

## Proposed Rule Change Could Increase Costs and Lengthen Time of Environmental Site Assessments

On August 26, 2004, EPA published a proposed rule defining the process by which a prospective purchaser can avoid landowner liability under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA). Anyone acquiring commercial and industrial property should pay close attention to this rule.

It will mandate important changes in the way that Phase 1 Environmental Site Assessments (ESAs) are to be conducted. These changes are not only expected to increase the ESA cost, but also lengthen the period of time required to complete routine environmental due diligence. It may be advisable for potential purchasers to consider implementing the proposed measures prior to approval, as the environmental, lending, and real estate communities now have a glimpse of EPA's more stringent requirements.

Under this proposed rule:

- The prospective purchaser must still engage a qualified environmental professional to perform the Phase I ESA – but the regulation now specifies the level of education and experience required in order to be eligible as a qualified environmental professional (e.g., hold a current Professional Engineer's or Professional Geologist's license or registration and have the equivalent of three years of full-time relevant experience). The existing rule makes no such specification.
- The qualified environmental professional must include a statement at the end of the written Phase I ESA report declaring that he or she has the professional knowledge and the specific qualifications to perform all appropriate inquiries, and that he or she has performed the investigation in a manner that conforms with the standards and practices set forth in the regulation. The existing rule does not specify this declaration, but simply requires a statement of the consultant's qualifications.
- The qualified environmental professional must visually inspect adjoining properties from the subject property's property line, from public rights-of-way, or from other vantage points (e.g., via aerial photography), as well as inspecting the facility. In addition, the qualified environmental professional is required to examine government records for information about nearby or adjoining properties in order to assess potential environmental impact to the subject property from off-site sources of contamination. The existing rule merely requires that such information be disclosed only to the extent that the information is revealed in the course of researching the subject property.

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Proposed Rule Change...(cont.)

- The prospective purchaser or the qualified environmental professional must determine if the purchase price reasonably reflects the unimpaired fair market value of the property. The existing rule simply encourages the prospective purchaser to note any reason for a lower price if that party has actual knowledge that the purchase price is significantly less than the purchase price of comparable properties.
- All appropriate inquiries must also include searches of environmental cleanup liens filed or recorded against the subject property. The existing rule allows the qualified environmental professional or purchaser to review only the title records.
- The qualified environmental professional must interview past and present owners, operators, and occupants. The proposed rule also states that interviews with current and past facility managers or employees should be undertaken if necessary to more fully ascertain current and past property uses and waste management practices. For abandoned properties, the new rule provides for the qualified environmental professional to include interviews with one or more owners or occupants of neighboring or nearby properties. The existing rule instructs the qualified environmental professional to interview only current owners and occupants, and, if available, the key site manager.

A copy of the decision can be found on our web site at [www.nexsenpruet.com](http://www.nexsenpruet.com) or by requesting a copy from one of our Environmental Team attorneys.

*This Environmental Alert is published as a service to our clients and friends. It is intended to be informational and does not constitute legal advice regarding any specific situation. If you would like to receive more detailed information about the subjects covered, please contact any of the attorneys listed below.*

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