law, including local zoning, would authorize the use for residential purposes.

Alternatively, a covenant might, at the time it is recorded, permit both retail use and industrial use on a vacant parcel of contaminated real property while prohibiting residential use. Assuming all retail and industrial uses were permitted by local zoning at the time the covenant is recorded, the municipality might, before construction begins, change that zoning to bar industrial use. If such a zone change is otherwise valid under state law, nothing in this Act would affect the municipality's ability to "down zone" the parcel.

If, on the other hand, an industrial use was existing and ongoing at the time the covenant was recorded, and an effort was then made to prohibit that use by ordinance, such state law doctrines as "vested rights" or non-conforming uses, rather than this Act, would govern the validity of the zoning action.

SECTION 7. NOTICE.

(a) A copy of an environmental covenant shall be provided by the persons and in the manner required by the agency to:

(1) each person that signed the covenant;

(2) each person holding a recorded interest in the real property subject to the covenant;

(3) each person in possession of the real property subject to the covenant;

(4) each municipality or other unit of local government in which real property subject to the covenant is located; and

(5) any other person the agency requires.

(b) The validity of a covenant is not affected by failure to provide a copy of the covenant as required under this section.

Comment

This section contemplates that the agency will normally require that the final signed environmental covenant be sent to affected parties. In addition to the obvious persons who should be notified, in an appropriate case, the agency might require notice to abutting property owners. These persons are likely to have been directly involved in any major administrative proceeding, but in other cases, such as a voluntary clean-up, they may have no knowledge of the existing conditions on abutting land.

In any event, the extent and manner of giving notice rests in the discretion of the agency, and the statute imposes an affirmative duty on the persons required to provide that notice to comply.

Subsection (b) provides that failure to provide a copy of the covenant does not

invalidate the covenant. Such a failure will not prevent the covenant from protecting human health and the environment and thus need not invalidate the covenant. The remedy for such a failure would be provided by other law.

SECTION 8. RECORDING.

(a) An environmental covenant and any amendment or termination of the covenant must be recorded in every [county] in which any portion of the real property subject to the covenant is located. For purposes of indexing, a holder shall be treated as a grantee.

(b) Except as otherwise provided in Section 9(c), an environmental covenant is subject to the laws of this state governing recording and priority of interests in real property.

Comment

Subsection (a) confirms that customary indexing rules apply to the covenant. Since the owner is granting the enforcement right to a holder, all the owners' names would appear in the grantor index and the holder's name would appear in the grantee index.

In those states where a tract or another recording system other than a grantor/grantee index is used, this section should be revised as appropriate.

The Act assumes that all parties will wish to record the environmental covenant and accordingly makes the state's recording rules apply. As between the parties, however, the effectiveness of the covenant does not depend on whether the covenant is recorded. A signed but unrecorded covenant, under traditional real property law, binds the parties who sign it and, generally, those who have knowledge of the covenant.

The Act makes clear that, as with all recorded instruments, an environmental covenant takes priority under the normal rules of "First in time, First in Right." *See* The Restatement of The Law Third Property–Mortgages § § 7.1 and 7.3. In that sense, the covenant does not enjoy the same priority afforded real property tax liens, because of the

substantial constitutional impediment such a change in priority would likely create.

However, the Act departs in important ways from the consequences of the normal priority and other traditional rules. For example, under Section 9, foreclosure of a tax lien cannot extinguish an environmental covenant. *See* Section 9(c).

Finally, in those case where the holder's interest is transferred to a successor holder, the assignment of that interest will be recorded, and the usual grantor/grantee indexing rules would apply. Note, however, that under Section 10(d), the assignment would be treated as an amendment of the covenant.

Recording of an environmental covenant pursuant to the law of this state provides the same constructive notice of the covenant as the recording or any other instrument provides of an interest in real property.

SECTION 9. DURATION; AMENDMENT BY COURT ACTION.

(a) An environmental covenant is perpetual unless it is:

(1) by its terms limited to a specific duration or terminated by the occurrence of a specific event;

(2) terminated by consent pursuant to Section 10;

(3) terminated pursuant to subsection (b);

(4) terminated by foreclosure of an interest that has priority over the environmental covenant; or

(5) terminated or modified in an eminent domain proceeding, but only if:

(A) the agency that signed the covenant is a party to the proceeding;

(B) all persons identified in Section 10(a) and (b) are given notice of the pendency of the proceeding; and

(C) the court determines, after hearing, that the termination or

modification will not adversely affect human health or the environment.

(b) If the agency that signed an environmental covenant has determined that the intended benefits of the covenant can no longer be realized, a court, under the doctrine of changed circumstances, in an action in which all persons identified in Section 10(a) and (b) have been given notice, may terminate the covenant or reduce its burden on the real property subject to the covenant. The agency's determination or its failure to make a determination upon request is subject to review pursuant to [insert reference to appropriate administrative procedure act].

(c) Except as otherwise provided in subsections (a) and (b), an environmental covenant may not be extinguished, limited, or impaired through issuance of a tax deed, foreclosure of a tax lien, or application of the doctrine of adverse possession, prescription, abandonment, waiver, lack of enforcement, or acquiescence, or a similar doctrine.

(d) An environmental covenant may not be extinguished, limited, or impaired by application of [insert reference to state Marketable Title and Dormant Mineral Interests statutes].

Comment

1. Subject to the other provisions in this Act, environmental covenants are intended to be perpetual, as provided in subsection (a). A covenant may be limited by its terms as provided in this Section, or amended or terminated under Section 10. Alternatively, in the limited circumstances described in this Section it may be modified in an eminent domain proceeding which meets the requirements of Subsection (a)(5). With concurrence of the agency, an environmental covenant may also be terminated in a judicial proceeding asserting "changed circumstances" as provided in Subsection (b).

2. Subsection (a)(5) provides special requirements to modify or terminate an environmental covenant by an exercise of eminent domain. The rationale for these

special requirements is that an exercise of eminent domain may result in a change of use for real property. Such a change must ensure that it does not increase environmental risk related to the real property.

The Act does not attempt to resolve all the many complex issues likely to arise when one government agency seeks to condemn an environmental covenant imposed by another agency pursuant to an agreement with a current or former owner of the property. For example, eminent domain may result in a change of use of that property. If the changed use requires termination of the covenant's existing activity and use limitations , and thus additional clean-up of the property, complex questions of liability and financial responsibility may arise. Alternatively, state law may already address questions of which governments have or do not have authority to condemn real property, or who are necessary or indispensable parties. State statutes are also likely to have so-called "quick take" provisions, a well developed Administrative Procedures Act, and other important provisions for aspects of condemnation proceedings beyond the scope of this Act.

Section 9(a)(5) has specific requirements for an exercise of eminent domain that modifies or terminates an environmental covenant. The applicability of this Act's eminent domain requirements to an eminent domain action under federal law will be determined by that law.

On the other hand, if the eminent domain proceeding were to go forward without the need to terminate or amend the environmental covenant, the existing covenant would remain in place and then the approval required by this subsection of the Act would not apply.

3. Subsection (b) imposes two specific requirements for a judicial change in an environmental covenant under the doctrine of changed circumstances. The first requires agency approval of such an application. The second requires that all parties to the covenant be given notice of the proceeding. This will allow those parties to protect their interests in the proceeding, including their interests arising from contingent future liability.

The Act intends that a court, in considering this section, would apply the doctrine of changed circumstances in its traditional sense – that is, as a proposed modification of the covenant to reduce or eliminate its burden. This section does not provide a substitute procedure for modifying a covenant to increase the burden on the real property. Such an outcome would be antithetical to the careful balancing of interests embedded in the Act. It would also be inconsistent with the expectations of owners and legally liable parties who have entered into the covenant with an expectation that the burden would not be increased except pursuant to the procedures set out in this Act.

4. Subsection (c) provides that environmental covenants are not extinguished by later tax foreclosure sales, or by a range of potential common law and statutory impairments. As a matter of public policy, these new forms of covenants seek to protect

human health and the environment and, presumably, the contamination of the real property that led to the activity and use limitations would still be present if the covenant were extinguished. Accordingly, the impairment of those limitations as a consequence of application of tax lien foreclosure or other doctrines would likely result in greater exposure to health risk. Thus termination of that protection to serve other public policies of governments seems inconsistent.

In contrast, to avoid any suggestion of impairment of contract, the Act confirms that prior mortgages and other lien holders, upon foreclosure, may extinguish a subsequent covenant that was not subordinated. The lien holder in that case, of course, would still be faced with the physical condition of the property and the agency would have whatever regulations and rights against such an owner that state and federal law afforded.

5. While this section imposes statutory constraints on the authority of the court to act in the first instance, the Act does not restrict application of other procedural and administrative law to judicial supervision of agency conduct. Thus, if a court were to determine that an agency has acted in violation of its statutory obligations in considering whether to approve a modification or termination of an environmental covenant, that conduct would be itself be subject to judicial scrutiny under other law of that state.

Where an environmental covenant applies to real property that is otherwise subject to one of the doctrines listed in Subsection (c), circumstances may arise in which the protections of the covenant are not needed. For example, rights gained by adverse possession would be limited by the environmental covenant's restrictions where a house had been inadvertently placed on real property subject to an environmental covenant that precluded residential use. In a case such as these, modification of the covenant can be sought pursuant to Section 10. Seeking such a modification will ensure that appropriate consideration will be given to residual environmental risks.

The basic policy of this Act to ensure that environmental covenants survive impairment is consistent with the broad policy articulated in the Restatement of the Law of Property (Servitudes) Third, §7.9.

States that do not have a Marketable Record Title Act or a Dominant Mineral Interests Act will not need subsection (d). States that do have a either or both of these acts may choose to put this exception in the respective statute rather than in this Act.

The exception to the Marketable Record Title Act and the Dormant Mineral Interests Act in optional (d) is analogous to exceptions commonly made for conservation and preservation servitudes. Restatement of the Law of Property Third (Servitudes) § 7.16 (5) (1998). It is based on the public importance of ensuring continued enforcement of environmental covenants to protect human health and the environment. For states adopting the registry of environmental covenants to be kept by the [insert name of state

regulatory agency for environmental protection] under Section 12 of this Act, the cost of extending title searches to this registry should be low.

If there is any question whether a specific environmental covenant is exempt from the requirements of the Marketable Record Title Act or the Dominant Mineral Interests Act, the agency should comply with that Act by re-recording the covenant within the relevant act's specified statutory period. This will ensure that the covenant is not extinguished under either of these acts.

Finally, the fact that the Act specifies that notice of either an eminent domain proceeding or an action to apply the doctrine of changed circumstances be given to persons identified in Section 10 does not mean that other persons might not also be entitled to notice of the action or to intervene as parties in the action under other legal principles. Other state law may require such notice and this Act does not affect such other, additional notice requirements.

SECTION 10. AMENDMENT OR TERMINATION BY CONSENT.

(a) An environmental covenant may be amended or terminated by consent only if the amendment or termination is signed by:

(1) the agency;

(2) unless waived by the agency, the current owner of the fee simple of the real property subject to the covenant;

(3) each person that originally signed the covenant, unless the person waived in a signed record the right to consent or a court finds that the person no longer exists or cannot be located or identified with the exercise of reasonable diligence; and

(4) except as otherwise provided in subsection (d)(2), the holder.

(b) If an interest in real property is subject to an environmental covenant, the interest is not affected by an amendment of the covenant unless the current owner of the interest consents to the amendment or has waived in a signed record the right to consent

to amendments.

(c) Except for an assignment undertaken pursuant to a governmental reorganization, assignment of an environmental covenant to a new holder is an amendment.

(d) Except as otherwise provided in an environmental covenant:

(1) a holder may not assign its interest without consent of the other parties;

(2) a holder may be removed and replaced by agreement of the other parties specified in subsection (a); and

(e) a court of competent jurisdiction may fill a vacancy in the position of holder.

Comment

1. A variety of circumstances may lead the parties to wish to amend an environmental covenant to change its activity and use limitations or to terminate the covenant.

Subsection (a) specifies the parties that must consent to the amendment. Subsection (a)(3) reaches a party that originally signed the covenant whether or not it was an owner of the real property. Such parties might typically be ones which were liable for some or all of the environmental remediation specified in the environmental response project, including contingent liability for future remediation. This provision is intended to apply to successors in interest to the party which originally signed the covenant where the successor continues to be subject to the contingent liability under the environmental response project.

Some of the original parties to the covenant may have signed the covenant because they have contingent liability for future remediation should it become necessary. The extension of that liability to successor businesses is a complex subject controlled by the underlying state or federal environmental law creating the liability. See Blumberg, Strasser and Fowler, The Law of Corporate Groups: Statutory Law, 2002 Annual Supplement, §18.02 and §18.02.4 (Aspen, 2002) and Blumberg and Strasser, The Law of Corporate Groups: Statutory Law–State §§ 15.03.2 and15.03.3 (Aspen, 1995). Where the party that originally signed the covenant has been merged into or otherwise become part of another business entity for purposes of future cleanup liability, subsection (a)(3) is

intended to require the consent of that successor entity rather than the consent of the original party.

2. In considering the potential liability of successor businesses, as discussed above, it is important to understand the dual chains of successors that a particular circumstance presents – (1) successors to ownership of the business that originally caused the contamination; and (2) successors to owners of the contaminated real property. Particularly when contamination occurred many years ago, those chains of successors may be very different.

Consider this hypothetical – although very typical – situation:

Real Property Ownership In 1925, Peter Plating, Inc. built a factory on a 3-acre lot in Hartford, CT and commenced its business, which was to apply chromium plating to coffee pots on that site. Customary business practice at the time was to discharge the exhausted chromium into "sumps" - holes dug in the ground, and filled with large stones. Peter Plating did this for 25 years.

In 1950, Peter Plating closed its Hartford plating operation, and sold the land and factory to Rabbit Warehouses, Inc. Rabbit used the factory for 25 years as a storage facility, then sold the factory in 1975 to Ernie Entrepreneur, an individual, who bought the land with the proceeds of a first mortgage from First Local Bank.

Ernie used the factory for light manufacturing until 1985. He also leased part of the site to Acme Auto Repair, Inc. Acme dumped used oil and degreasers into its own sump on the lot. At some unknown date, Acme ceased operations.

In 1985, after Ernie learned of the contamination, he transferred ownership of the land to a corporation – Ernie, Inc. Ernie and his wife owned all the stock of the new corporation. In 1986, Ernie ceased operations, abandoned the factory, and moved with his family to an island off North Carolina. Ernie, Inc. was later administratively dissolved under state law for failure to file its annual reports.

First Local Bank started foreclosure in 1986, learned of the contamination, and withdrew the foreclosure action because of its reluctance to be in the chain of title. The Bank still holds the mortgage, but long ago wrote off the debt on its books.

Real property taxes have not been paid since 1984. City officials started to foreclose for unpaid taxes, but when they learned of the contamination, they, like First Local Bank, decided not to foreclose.

In 2002, the City demolished the factory as a safety measure, put a fence around it and put a $200,000 demolition lien on the property. Today, the site is abandoned, and

neighborhood children play games on the lot after crawling under the fence. Clean-up costs are estimated at $1.6 million; a "clean" 1.5-acre lot in this run-down neighborhood recently sold for $50,000.

The traditional "chain of title" doctrine in real property suggests that successive owners and operators of the real property, beginning with the original owner or tenant that caused contamination of the real property, may all have potential liability. In chronological order, they include: (1) Peter Plating, Inc.; (2) Rabbit Warehousing, Inc. (3) Ernie Entrepreneur, individually; (4) Acme Auto Repair, Inc.; and (5) Ernie, Inc.

Stock and Asset Ownership Aside from the successor real property ownership, we must also consider the successor ownership of the business that caused the contamination. Assume that 100% of Peter Plating's stock was acquired by a publicly-held corporation, Jefferson, Inc., in 1950. The parent corporation moved the plating business to a southern state, which is why the Hartford business closed. In 1970, Jefferson sold off the plating assets, but no stock, to Hiccup, NA, a publicly traded British corporation. Both Jefferson and Hiccup are still in business.

This chain of stock and asset sales should result in at least one and perhaps two additional "successors" whose role in the transaction may require further analysis.

Assume this Act had been in effect in 1940, and Peter Plating, Inc. had signed the original environmental covenant. If the agency wishes in 2003 to amend the 1940 covenant, it will be important to determine who must sign on behalf of Peter Plating – the person who originally signed the covenant in 1940 – as required by subsection 10 (a) (3).

3. Note also that Ernie, Inc. – the current owner – has abandoned the property and moved out of state. Neither this corporation or Ernie Entrepreneur, as an individual, is likely to cooperate in signing a new covenant today or an amendment to an original covenant that was signed in 1940. This may pose practical difficulties in satisfying the requirements of Section 10)(a)(2).

4. In order to secure the consents required by this section, it is likely that the agency will require the party seeking the amendment to provide notice to the parties whose consent is required by the statute.

5. Note that this section does not require the consent of intermediate owners of the real property – in our example, if the original owner in 1940 was Peter Plating, and the current owner is Ernie, Inc., then Rabbit Warehouses, Inc., would not be required to approve an amendment to the covenant. Rabbit would have been bound by the covenant when it bought the parcel in 1975. Since there is no allegation that Rabbit took any action in violation of the covenant, and Rabbit conveyed the property to Ernie without retention of any interest in the property, Rabbit would not be affected by the covenant and

therefore need not sign the amendment.

6. Finally, the covenant may be amended or terminated with respect only to a portion of the real property that was originally subject to the covenant. Thus, for example, if a covenant originally covered 100 acres of real property and as a result of remediation activity, 50 acres of the site eventually became completely free of contamination and pose no further environmental risk, the parties might agree to terminate the activity and use limitations on the cleaned up 50 acres while leaving the covenant in place on the remaining land.

7. As provided in Section 11(b), this Act does not limit the agency's regulatory authority under other law to regulate an environmental response project and the agency may be well advised to consider the implication of this provision in drafting a specific environmental covenant. Thus, for example, if new science suggested a need for additional monitoring or remediation at a contaminated site beyond that mandated in a recorded environmental covenant applicable to that site, the agency's authority to require that additional work would depend on other law, while its authority to impose the remediation cost on other parties may depend both on that law and on the terms of any prior agreements the agency may have executed with potentially liable parties.

Under this Act, however, the agency would be prevented from administratively releasing or amending real property covenants without approval of the parties designated in this section. Given the potential legal liability of the parties in the two chains of title who may be affected by an amendment to or termination of the covenant, this is an appropriate outcome.

However, over time, it may not be practical to identify the original parties or their corporate successors in order to secure their consent. Section 10(a)(3) provides a judicial mechanism by which the need for absent parties' consent may be avoided.

The same section highlights the possibility that the agency might seek the agreement of the original parties to future amendments of the covenant, without the need for later consent. Such a waiver might be attractive to original parties, depending on the extent to which the agency was willing to hold original parties harmless from the liability that might otherwise accrue from a claimed injury following a use once prohibited by the original covenant, and depending also on the overall cost of the transaction.

Where there is a change in either the current knowledge of remaining contamination or the current understanding of the environmental risks it presents, the agency may conclude that the environmental response project should be changed or new regulatory action taken. The agency's ability to take such action is contemplated by §11(b) but, in the absence of consent, is not governed by this Act.

The agency may wish to consider whether the following parties have a sufficient interest in a particular proposal to make notice of the proposed amendment to them advisable:

(1) All affected local governments;
(2) The state regulatory agency for environmental protection if it is not the agency for this environmental response project;
(3) All persons holding an interest of record in the real property;
(4) All persons known to have an unrecorded interest in the real property;
(5) All affected persons in possession of the real property;
(6) All owners of the fee or any other interests in abutting real property and any other property likely to be affected by the proposed modification;
(7) All persons specifically designated to have enforcement powers in the covenant; and
(8) The public.

The agency may also wish to consider whether the notice should include any of the following:

(1) New information showing that the risks posed by the residual contamination are less or greater than originally thought;
(2) Information demonstrating that the amount of residual contamination has diminished; and
(3) Information demonstrating that one or more activity limitations or use restrictions is no longer necessary.

SECTION 11. ENFORCEMENT OF ENVIRONMENTAL COVENANT.

(a) A civil action for injunctive or other equitable relief for violation of an environmental covenant may be maintained by:

(1) a party to the covenant;

(2) the agency or, if it is not the agency, the [insert name of state regulatory agency for environmental protection];

(3) any person to whom the covenant expressly grants power to enforce;

(4) a person whose interest in the real property or whose collateral or liability

may be affected by the alleged violation of the covenant; or

(5) a municipality or other unit of local government in which the real property subject to the covenant is located.

(b) This [act] does not limit the regulatory authority of the agency or the [insert name of state regulatory agency for environmental protection] under law other than this [act] with respect to an environmental response project.

(c) A person is not responsible for or subject to liability for environmental remediation solely because it has the right to enforce an environmental covenant.

Comment

1. Subsection (a) specifies which persons may bring an action to enforce an environmental covenant.

2. Importantly, the Act seeks to distinguish between the expanded rights granted to enforce the covenant in accordance with its terms, and actions for money damages, restitution, tort claims and the like.

This Act confers standing to enforce an environmental covenant on persons other than the agency and other parties to the covenant because of the important policies underlying compliance with the terms of the covenant. Thus, for example, in the case of a covenant approved by a federal agency on real property which has been conveyed out of federal ownership, the Act confers standing on a state agency to enforce the covenant, even though the agency may not have signed it. Further, a local affected government is empowered to seek injunctive relief to enforce a covenant to which it may not be a party. In both cases, absent this Act, those state and municipal agencies might not have standing to enforce a covenant, and might simply be relegated to seeking standing under other law.

Similarly, the mandated 'holder' has a statutory right to enforce the covenant under this section, since the holder must be a party to the covenant. Over time, the holder may come to play a significant role in the monitoring and enforcement process.

On the other hand, the Act does not provide any authority for a citizens' suit to enforce a covenant, although other law may authorize such suits. This Act does not affect

that other law.

3. The Act does not authorize any claims for damages, restitution, court costs, attorneys fees or other such awards. Standing to bring such claims, and the bases for any such cause of action, must be found, if at all, under other law. At the same time, while this action does not authorize any such cause of action, it does not bar them if available under other law.

4. Subsection (b) recognizes that in many situations the statutes authorizing an environmental response project will provide substantial authority for governmental enforcement of an environmental covenant in addition to rights specified in the environmental covenant.

[SECTION 12. REGISTRY; SUBSTITUTE NOTICE.

(a) The [insert name of state regulatory agency for environmental protection, secretary of state, or other appropriate state officer or agency] shall [establish and maintain a] [maintain its currently existing] registry that contains all environmental covenants and any amendment or termination of those covenants. The registry may also contain any other information concerning environmental covenants and the real property subject to them which the [state regulatory agency for environmental protection, secretary of state, or other appropriate state officer or agency] considers appropriate. The registry is a public record for purposes of [insert reference to State Freedom of Information Act].

(b) After an environmental covenant or an amendment or termination of a covenant is filed in the registry [established][maintained] pursuant to subsection (a), a notice of the covenant, amendment, or termination that complies with this section may be recorded in the land records in lieu of recording the entire covenant. Any such notice must contain:

(1) a legally sufficient description and any available street address of the real

property subject to the covenant;

(2) the name and address of the owner of the fee simple interest in the real property, the agency, and the holder if other than the agency;

(3) a statement that the covenant, amendment, or termination is available in a registry at the [insert name and address of state regulatory agency for environmental protection, secretary of state, or other appropriate state officer or agency], which discloses the method of any electronic access; and

(4) a statement that the notice is notification of an environmental covenant executed pursuant to [insert statutory reference to this [act]].

(c) A statement in substantially the following form, executed with the same formalities as a deed in this state, satisfies the requirements of subsection (b):

"1. This notice is filed in the land records of the [political subdivision] of [insert name of jurisdiction in which the real property is located] pursuant to, [insert statutory reference to Section 12 of the Uniform Environmental Covenants Act].

2. This notice and the covenant, amendment or termination to which it refers may impose significant obligations with respect to the property described below.

3. A legal description of the property is attached as Exhibit A to this notice. The address of the property that is subject to the environmental covenant is [insert address of property] [not available].

4. The name and address of the owner of the fee simple interest in the real property on the date of this notice is [insert name of current owner of the property and the owner's current address as shown on the tax records of the jurisdiction in which the

property is located].

5. The environmental covenant, amendment or termination was signed by [insert name and address of the agency].

6. The environmental covenant, amendment, or termination was filed in the registry on [insert date of filing].

7. The full text of the covenant, amendment, or termination and any other information required by the agency is on file and available for inspection and copying in the registry maintained for that purpose by the [insert name of state regulatory agency for environmental protection] at [insert address and room of building in which the registry is maintained]. [The covenant, amendment or termination may be found electronically at [insert web address for covenant]."]

Comment

1. This section should be used only by states that require creation of a registry of environmental covenants pursuant to this optional Section. At the time this Act was promulgated, Section 101 of CERCLA had recently been amended to encourage states to create registries of sites where remediation work had been completed; *see* Small Business Liability Relief and Brownfields Revitalization Act, Pub. L. No. 107-118 § 128(b)(1)(C) (2002). The Act anticipates that in those states that choose to create such a registry for federal law purposes, this section would prove useful in integrating local land recording systems with a single, state-wide registry.

2. The notice specified in this Section may be recorded in the land records in lieu of recording the environmental covenant. However, such a notice should be authorized only if the registry is established and the environmental covenant is recorded there. Where there is no separate registry, the environmental covenant must be recorded in the land records and this notice would not be used.

3. A description of the property under subsection (b)(1) may include identification by latitude/longitude coordinates. Note also that a description of the

location of the contamination itself on the site may require considerably more detail than the description of the real property subject to the covenant; *see* the discussion of this subject in the comments to Section 4.

4. The web address required to be contained in the notice by subsection (c)(7) should reflect the most direct means of identifying the full covenant and accompanying information. As appropriate, the address may require a specific internet address, page or name reference, document number of other unique identifying name, number or symbol.

A registry created under this optional section could be self-funding, in the same way that the corporate records departments of most Secretaries of State offices and the land recording offices of most counties and municipalities are self-funding.]

SECTION 13. UNIFORMITY OF APPLICATION AND CONSTRUCTION.

In applying and construing this uniform act, consideration must be given to the need to promote uniformity of the law with respect to its subject matter among states that enact it.

SECTION 14. RELATION TO ELECTRONIC SIGNATURES IN GLOBAL AND NATIONAL COMMERCE ACT.

This [act] modifies, limits, or supersedes the federal Electronic Signatures in Global and National Commerce Act (15 U.S.C. Section 7001 et seq.) but does not modify, limit, or supersede Section 101 of that Act (15 U.S.C. Section 7001(a)) or authorize electronic delivery of any of the notices described in Section 103 of that Act (15 U.S.C. Section 7003(b)).

SECTION 15. SEVERABILITY.

If any provision of this [act] or its application to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of this [act] which can be

given effect without the invalid provision or application, and to this end the provisions of this [act] are severable.

ACC Extras

Supplemental resources available on www.acc.com

Green Leasing or The Greening of Real Estate.
Program Material. July 2009
http://www.acc.com/legalresources/resource.cfm?show=460602

An Environmental Due Diligence Checklist for Real Estate Transactions.
ACC Docket. June 2000
http://www.acc.com/legalresources/resource.cfm?show=87819

Real Estate Transactions for Corporate Counsel.
Program Material. December 2007
http://www.acc.com/legalresources/resource.cfm?show=19970

Please note, these additional resources are provided by the Association of Corporate Counsel and not by the faculty of this session.