

# CHECKPOINT

SPRING 2004

**THIS ISSUE**

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- ⇒ Due diligence – EPA's "All Appropriate Inquiry"
- ⇒ Rhode Island's environmental strategic plan
- ⇒ Changes to the Massachusetts Waste Site Cleanup regulations and penalties
- ⇒ Federal permits for storm water management at construction sites
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**DATES TO REMEMBER:**

- ⇒ April 15, 2004: Deadline for Air source registration in Massachusetts.
- ⇒ July 1, 2004: Deadline to submit Massachusetts Toxic Use Reduction Plans/Plan Updates.

**PRESIDENT'S MESSAGE**



Welcome to the first issue of SAK Environmental's newsletter, CheckPoint. The newsletter is a milestone for the company and reflects the success of the firm thanks to the support of its clients. At first I questioned the value of another newsletter when so many of you are already bombarded with environmental news electronically and by paper. But just as the prolific number of cable TV stations has reduced the quality of television, the volumes of environmental news you receive is likely watered down. My philosophy for CheckPoint is to provide you information that is accurate, concise, useful and timely. It is the same philosophy used when providing professional services

to our clients. As the first issue, there is no better time to solicit your feedback. Don't hesitate to submit topics of interest and constructive criticism to [info@sakenvironmental.com](mailto:info@sakenvironmental.com).

Sincerely,

Stephen Sakakeeny  
President, LSP, CPG, CHMM

**THE CHANGING FACE OF DUE DILIGENCE - EPA RELEASES DRAFT FINAL CONSENSUS DOCUMENT ON CERCLA'S "ALL APPROPRIATE INQUIRY"**

The American Society for Testing and Materials (ASTM) standard E1527-00 has long been the industry benchmark for performing environmental due diligence on commercial and industrial real estate. The ASTM standard explicitly states that it is intended to satisfy the innocent landowner defense defined in the Comprehensive Environmental Response and Liability Act (CERCLA). Until recently, CERCLA did not define a protocol for inquiry, such as the ASTM standard provides, to satisfy the innocent landowner defense. When President Bush signed into law the Small Business Relief and Brownfields Revitalization Act on January 11, 2002, two significant changes occurred relating to CERCLA. First, two new types of property owners

became eligible for CERCLA liability relief – bona fide prospective purchasers and contiguous property owners. Secondly, EPA had to develop a rule for "all appropriate inquiry" in order for eligible parties to meet the statutory criteria of protected property owners. A person must perform "all appropriate inquiry" into the previous ownership and uses of the property before acquisition of the property. Persons who knowingly purchase contaminated property after properly performing "all appropriate inquiry" do not qualify for CERCLA liability relief under the innocent landowner defense or contiguous property owner. However, liability protection is still afforded as a bona fide prospective purchaser. EPA convened a negotiated rule making committee to develop a consensus document on "all appropriate inquiry". In November 2003, the committee issued a draft final consensus document on the rule which is available on EPA's web site at <http://www.epa.gov/brownfields/aai/draftreglangfinal.htm>.

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## "ALL APPROPRIATE INQUIRY" *continued*

"All appropriate inquiry" is unsurprisingly similar to the ASTM E1527-00 standard such that property ownership, land use, and petroleum and hazardous material uses must be defined through the same data collection techniques established by ASTM. "All appropriate inquiry" does not reference the ASTM standard and therefore the ASTM definition of Recognized Environmental Condition does not apply. Instead, "all appropriate inquiry" is intended to identify conditions indicative of releases and threatened releases of hazardous substances, pollutants, contaminants, petroleum and petroleum products, and controlled substances on, at, in, or to the subject property. "All appropriate inquiry" establishes a definition for "data gaps", which must be identified and declared in the inquiry. Sampling and analysis is then considered to address data gaps. One of the most significant differences between the ASTM standard and "all appropriate inquiry" is the definition of "environmental professional". Where ASTM broadly defines an environmental professional, "all appropriate inquiry" provides a rigorous definition. Environmental professionals qualified to conduct "all appropriate inquiry" are defined as those persons having a Professional Geologist's license, Professional Engineer's license, or registration from a state, specific educational requirements, and have the equivalent of three years full-time relevant experience.

It is no doubt that "all appropriate inquiry" will be quickly embraced in the environmental industry to protect prospective purchasers of real property and the financial institutions that finance them. While the ASTM standard E1527-00 appears to be transforming into a technical compliment to "all appropriate inquiry", it is clear that the "all appropriate inquiry" rule, when promulgated, will be the new standard for environmental due diligence. EPA plans to submit the proposed rule to the U.S Office of Management & Budget for regulatory and economic impact analysis in early April 2004. Publication of the draft regulation in the Federal Register for public comment may not occur until October 2004.

## RHODE ISLAND DEM ISSUES FINAL DRAFT STRATEGIC WORK PLAN

In November 2003, the Rhode Island Department of Environmental Management (RIDEM) released a final draft Strategic Work Plan for Fiscal Years 2004 and 2005. The plan clearly reveals the direction of the department, which is stronger rule making and more aggressive enforcement, and provides a schedule of activities and policy changes. The plan, which was available for public comment through January 30, 2004, is a comprehensive programmatic review of the state of the environment in Rhode Island. It reviews air, water, land preservation and restoration, health & safety, natural resources, solid waste management, and compliance assistance and enforcement. Objectives, key strategies, and performance indicators are listed in detail for each program and initiative. Many new initiatives and a schedule for rule making are included. The strategic plan can be reviewed at RIDEM's web site at <http://www.state.ri.us/dem/pubs/plan2003/work0405.htm>

### COMPANY NEWS

- ⇒ SAK Environmental completed an environmental due diligence of a local airport being considered for redevelopment. Extended inquiry was required to define hazardous material handling practices by airport operations and private aviation pilots.
- ⇒ The Managed Assets group of a major bank awarded SAK Environmental a risk management contract. SAK will review, quantify, and plan for environmental risks posed by "at risk" financial portfolios. Risk management will include environmental compliance, pollution, and facility reuse.
- ⇒ SAK Environmental authored a featured article entitled "Facility and Property Decommissioning as Part of Your Real Estate Management Plan" in New England's Environment magazine November/December 2003 issue. Call SAK for a reprint.

### PROPOSED CHANGES TO THE MASSACHUSETTS WASTE SITE CLEANUP REGULATIONS ON THE WAY

Several modifications are being proposed to the Massachusetts Contingency Plan (MCP) regulation (310 CMR 40.0000). The Massachusetts Department of Environmental Protection (MADEP) plans to release a public hearing draft of the changes this spring. MADEP dubs the revisions "Wave 2" which reflect the second round of modifications that were planned by MADEP since publication of an environmental impact report on the waste site clean up program in 1999. Proposed changes to the MCP are summarized below.

#### Clarifications and Added Flexibility

In an effort to avoid delays in construction projects, revisions are proposed to allow for "focused" risk characterization of that portion of contaminated soil located next to, or in the foot print of, a permanent structure (i.e. building) being built. To-date, there has been reluctance by owners and environmental professionals to move forward on construction projects where contaminated soil is present. This change is intended to minimize impacts to site development while properly addressing environmental risk.

New provisions will also clarify requirements for the excavation of contaminated soil at disposal sites that have achieved a Response Action Outcome (RAO) and have been closed out. Other than implementing proper soil management procedures, there are no

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## PROPOSED CHANGES TO THE MASSACHUSETTS WASTE SITE CLEANUP REGULATIONS ON THE WAY *continued*

additional requirements for the excavation of contaminated soil at disposal sites that have been closed out with a Class A-1, A-2 or B-1 RAO (i.e. no Activity Use Limitation was required). For disposal sites with an AUL, up to 100 cubic yards of petroleum contaminated soil or 20 cubic yards of soil contaminated with hazardous material can be removed without notifying or seeking approval from MADEP. Removal of contaminated soil greater than these amounts must be conducted as a Release Abatement Measure.

Changes are proposed to eliminate the burdensome requirement of obtaining a Grant of Environmental Restriction to prevent the installation of private water supply wells. Instead, Activity Use Limitations (AUL) will be expanded to restrict private wells to non-drinking water uses.

Many disposal sites have reached a Class C Response Action Outcome (RAO) which declares achievement of a temporary remedial solution. MADEP believes that the ambiguity of this RAO has become an attractive alternative to more expensive permanent clean up. Revisions are proposed to clarify the performance standard of the Class C RAO and to prevent inappropriate selection of this outcome by establishing two tiers– a Class C-1 for temporary solutions having no feasible permanent solution, and a Class C-2 for temporary solutions where a feasible permanent solution does exist. Class C-1 RAOs will be subject to periodic evaluations every 5-years as currently required while Class C-2 RAOs will continue response actions towards a Permanent Solution under a Tier 1 Permit or Tier II Classification. Guidance for determining the feasibility of achieving a permanent solution will be developed by MADEP.

A notification exemption is proposed for the presence of "naturally occurring" Arsenic and Beryllium in Worcester County and Boston Blue Clay.

### More Reporting and Expanded Public Involvement

In an effort to efficiently track the growing number of disposal sites undergoing remediation and to ensure that clean up is being performed as proposed, MADEP is proposing to expand reporting under the Remedy Operation Status (ROS) to now include "passive" remediation systems. Passive systems include activities such as monitored natural attenuation and reactive barriers where equipment operation and maintenance is not required. For "active" treatment systems, submittal of a new form, Remedial System Monitoring Report (RSMR), will be required to more closely track these clean ups. Monthly submittal of RSMRs will be required for disposal sites where an Imminent Hazard or Critical Exposure Pathway is present, otherwise quarterly submittal will be required.

Public involvement will be expanded to include issuing a copy of the Release Notification Form with a site locus map or assessor's parcel map/number to local officials, providing a summary of findings to local officials rather than the current notice of report availability, and notifying public water suppliers of releases in resource protection areas with groundwater contamination greater than GW-1 reporting thresholds. Additional requirements are proposed to include informing third party property owners of their right to obtain data if their property is sampled, informing property owners and occupants of disposal sites where an Immediate Response Action is being conducted, notifying owners if their property is part of a disposal site, and notifying abutting property owners that their property is next to a disposal site.

### Asbestos

One of the more significant impacts by the proposed changes is the addition of Asbestos as a regulated compound. Asbestos in soil would be subject to release notification and clean up standards. The addition of Asbestos as an MCP regulated compound will likely become part of environmental due diligence for commercial real estate, particularly on land where fill is present or on land that has been subject to historic or prolonged development.

Soil and groundwater clean up standards will also be updated using more recent toxicity data and updated methodologies. MADEP estimates that of the universe of current disposal sites reported to the department, about 7% of the sites may require additional response actions under the revised standards. The remainder of sites will be unaffected. For disposal sites with soil contamination, about 20% of the sites may require additional response actions under the revised standards. The new standards will not affect disposal sites that have been have achieved a Class A or B RAO.

### Stiffer Penalties

Finally, MADEP has proposed a significant increase to administrative penalties in 310 CRM 5.00 relating to the MCP. A penalty of up to \$25,000 per day for failure to report a release is proposed – up from \$1,000 per day. Additionally, a \$25,000 per day penalty is proposed for a violation of an Activity Use Limitation.

MADEP expects the proposed regulations to become available in late March or early April 2004. Final regulations are targeted early summer 2004. Contact Ms. Elizabeth Callahan of MADEP at 617-348-4056 or at elizabeth.j.callahan@state.ma.us for additional information or to be added to the e-mail distribution list.

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## STORM WATER AT CONSTRUCTION SITES REQUIRES A USEPA PERMIT

It has been one year since the March 2003 U.S. Environmental Protection Agency (EPA) deadline for owners and operators to begin submitting storm water discharge applications for "small construction sites" yet few people realize that federal law applies at all. In Maine, the DEP found about 50% of construction projects in violation of state and federal storm water management requirements. EPA, in addition to the local conservation commission or state environmental agency, requires storm water permitting.

EPA requires "small construction sites", which are defined as any construction project disturbing between 1 and 5-acres of land, to obtain a storm water permit. Sites less than one acre are also subject to permitting if they are part of a larger common plan of development with a planned disturbance equal to or greater than 1-acre. Storm water permits for construction projects disturbing 5-acres or more of land have been required since 1990. "Disturbing" is defined as exposed soil resulting from clearing, grading, and excavating and could have occurred from road building, construction of residential homes, office buildings, industrial sites, or demolition.

Requirements of the federal rule include submittal of a Notice of Intent, certification that the activity will not impact endangered or threatened species, and implementation of a site specific Storm Water Pollution Prevention Plan. The plan must outline storm water management issues at the site and specific activities to minimize pollutants from the site. A Notice of Termination is submitted when final stabilization at the site is achieved or another operator has assumed control of the construction project.

### FUTURE ISSUES

If you know of others who wish to receive the newsletter, submit contact information, including e-mail, to [info@sakenvironmental.com](mailto:info@sakenvironmental.com).



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