Opinion Regarding Costs Impact to the Private Sector Marketplace

I initially began providing Phase 1 Environmental Assessments to the private sector marketplace in November, 1988. Over the past 16 years I have provided environmental services to banks and lenders, developers, attorneys, and other like individuals and entities involved in the real estate transaction process. For the past several years the lion's share of my business has consisted of banks and lenders, small, medium and large. In addition to Phase 1 assessments my firm provides full line services commonly associated to real estate transactions.

At issue herein are selected cost factors as evaluated in the "Economic Impact Analysis for the Proposed All Appropriate inquiries Regulation as prepared by ICF Consulting and dated August 3, 2004. This document renders a bottom line determination of an expected increase in Phase I costs to the marketplace as being less than $50 per report. It is the unanimous opinion in our office that this result is not only invalid but that the formulations on which it is based are also fundamentally flawed.

A recently conducted survey by Environmental Data Resources, Inc. addressed the anticipated cost impacts of the EPA AAI proposed rules on Phase 1 assessments. The survey included more than 500 Phase I providers in nine U.S. cities. The majority of respondents (or 60%) anticipate cost increases of more than 10%, with 16% predicting increases of more than 20%. A companion survey also indicated that most consultants in the private sector marketplace charge between $1,700 to $2,300 for a Phase 1 report, depending on factors such as type of property and geographic area. The anticipated cost increases relating to the proposed rules are obvious and substantial. The question arises, how can so many front line providers of Phase 1 reports be wrong. I submit that they are not.

In my opinion the cost for a Phase 1 will increase by at least 15 to 20% if the new rule goes into effect. Because the proposed rule is vague and untested it is hard to give an exact estimate, but I am confident it will be at least this much.

Attention is directed to Section 7.3.3 of the ICF report "Incremental Costs – AAI Regulation", and related Exhibit 7-7, Incremental Labor Hour Burden Under AAI Regulation – Properties Transitioning from ASTM-1527-2000". I will first address two specific areas of the Exhibit, Sec. 312.26, Reviews of Federal, State, Tribal, and local government records, and Sec. 312.29, Commonly known or reasonably ascertainable information about the property.

<u>Sec. 312.26, Reviews of Federal, State, Tribal, and Local Government Records</u>

As the table acknowledges, "All" property types will be affected, however, no incremental increase in labor costs is expected. This is because ICF states that the proposed rule does not require any more review of these record sources than current ASTM practice. This assumption is incorrect. ASTM E1527 limits records reviews to standard enumerated sources. The new rule, on the other hand, requires a "performance

based" review that is essentially open ended. The new rule will require searching substantially more records and will take many additional hours. Once again, using Environmental Data Resources as a reference, their website presently posts that in response to the AAI proposed rules that they have "added 475 new databases and counting" so as to assist their clientele in dealing with the upcoming AAI rules. While we cannot give an exact number, it is reasonable to assume that a significant number of additional database records will be added. The resulting bottom line labor costs impacts are related to the significantly increased labor time in the review, and more importantly the evaluation of the additional information. Additionally, the new source research item must be added to the resulting due diligence report along with the written evaluation of the result.

Sec. 312.29, Commonly Known or Reasonably Ascertainable Information About the Property

What information is commonly known and who commonly knows it? The EP may refer to one or more of four listed sources of information. At such time that this rule is eventually sorted out in the courts, will only one of the four be enough? This question begs specific resolve now rather than later because of the liability issues. Was the information reasonably obtainable? This is extremely arbitrary. The performance based approach of the new rule will, however, force environmental consultants to spend many hours researching the commonly known category newly created by this rule. ICF assumes that this category is already included in searches conducted pursuant to ASTM E1527 and allocates no additional cost. This is incorrect. ASTM E1527-00 § 7.1.4; and 7.3.2.3 fulfill the requirements of CERCLA and strictly limit the application of commonly known or reasonably ascertainable information to specifically enumerated sources. The new rule requires consultants to conduct an open-ended search throughout the local community.

Even the sources have fundamental flaws in being obtainable or practical. Source (1) Current owners or occupants of neighboring properties who may have knowledge of, or, information related to the subject property – Problem: in a private sector transaction, the existence of the transaction itself, particularly in the early stages, is confidential in nature. Source (2) Local and State government officials who may have knowledge of, or, information related to the subject property – Problem: Fire Marshals and other such individuals in local government departments have their own responsibilities and are spread thin due to inadequate staffing. Thusly, these resources are not practical or readily ascertainable, but would the courts see it in the light of such practical reality? Source (3) Others with knowledge of the subject property – Problem: who are others and will the courts decide. Source (4) Other sources of information, eg. newspapers, websites, community organizations, local libraries and historical societies, Problem: also concerns me from a liability perspective. Does a Google search turn something up? Does the librarian know something that the other librarian doesn't?

The above paragraph references some of the practical considerations and liability issues but the economic dynamic remains. What are the cost dynamics of discovering this

"commonly known and reasonably ascertainable information?" Exhibit 7-7 indicates that no price increase will occur. ICF's conclusion is based on invalid assumptions and is erroneous.

Sec. 312.29 – The Relationship of the Purchase Price to the Value of the Property, if the property was not contaminated

Although the proposed rule apparently envisions that the valuation analysis will be conducted by the purchaser rather than the environmental professional, it also requires the report of the environmental professional to take into account this information. The Environmental Professional simply has no business in this part of a real estate transaction. In the private sector, the purchase price of a property is confidential to the buying and selling parties involved in the transaction. The third party vendors are not commonly privy to this information and are not expected to ask. If I were to make common practice of asking my clients about the financial specifics of their deal, they would tell me that it is none of my business, and they would be right. Private sector transactions as they are being conducted are just that, private.
In any event, the ICF analysis includes a modicum of time for the Environmental Professional to consider this market value information, but no time or cost allocation for the purchaser to conduct the market value analysis. The actual conduct of the market valuation will definitely have some cost. If the environmental professional were to be responsible for considering this information (which I oppose) it would surely take longer than the half hour allotted by ICF and would surely come into play in virtually all transactions because the purchaser would conduct a defensive appraisal for fear of liability exposure.

Beyond this, an EP is not in an informed position to be able to "take into account"such comparable price analyses of multiple parcels of real estate in an area and draw an experienced conclusion regarding purchase price. But that is what proposed section 312.21(b) would require. This is a separate industry altogether. I urge that this proposed section 3.12.29 be removed.

In addition to the sections discussed above, the interviews, historical sources, and lien search provisions of the new rule all add substantial cost and uncertainty to the conduct of a Phase 1 site assessment.

The ASTM –1527 protocol serves the private sector efficiently from both the performance and cost perspectives. The proposed AAI rules essentially forces a public sector approach to real estate transactions on a private sector marketplace that operates under strict time and cost constraints. Nonetheless, the overall time and cost ramifications on the private sector marketplace have not been been credibly addressed by ICF in the document issued for the EPA. The zero time and related cost allowances put forth by ICF not only ignore the obvious labor cost burdens but also the related abstract costs such as increased professional liability premiums, more conducted Phase II's to close data gaps, and fewer providers in the marketplace as a result of the proposed stringent Environmental Professional qualifications.

ICF's determinations are arbitrary in nature and may well be based on arbitrarily established foundations. Such arbitrary foundations were voiced by EPA representatives at an AAI workshop held as part of ASTM's meeting in Washington DC on October 5, 2004, "ICF's baseline was E 1527, but that's not being met right now by many poor-quality consultants. If the industry was truly following ASTM, the impact wouldn't be as great. Many are claiming their Phase Is are ASTM-compliant when in fact they're falling short of the bar." Seems to be a perception among committee members and EPA players here that if you're doing good work now, then there's not a whole lot that's changing.

The base line is, in fact, that the private sector market place is functioning well under E 1527 and that most consultants are doing their jobs in compliance with the protocol. The new rule simply adds a significant amount of work that is not required by current industry practice. The proposed AAI rules significantly expand consultant liability exposure, which will result in higher errors and omissions insurance premiums. The new rule will increase labor costs and associated time dynamics of the due diligence process. In many instances it may be impossible to comply with the new rule within the timeframe that the marketplace allows for closing commercial real estate transactions.

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