

**EPA’S PROPOSED “ALL APPROPRIATE INQUIRIES”  
RULE IMPOSES NEW DUTIES ON ENVIRONMENTAL  
PROFESSIONALS AND THEIR CLIENTS**

**November 2004**

[www.morganlewis.com](http://www.morganlewis.com)

Philadelphia ■ Washington ■ New York ■ Los Angeles ■ San Francisco ■ Miami ■ Pittsburgh ■  
Princeton ■ Chicago ■ Palo Alto ■ Dallas ■ Harrisburg ■ Irvine ■ Boston ■ London ■ Paris ■  
Brussels ■ Frankfurt ■ Tokyo

## EPA's Proposed "All Appropriate Inquiries" Rule Imposes New Duties on Environmental Professionals and their Clients

November 2004

EPA's proposed "All Appropriate Inquiries" rule, if adopted as proposed and if fully embraced by the market, could create significant changes in customary practice for pre-acquisition environmental due diligence. In addition to codifying the steps that must be followed to qualify for new federal liability protections, the proposal would impose new duties on the "users" of environmental site assessments who seek such protections. The proposal would create a highly collaborative process that would call upon environmental professionals, their clients, and their legal and real estate advisors to clarify their respective roles early in transactions, and to exercise a heightened degree of scrutiny.

### BACKGROUND

In the 2002 Brownfields Amendments (formally known as the "Small Business Liability Relief and Brownfields Revitalization Act"), Congress created new defenses to CERCLA liability for "bona fide purchasers" and "contiguous property owners." First-time purchasers or lessors of property can qualify for these conditional liability defenses if they conduct "all appropriate inquiries" before they acquire their property interests, provided they meet relevant statutory criteria. After a long delay, EPA on August 24, 2004 issued its proposed standard for "all appropriate inquiries" (69 Fed. Reg. 52542; available on the web at <http://www.gpoaccess.gov/fr/index.html>; enter "all appropriate inquiries"). The proposal is also intended to clarify the requirements necessary to establish the "innocent landowner defense" created by the 1986 Superfund Amendments.

Significantly, the proposal focuses only on the *pre-acquisition* diligence process, and does not discuss in detail the post-acquisition duty of "appropriate care" which is the subject of EPA's March 2003 "[Common Elements Guidance](#)." Nonetheless, the preamble makes clear that parties must pay close attention to "reasonable care" requirements after purchase to preserve these conditional defenses.

New landowners and lessors may qualify for the "innocent landowner defense" or the "contiguous property defense" if they follow the "all appropriate inquiry" process and do not identify releases or threatened releases of hazardous substances, provided they meet relevant statutory criteria and exercise "appropriate care" after acquisition (among other things, they must "take reasonable steps to stop a release, prevent a threatened release, and prevent exposure to a release or threatened release"). New owners or lessors who identify contamination during the "all appropriate inquiry" process may qualify for the "bona fide purchaser defense" if they meet relevant statutory criteria and satisfy "appropriate care" obligations after acquisition. To claim the "bona fide purchaser" or the "contiguous property owner" defense, a party must also demonstrate that it is neither potentially liable nor affiliated with any other party that is potentially liable for response costs. A "bona fide purchaser" or "innocent purchaser" must show that it bought the

---

This White Paper is published to inform clients and friends of Morgan Lewis and should not be construed as providing legal advice on any particular matter.

property after all disposal of hazardous substances, and the “contiguous property owner” must show that it did not cause or contribute to the release.

## **NEW PERFORMANCE CRITERIA**

EPA’s proposal and regulatory preamble add flesh to the consensus position adopted last November by a committee of stakeholders in a negotiated rulemaking under the auspices of the Federal Advisory Committee Act (FACA). The FACA committee chose to forego a prescriptive checklist in favor of a “performance-based approach,” which calls upon the environmental professional to exercise best professional judgment in key areas (and will call upon the courts to exercise their discretion in determining whether the report meets the statutory criteria). *Both* the environmental professional *and* the user must “review and evaluate the thoroughness and reliability of the information gathered in complying with each standard and practice in this subpart, taking into account information gathered in the course of complying with other standards and practices of this subpart.”

In advancing the proposal, EPA declined to follow or even to reference any portion of the prevailing standard for environmental site assessments (issued by the American Society of Testing and Materials, or “ASTM”). EPA explains that ASTM’s existing standard (ASTM E1527-2000) does not address all of the statutory prerequisites identified in the Brownfields Amendments (most notably, interviews with past owners, operators and occupants; inspections of adjoining properties; lien searches; and evaluation of the relationship of the purchase price to the value of the property if it was not contaminated). EPA notes that it is prepared to reference a new industry standard in the final rule, if one emerges. ASTM is actively working to develop a new standard.

## **IDENTIFYING AN “ENVIRONMENTAL PROFESSIONAL”**

At the outset, users of environmental site assessment services will need to verify that the individual or firm they are using meets the rule’s new definition of “environmental professional.” Consultants can qualify as environmental professionals if they are licensed professional engineers, professional geologists, or government-licensed or -certified professionals with three years of relevant experience; college graduates with science or engineering degrees and five years of relevant experience; or college graduates of any background with 10 years of relevant experience at the time the rule is finalized. EPA will not act as an accrediting organization, nor will it audit the services of environmental professionals. Instead, parties who assert the relevant defenses in a court proceeding will have the burden of establishing that the environmental professional meets the regulatory qualifications.

Individuals who do not meet the criteria may perform some of the tasks, provided that a qualified professional supervises their work and signs a declaration that the report satisfies all elements of the rule. Users will want to ensure that the environmental professional is adequately supervising the work of all nonprofessionals under his or her charge.

## **NEW DILIGENCE REQUIREMENTS**

The proposed rule adds a number of new requirements that are likely to make environmental site assessments costlier and more time consuming. Key new requirements include the following:

### **INTERVIEWS**

Past owners and operators must now be interviewed. In addition, the rule adds a controversial requirement to interview neighbors under certain circumstances. Neighbor interviews are mandatory for abandoned properties that appear to have had uncontrolled access. To the extent necessary to meet the rule's performance criteria, neighbor interviews may also be required as part of the environmental professional's obligation to collect "commonly known or reasonably ascertainable information" about the property.

### **INSPECTIONS OF ADJOINING PROPERTIES**

Adjoining properties must be visually inspected from the property line or a right-of-way, and particular attention must be given to areas where hazardous substances may have been managed.

### **LIEN SEARCHES**

The *user* must search for environmental liens and provide this information to the environmental professional. These searches may be difficult because some liens are not recorded, and recording methods vary from jurisdiction to jurisdiction.

### **EVALUATION OF PURCHASE PRICE**

The *user* must evaluate whether the purchase price reasonably reflects the market value of the property were it not contaminated. Formal real estate appraisals are not required. The user is not expected to determine the precise value of the property, but instead whether the purchase price reasonably reflects its market value.

### **SPECIALIZED KNOWLEDGE**

The *user* has a duty to ensure that its "specialized knowledge" regarding the property and the circumstances surrounding it is conveyed to the environmental professional early in the process and is taken into account in the final report. Cases cited by EPA suggest that the general sophistication of the purchaser, as well as specific facts in his or her command, should be evaluated by courts reviewing whether the "all appropriate inquiries" rule has been satisfied.

### **EVALUATING DATA GAPS**

*Both* the environmental professional *and* the user must identify any data gaps (defined as lack of information or inability to obtain information) that affect the ability to identify releases or potential releases. The proposal does not provide concrete criteria for determining when a data gap is significant, but rather calls on the environmental professional to comment on the significance of the data gap in view of the totality of information collected under all aspects of the appropriate inquiry process. EPA directs environmental professionals to look to the totality of the circumstances in considering the “degree of obviousness of the presence or likely presence of contamination” and the ability of the landowner to detect contamination upon reasonable investigation (these latter criteria are considerations required under the 1986 CERCLA amendments to qualify for the innocent purchaser defense).

The preamble clarifies that a person can meet the “all appropriate inquiry” standard even if the report contains data gaps. Significantly, it notes that sampling and analysis are not required to fill data gaps, but may be valuable to address certain data gaps. It goes on to say that “the fact that the all appropriate inquiry standards would not require sampling and analysis may not prevent a court from concluding that, under the circumstances of a particular case, sampling and analysis should have been conducted” to satisfy the “degree of obviousness” and “ability to detect” considerations. 69 Fed. Reg. at 52568. Furthermore, EPA suggests that failure to fill data gaps after purchase could limit or eliminate the ability to claim the defenses.

This cautionary language, and similar cautions about “continuing obligations” after purchase, will require parties to think very carefully about the need for sampling either before or after the acquisition. EPA’s preamble repeats in multiple sections the caution that “[a]n inability to identify a release or threatened release during the conduct of all appropriate inquiries does not negate the landowner’s ongoing or continuing responsibilities under the statute, including the requirements to take reasonable care to stop the release, prevent a threatened release, and prevent exposure to the release or threatened release once the landowner has acquired the property.” *See, e.g.* 69 Fed. Reg. 52546; 52560. EPA clarifies that these obligations are not contingent on the results of “all appropriate inquiries.”

As an example, EPA says a party that fails to identify a leaking underground storage tank during the all appropriate inquiry process could lose the new CERCLA liability protection due to a lack of information with which to comply with the due care requirement to stop the ongoing release of hazardous substances. 69 Fed. Reg. 52560. CERCLA does not impose liability for petroleum releases, and the Brownfields Amendments do not provide liability protection for them. Only recipients of site characterization and assessment grants need to address potential releases in performing “all appropriate inquiries.”

While it is not clear, this language suggests that a party could lose the defense immediately upon learning of a tank release, even if it had performed thorough diligence that satisfied in all respects the “all appropriate inquiries” rule. This reading appears contradictory to the Common Elements Guidance, which suggests that compliance with

“reasonable care” requirements is to be evaluated from the moment an innocent landowner or contiguous landowner learns of contamination on his or her property. Nonetheless, EPA appears to envision a circumstance where a party that fails to fill a significant data gap by sampling after purchase would not be able to establish reasonable care, and may not be entitled to the defense.

Taken together, these statements create strong incentives to sample after purchase to prevent loss of the applicable defenses. EPA’s Common Elements Guidance in fact suggests a bias toward sampling by stating that “pre-purchase ‘appropriate inquiry’ will most likely inform the bona fide prospective purchaser as to the nature and extent of the contamination on the property and what might be considered reasonable steps regarding the contamination” after purchase.

In addition to the reasonable care requirements, these continuing obligations include the responsibilities (1) to comply with land-use restrictions; (2) not to impede the effectiveness of institutional controls; (3) to cooperate with and provide access to persons undertaking response actions; and, in the case of the bona fide prospective purchaser and contiguous property owner, (4) to comply with information requests and subpoenas and provide legally required notices.

## **RESTRICTIONS ON SHELF LIFE AND TRANSFERABILITY**

Further, the rule would require both authors and users of environmental site assessments to be alert to “shelf life” and “transferability” issues, which will affect the pace and cost of transactions (particularly large ones). To be valid, an all appropriate inquiry report must have been prepared within one year before transfer of title, and key elements of the report must be updated if they were collected more than 180 days before transfer (e.g., interviews, lien searches, local government searches, visual inspections). “All appropriate inquiry” reports prepared for the benefit of one party can be used by another party only to the extent that the information is updated and the new user satisfies the performance standards and user requirements identified above. These restrictions are likely to lead to new reliance limitations in environmental consultants’ contractual terms and conditions.

## **CONCLUSION**

It remains to be seen whether the “all appropriate inquiries” rule will prompt the market to “commoditize” a new product that displaces the existing ASTM standard, and to what extent buyers and their lenders will accept less extensive reviews based on their own risk criteria or the size and pace of their transactions. It is clear that the proposed rule provides no easy formula for qualifying for the new conditional CERCLA liability protections. It is important to note that the rule addresses only federal defenses, and does not deal with liability under state law. Some states have enacted bona fide purchaser defenses to state law liability, but others have not.

On October 7, 2004, California enacted its Brownfields Bona Fide Purchaser Protection Act (AB389/SB493). The California legislation creates innocent landowner, bona fide purchaser and contiguous owner defenses to liability under the California Superfund law similar to those under federal CERCLA. However, the legislation goes further than CERCLA in providing that the three defenses also apply to liability assessed under various other state statutes applicable to property contamination, and to common-law theories of liability such as nuisance and trespass.

To mitigate potential liability concerns, transaction parties and their advisors will need to clarify their respective roles early on, carefully review the “all appropriate inquiry” report, and avail themselves of other critical tools, such as carefully drafted contracts, insurance, and well-conceived development plans. Buyers will also need to ascertain their lenders’ requirements early on. Most importantly, new owners should not expect to be able to avoid liability simply by commissioning a newer, more expensive report. They will need to be constantly attentive to the post-purchase obligations imposed by statute. While they may not be required to remove contaminated soil or treat groundwater, they will very likely need to do (or require others to do) something to contain or prevent exposure to contaminants.

EPA welcomes comments on the proposed rule until November 30, 2004 (email to [superfund.docket@epa.gov](mailto:superfund.docket@epa.gov), with the subject line “Attention Docket ID No. SFUND-20044-0001” or follow other instructions in the preamble).

If you have any questions about the new requirements, please contact your primary Morgan Lewis attorney or one of the attorneys listed below:

**Los Angeles**

Randolph C. Visser	213.612.2632	<a href="mailto:rvisser@morganlewis.com">rvisser@morganlewis.com</a>
Martin “Kelly” J. McTigue, Jr.	213.612.2575	<a href="mailto:kmctigue@morganlewis.com">kmctigue@morganlewis.com</a>

**New York**

Eric B. Rothenberg	212.309.6371	<a href="mailto:erothenberg@morganlewis.com">erothenberg@morganlewis.com</a>
Mark C. Pennington	212.309.6175	<a href="mailto:mpennington@morganlewis.com">mpennington@morganlewis.com</a>
Judith A. Walkoff	212.309.6352	<a href="mailto:jwalkoff@morganlewis.com">jwalkoff@morganlewis.com</a>

**Philadelphia**

John J. McAleese, III	215.963.5094	<a href="mailto:jmcaleese@morganlewis.com">jmcaleese@morganlewis.com</a>
-----------------------	--------------	--