



November 11, 2004

OSWER Docket
Environmental Protection Agency
Mail Code: 5305T
1200 Pennsylvania Ave. N.W.
Washington, D.C. 20460
Attention Docket ID No. SFUND-2004-0001

To Whom It May Concern:

On behalf of the more than 25,000 members of the Appraisal Institute, American Society of Appraisers and American Society of Farm Managers and Rural Appraisers, thank you for the opportunity to provide comment on the Environmental Protection Agency's proposed rule on "All Appropriate Inquiry." We have a number of concerns relating to Section 312.29, which addresses differences between purchase price and market value, in addition to Section 312.10 regarding the definition of an environmental professional.

The Proposed Rule

The Environmental Protection Agency (EPA) developed this proposed rule in response to provisions in the Small Business Liability Relief and Brownfields Revitalization Act of 2002 requiring EPA to develop regulations governing how to conduct "all appropriate inquiries." All appropriate inquiries are the inquiries into the previous ownership, uses and environmental condition of a property that must be conducted prior to acquisition by parties seeking Superfund liability protections for contiguous property owners, bona fide prospective purchasers and innocent landowners.

Purchase Price/Market Value Relationship

Section 312.29 of the proposed rule requires that the prospective purchaser of the property consider whether or not the purchase price to be paid for the property reflects its fair market value, assuming that the property is not contaminated. The proposed rule says there may be many reasons that the price paid for a particular property is not an accurate reflection of the fair market value. The proposed rule would require that the purchaser 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.

The Preamble of proposed rule states further with regard to Section 312.29:

"The proposed rule does not require that a real estate appraisal be conducted to achieve compliance with this criterion. Although the Negotiated Rulemaking Committee discussed the potential value in requiring that an appraisal be conducted, the Committee determined that a formal appraisal is not necessary for the purchaser to make a general determination of whether the price paid for a property reflects its market value. Such a determination 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 is reflective of its market value. Significant differences in the purchase price and market value of a property should be noted and the reasons for any differences should be noted."

We are concerned that the Congressional mandate for comparison of the fair market value of the property to the purchase price was not sufficiently addressed by the Negotiated Rulemaking Committee and in the proposed rule. If left unaddressed, we believe Section 312.29 will leave prospective purchasers (and the EPA) in a precarious position, and that vagaries in the proposed rule will continue to dissuade the purchase of contaminated or potentially contaminated properties.

Environmental Litigation and Market Value

Market value, or "fair market value," is one of the most understood and recognized legal and public policy terms in use today. Fair market value is defined and mandated to be used throughout federal law, our judicial system, interstate and international commerce and the financial services sector. Federal agencies utilizing market value in their regulations include: the Department of Transportation, Department of Interior, Department of Housing and Urban Development, General Services Administration and Office of Management and Budget as well as the five federal financial institution regulatory agencies.

We are not aware of any case where a federal agency requires the consideration of market value yet states in its regulations that "an appraisal need not be utilized." To the contrary, most federal agencies seek to promote the acquisition of the most accurate opinion of market value by using the services of a competent appraisal professional.

Similarly, to ensure the quality of compliance with public policy, all state governments regulate real estate appraisers and a majority of states have adopted "mandatory appraiser licensing" requirements that require opinions of market value to be estimated by licensed or certified appraisers (see attachment for mandatory appraiser licensing states). In these states, all opinions of market value must be performed by a licensed or certified appraiser and in compliance with the Uniform Standards of Professional Appraisal Practice (USPAP), the accepted standards of the appraisal profession. It does not appear that the proposed rule has taken this into consideration, or else this would have been discussed in the proposed rule. As it is, the proposed rule may be advising prospective purchasers to violate appraiser licensing laws in mandatory appraiser licensing states.

Additionally, many of our members testify in environmental litigation regarding property market value before and after contamination in conjunction with other qualified environmental professionals, and their experiences tell us that opinions by professional appraisers of the market value of properties "affected" and "unaffected" by contamination are given strong weight. We believe it is unlikely that a competent attorney would prepare a defense for a client in federal court utilizing the concepts in the

proposed rule, which contradict the law itself.

To provide a sustainable defense, a proper baseline must be established. This baseline is market value. Market value is established through the appraisal process. Unfortunately, the procedures outlined in Section III, M, Paragraph 2, fall short of providing a sustainable baseline (market value).

Throughout most of the proposed rule, the EPA is careful to require that research be conducted in a competent manner. The Preamble does not state that specific types of research methodology are acceptable or unacceptable. For example, it does not state that a history of ownership achieves compliance by using Sanborn Maps or tax records. Yet in Section III, M, Paragraph 2, of the Preamble, the EPA specifically defines how to comply with the purchase price-market value comparison. In Section III, M, Paragraph 2, the EPA moves away from referring to competency, providing its own version of valuation methodology instead. The valuation methodology noted is inconsistent with appraisal methodology, public policy and case law.

The application of the sales comparison approach is simply more complicated than described in the Preamble. It is frequently difficult to find highly similar property sales (or comparable sales), and thus the services of a professional appraiser are required. Professional appraisers analyze details of verified comparable sales and know how to make adjustments to the sales or expand the search to other, similar areas. Public policy and case law have well outlined what is needed to produce a credible opinion of market value.

In many cases, the sales comparison approach is not the primary approach utilized by the marketplace. The “cost approach” and “income approach” sometimes provide the definitive value for a property. Thus, the Preamble provision specifying consultation by a real estate expert who can perform a “comparability analysis” is confusing because of its vagueness.

Because of this, we believe the proposed rule provides deficient appraisal methodology advice without adequately explaining the valuation process, which could come to haunt a property owner (or the EPA) in the future. That being said, it is not our intent to inject additional expenses to the transaction process. Our goal is to caution the EPA that the issue should not be avoided or taken lightly, and that a ready solution is available to address this confusion.

Suggested Modification

We suggest a minor clarification in the Preamble, Section III, M, Paragraph 2, would help provide better direction to the public and prospective purchasers. We believe this recommendation will require little or no additional cost to the prospective purchaser if incorporated correctly.

We request EPA amend Section III, M, of the Preamble to read as follows:

The comparison of purchase price to Fair Market Value required to meet Section 312.29 of the Act may be accomplished in several ways. While the proposed rule does not require that a real estate appraisal be conducted to achieve compliance with this criterion, the prospective purchaser should make the decision regarding scope of this study in light of a

potential need to defend against liability as a prospective purchaser. An informal assessment of the property may be conducted using acceptable valuation methodology. The Prospective Purchaser must decide if the informal assessment is sustainable in a later action. But, it should be noted that in most transactions, a formal appraisal is being prepared for lending or other purposes. The intended use section of the appraisal can include its utilization for AAI compliance. Appraisals are prepared to meet the Uniform Standards of Appraisal Practice (USPAP). USPAP requires that appraisers analyze the details of the current transaction. This analysis can and should include a study of the relationship of the price being paid to market value.

The objective is to determine whether or not the purchase price to be paid for the property is reflective of the environmental conditions present at the site. Significant differences between the Market Value of the property "as if unimpaired" and the purchase price provide a basis for this observation. Reasons for any differences between unimpaired market value and sales price should be noted.

Concerns Regarding Appraisal Costs Halting Brownfield Development

Representatives of the Negotiated Rulemaking Committee have stated that that they feared hundreds of thousands of appraisals would be needed and would "halt" brownfield redevelopment. We disagree with this position.

The vast majority of commercial real estate transactions utilize financing. In virtually all lending transactions, an appraisal is being prepared to substantiate the loan while the All Appropriate Inquiry is being conducted. Rather than avoid the appraisal issue, we suggest the EPA utilize this opportunity to encourage a link between environmental issues and valuation issues. This is a reasonable and productive approach to protecting the public good.

Underwriters at financial institutions tell our members that they often review appraisals disclaiming any environmental issues; while at the same time they review other reports describing contamination issues at the property. If the lender were to simply subtract remediation costs from the "unimpaired value," the true market value impact of environmental conditions may not be accurately addressed. An environmental appraisal considers not only remediation costs, but also ongoing costs, responsibilities and stigma (market resistance).

Competent appraisers understand the valuation effects of environmental issues and can render opinions of value for the property as if "unimpaired" as well as an opinion of value in consideration of the environmental impairment. USPAP actually provides that the "impaired" value is the actual base value. The "unimpaired" value must invoke a hypothetical condition, meaning the state of appraised condition is not true, but is assumed to be true for the appraisal. This kind of information can assist prospective purchasers in making the market value/purchase price determination.

Linkage of the appraisal being prepared for other purposes to All Appropriate Inquiry is simple, reasonable and cost efficient. Generally, only a slight change in the scope of work would be needed to effect this change. Our organizations have a large body of knowledge on this subject and can

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help establish a coordinated solution. Our organizations stand committed to assist you in this endeavor, and we recommend the EPA encourage this inter-communication in its Final Rule.

Definition of Environmental Professional

Finally, we believe the definition of “environmental professional” should be reserved for those persons properly trained and licensed to perform environmental assessments, including individuals who have earned professional designations in the environment assessment industry.

Some real estate professionals have taken courses such as the joint Appraisal Institute/National Association of Environmental Risk Auditors (NAERA) seminar entitled *Introduction to Environmental Issues for Real Estate Appraisers*. In this seminar students learn to use forms such as the Appraisal Institute’s Property Observation Checklist and NAERA’s Uniform Environmental Risk Screening Report. Some have chosen to pursue certification in this area through courses and other requirements offered by NAERA and the National Registry of Environmental Professionals.

The EPA has proposed that a “certified engineer” be placed above all other professional qualifications in the signing off on All Appropriate Inquiry investigations. While current regulations state what one must do to conduct such an inquiry, the proposed rule would change this to state who that person should be.

We do not believe engineers should be given special status in the environmental assessment industry as that designation does necessarily bring with it the needed skill set to protect the public health. As such, we recommend that §312.10(b)(1)(i-iv) of the EPA proposed rule be amended to state that all requirements to conduct All Appropriate Inquiries set forth for engineers be the same as those with a BA or BS level degree in an environmentally concentrated field; and that the experience requirement for those with no degree in an environmentally concentrated field be reduced from ten years to five years. We agree that when actual testing is required, a higher level of education and experience is appropriate, but for the level of research required under AAI, the public health can be adequately protected at the five-year experience level.

If our organizations can be of assistance, please contact Don Kelly, Vice President of Public Affairs, Appraisal Institute, at 202-298-5583 or dkelly@appraisalinstitute.org, Ted Baker, Executive Vice President, American Society of Appraisers, at 703-733-2109 or tbaker@appraisers.org, or Steve Runyan, Government Relations Chair, American Society of Farm Managers and Rural Appraisers, at 661-747-6458 or srunyan@bak.rr.com.

Sincerely,

Appraisal Institute
American Society of Appraisers
American Society of Farm Managers and Rural Appraisers

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Attachment

States Requiring Mandatory Licensing of Appraisers

To provide an opinion of market value any individual in the following states must be licensed or certified by the appropriate state real estate appraiser regulatory agency. All opinions of market value in these states must be done in accordance with the Uniform Standards of Professional Appraisal Practice published by The Appraisal Foundation.

Alabama
Connecticut
Delaware
District of Columbia
Idaho
Louisiana
Maine
Michigan
Minnesota
Mississippi
Missouri
Nebraska
Nevada
New Jersey
New Mexico
North Carolina
Oregon
Pennsylvania
Rhode Island
South Carolina
South Dakota
Tennessee
Texas
Utah
Virginia
Washington
West Virginia