

**U.S. Environmental Protection Agency
All Appropriate Inquiry Negotiated Rulemaking Committee**

Meeting Summary -- April 29-30, 2003

Welcome

Barry Breen, Deputy Assistant Administrator, Office of Solid Waste and Emergency Response (OSWER), Stephen Luftig, Senior Advisor on land reuse, OSWER, and Linda Garczynski, Director, Office of Brownfields Cleanup and Redevelopment (OBCR) welcomed the negotiators and thanked them for agreeing to participate in the negotiated rulemaking process. They expressed their confidence in the eventual success of the negotiated rulemaking process because of the talent and expertise of the Committee members, which will be brought to bear on the development of the All Appropriate Inquiry (AAI) standard. Patricia Overmeyer, OBCR, was introduced as the Designated Federal Official, whose responsibilities are outlined in the Federal Advisory Committee Act.

Introductions

All Committee members, Resource participants, Facilitators and members of the public introduced themselves.

Statutory Framework for Negotiated Rulemaking

Debbie Dalton of EPA's Conflict Prevention and Resolution Center discussed the rulemaking process at EPA, and the requirements and responsibilities outlined in the Negotiated Rulemaking Act and the Federal Advisory Committee Act (FACA). She highlighted the importance of Committee members' ongoing communications with constituents and superiors throughout the process.

Overview of the Negotiated Rulemaking Process

Susan Podziba, Facilitator, Susan Podziba & Associates, provided an overview of the convening assessment and negotiation phases of the negotiated rulemaking process. She described how Committee discussions will focus on seeking agreements in concept and ultimately, consensus regulatory language.

Discuss and Revise Ground Rules

The Committee discussed and revised the ground rules, which will govern its activities throughout the negotiated rulemaking process. The ground rules were tentatively adopted, subject to Committee member feedback from constituents. The Committee members engaged in in-depth discussions on such issues as its mission statement, the role of Resource participants, Committee review of the preamble to the regulation, and Committee member absence from meetings. Key discussion points included:

Mission Statement: The Committee agreed to keep the mission statement broad rather than list specific interests of stakeholders because of the difficulty of accurately listing all the concerns of Committee members.

Resource Participants: Resource participants are those who interact with and/or represent constituencies across the spectrum of stakeholders. They will provide

expertise to the Committee and may participate in work groups. Some members indicated that they would nominate additional Resource participants once the ground rules are formally adopted.

Preamble: The Committee discussed its review of the preamble to the regulation. The preamble is written after the regulatory language is drafted and serves to clarify and explain, sometimes by example, aspects of the rule. Committee members stressed the importance of their review of the preamble, and it was agreed that EPA will provide the draft preamble to the Committee for a timely review, and if there is a consensus among Committee members, convene a meeting to discuss it.

Absence from Meetings: According to the ground rules, absence will be equivalent to not dissenting. Thus, each organizational member will be represented by a principal negotiator and an alternate. If neither is available to attend a meeting, the member may write a memo with his/her opinions and concerns on issues to be discussed at that meeting for distribution to the Committee.

Agenda of Issues

The agenda of issues that the Committee will discuss is broadly contained in the criteria identified in Section 223(2)(B)(iii) of the Brownfields Law. Each criterion includes a set of sub-issues. EPA reminded the Committee that the Brownfields Law amends the Superfund liability provisions for all property owners, not just brownfields, and therefore, the AAI rule applies to all properties for which an owner will assert liability protection.

Before discussing the criteria, the Committee sought to identify broad, general issues. They included:

- The need to harmonize the rule with other requirements for liability protection under the Brownfields Law and other federal statutes (e.g. appropriate care, prevention of future releases, compliance with institutional controls);
- The usefulness of a tiered approach of varied levels of investigation, based on property type, to avoid, for example, unnecessary assessment of clean sites;
- The question of whether all the statutory criteria must be included in the regulation and applied to all property types to accomplish all appropriate inquiry;
- The scope of the standard with regard to the level of investigation for properties with varying levels of contamination, for example, will the standard include a pre-phase I assessment, require sampling, or outline the steps for a phase I and/or phase II assessment ?;
- Public notice of findings of contamination and a duty to report a threat to public health and safety;
- The structure of the regulation in terms of whether it will be performance-based or prescriptive;

- Transferability of AAI liability relief; and
- How the rule will accommodate the unique characteristics of rural properties, for example, sometimes limited availability of information or access.

In addition, there was a discussion of the starting point for writing the standard. Some Committee members suggested that ASTM 1527-00, a current industry standard and the interim standard under the Brownfields Law, should be revised and amended to create the new AAI standard. Other Committee members suggested there were other documents such as state or EPA guidance documents that could serve the same function. Since not all Committee members were familiar with all the documents discussed, this question was tabled until all members had an opportunity to review them.

In response to questions about the scope of the standard, the Committee decided to create a work group to discuss how a tiered approach to assessments might be structured.

Criteria #1: The results of an inquiry by an environmental professional

All members agreed that the intent of this criterion is to ensure the quality of environmental assessments. Committee members discussed the kinds of credentials that might be required of environmental professionals. The Committee agreed that there may be combinations of credentials – academic training, such as engineering and geology, and work experience—that would result in the appropriate expertise to perform all appropriate inquiry. Committee members agreed to email their ideas about qualifications to Patricia Overmeyer, EPA.

Criteria #2: Interviews with past and present owners, operators, and occupants of the facility for the purpose of gathering information regarding the potential for contamination at the facility.

The Committee discussed which contaminants should be included in the assessment, who should be interviewed, and what to do if required individuals could not be interviewed.

Contaminants: Committee members suggested three categories of contaminants: (1) CERCLA substances, which must be included in the AAI standard for all properties; (2) additional substances required for Brownfields grantees under the Brownfields Law, such as petroleum; and (3) other substances, such as radon and mold, which are typically required by banks and lenders, but are not considered hazardous substances under CERCLA. Further discussion is required on the third category.

Interviewees: The Committee discussed who to interview to determine historic uses of a site. The Committee discussed whether that adjacent neighbors could provide useful information in addition to key site managers and employees, and owners and operators.

Unwilling or Unavailable Interviewees: The Committee discussed the need to determine what a “reasonable effort” would mean in terms of trying to complete a series of required interviews. Some pointed to situations where people could not be found or were

unwilling to speak with the environmental professional. This led to a discussion of on-site sampling in place of some interviews. Other members raised the issue of an owner not wanting neighbors to know a property was for sale.

Public Comments (April 29 & 30)

John Watson, of National Brownfield Association, questioned the appropriateness of using the term “brownfields” in the Ground Rules mission statement. Rebecca Sigler, of Holland & Knight, spoke about public participation in work groups. Katie Shorting, of Mortgage Bankers Association, raised concerns about public notice of limited information identified in phase I assessments.

Logistics

Schedule: The Committee will meet on June 10-11, July 8-9, September 9-10, October 14-15, and November 12-13, 2003.

Background Readings: The Committee will review the following documents in preparation for the June 10-11 meeting: ASTM 1527, ASTM 1528, ASTM E1984, EPA documents “*Common Elements*,” *Region 2 Brownfields Project Planning Guidance* and *Quality Assurance Guidance for Conducting Brownfields Site Assessments*, New Jersey and Illinois Guidance, and Pennsylvania’s ACT 2.

ASTM 1527, was provided to Committee members. ASTM will also provide 1528 and E1984. The public may review ASTM standards as part of the EPA docket of the AAI reg neg committee, but may not make copies of these copyrighted documents. The EPA documents were distributed at the meeting. Website links will be sent for the other documents. Anyone needing hard copies rather than website links should send such a request to Patricia Overmeyer by email.

Expert Presentations: EPA will work with the Environmental Law Institute and Committee members to arrange presentations on the background reading documents as well as information about other state programs.

Next Steps

Alternates: All members will identify an alternate and send his/her name and contact information to Patricia Overmeyer.

Documents: Facilitators will distribute revised ground rules, a draft meeting summary, and a draft agenda prior to the June 10-11 meeting.

Environmental Professional Qualifications: Committee members should send ideas to Patricia Overmeyer.

Flowchart Work Group: will hold a conference call on May 13, 10:00 AM – 12:00 PM EDT to initiate discussions of a tiered approach for the standard.

U.S. Environmental Protection Agency
All Appropriate Inquiry Negotiated Rulemaking Committee
April 29 & 30, 2003
Attendance

Committee Members:

Kathy Blaha, Trust for Public Land
Eric Block, National Groundwater Association
Carol Bowers, American Society of Civil Engineers
Clifford Case, International Municipal Lawyers Association
Abbi Cohen, Mortgage Bankers Association of America
Robert Colangelo, National Brownfield Association
Tom Crause, Illinois Environmental Protection Agency (ASTSWMO)
Andy Darrell, Environmental Defense
Deeohn Ferris, Partnership for Sustainable Brownfields Redevelopment
Diane Hanna, Gila River Indian Community
Karl Kalbacher, Maryland Department of the Environment (ASTSWMO)
Julie Kilgore, Wasatch Environmental, Inc.
David Lourie, ASFE
Stephen Luftig, U.S. Environmental Protection Agency
Vernice Miller-Travis, West Harlem Environmental Action
Martin Mitchell, National Association of Homebuilders
Roger Platt, Real Estate Roundtable
Lenny Siegel, Center for Public Environmental Oversight
Judy Sheahan, The US Conference of Mayors
Jeff Telego, Environmental Bankers Association
Barry Trilling, National Association of Industrial and Office Properties
James Tripp, Environmental Defense
Matt Ward, National Association of Local Government Environmental Professionals
Julie Wolk, U.S. Public Interest Research Group

Patricia Overmeyer, US EPA, Designated Federal Official
Deborah Dalton, US EPA, Conflict Prevention and Resolution Center
Susan Podziba, Susan Podziba & Associates, facilitator
Meighan Matthews, Susan Podziba & Associates, facilitator

Resource Participants:

Kevin Matthews, AIG Environmental
Lindene Patton, Zurich North America
Sara Beth Watson, American Bar Association
Russell Riggs, National Association of Realtors

Public

Khanna Johnston, US EPA
Karen Wardzinski, DOJ

Mike Mittelholzer, NAHB
Meredith Preston, BNA
Bruce Lundgren, NAHB
Eric Wieser, BPI News
Helen Keplinger, EPA
Kris Swanson, ATSWMO
M. Charles, ASCE
Dianne Crocker, EDR
Gene Watson, SECOR, International
Rebecca Sigler, Holland & Knight LLP
Catherine Tunis, EPA OPEI
Robert Myers, EPA Superfund
Michael Charles, American Society of Civil Engineers
Dan Smith, ASTM
Christine Reimer, NGWA
Kelly Novak, National Association of Development Organizations
David Luick, International Council of Shopping Centers
Charlie Grizzle, International Council of Shopping Centers
Dick Cantor, ICSC consultant, Grizzle Co.