

Public Meeting

Negotiated Rulemaking on All Appropriate Inquiry

April 15, 2003

I. Introduction

Linda Garczynski, Director, EPA's Office of Brownfields Cleanup and Redevelopment (OBCR), opened the public meeting by stating that EPA is holding this meeting to listen to comments and questions from the public before the advisory committee charged with establishing the standard for "all appropriate inquiry" convenes April 29–30, 2003. "All Appropriate Inquiry" refers to the requirements for assessing the environmental conditions of a property prior to its acquisition. The Brownfields Law requires EPA to develop regulations establishing standards and practices for assessing the environmental conditions of a property prior to its acquisition by January 2004. The committee has been established under the Federal Advisory Committee Act (FACA) as part of the process to undertake a negotiated rulemaking for "all appropriate inquiry."

Liability Relief and "All Appropriate Inquiry"

Susan Bromm, Director, EPA's Office of Site Remediation Enforcement (OSRE), told the group it is her hope that after a party conducts "all appropriate inquiry" into a site, OSRE staff will not be involved with the party at the site. Currently, the American Society for Testing and Materials (ASTM) standards (E1527-97 and E1527-00) are used to determine environmental conditions at a site. Bona fide prospective purchasers, contiguous property owners, and innocent landowners that want liability limitations under the Brownfields Law are required to undertake "all appropriate inquiry" at a site and exercise "appropriate care" by taking "reasonable steps" at the property. OSRE issued guidance on March 6, 2003 that includes the definition of "reasonable steps." The *Interim Guidance Regarding Criteria Landowners Must Meet in Order to Qualify for the Bona Fide Prospective Purchaser, Contiguous Property Owner, or Innocent Landowner Limitations on CERCLA Liability "Common Elements"* can be found on OSRE's website at <http://www.epa.gov/Compliance/resources/policies/cleanup/superfund/common-elem-guide.pdf>.

Establishing Standards for "All Appropriate Inquiry" under the Federal Brownfields Law

Patricia Overmeyer, OBCR lead and Designated Federal Official on the "all appropriate inquiry" negotiated rulemaking, explained that the law provides protection for the three types of property owners noted above. The law clarifies that these property owners are not liable for contamination at a site if they exercise due care, comply with land use restrictions and institutional controls, and grant access to those performing response actions at the site. In addition, the owner must conduct "all appropriate inquiry" prior to purchasing the property. An innocent purchaser must conduct "all appropriate inquiry" prior to purchasing the property and must also demonstrate that "reasonable steps" were taken to prevent future releases and exposure to releases.

The Brownfields Law also requires that site assessments conducted by entities receiving EPA brownfields grants must comply with the "all appropriate inquiry" requirement of the law. In addition, the law sets forth ten criteria that must be included within the standards for "all

appropriate inquiry” and requires that the regulations be developed within two years of the law’s enactment (by January 2004).

The law also established interim standards for conducting “all appropriate inquiry,” which will remain in effect until EPA promulgates final federal standards. The law requires the use of procedures developed by ASTM, citing the E1527-97 standard. However, ASTM has updated to a 2000 standard. A final rule will be published over the next several weeks recognizing both the 1997 and 2000 ASTM standards as acceptable in meeting the “all appropriate inquiry” requirement.

EPA is proceeding with developing the federal standard on “all appropriate inquiry” through a regulatory negotiation process. All interests will be represented on the FACA committee, and decisions will be made through consensus. EPA will begin the process by identifying issues and following the ten criteria set forth in the law that must be included in the standard developed. However, the FACA committee will be responsible for determining its own schedule and developing the content of the standard. EPA will then use the content agreed upon by the FACA committee when developing its proposed rule and follow any additional administrative procedure requirements.

EPA has hired Susan Podziba as the neutral third party to facilitate the regulatory negotiation. Ms. Podziba began this effort by identifying the issues involved to determine if a regulatory negotiation was the best process for developing the standard. Ms. Podziba conducted interviews with stakeholders to discuss issues related to developing a rule and whether the stakeholders believed a regulatory negotiation would be successful. A convening report was prepared containing these findings.

Overview of the Regulatory Negotiation Process

Deborah Dalton, Director of the Conflict Prevention and Resolution Center within EPA’s Office of General Counsel, explained that her office provides coaching to EPA program offices throughout the regulatory negotiation process. EPA has undertaken 20 regulatory negotiations since 1983, and most have been successful.

To date, EPA has conducted the following steps in the negotiated rulemaking process for “all appropriate inquiry,” which are typical of those taken in other regulatory negotiations:

1. EPA conducted an internal assessment among its program offices, including OBCR and the Office of Emergency and Remedial Response, to determine its own interest in negotiating a rule.
2. EPA retained a neutral third party facilitator/mediator (Ms. Podziba) to conduct a more rigorous assessment of the feasibility. This assessment included interviews with agency management and staff as well as interviews with external stakeholders who might be affected by the rule.
3. EPA took public comments on whether a regulatory negotiation is the best process to use.

Public comments on the “all appropriate inquiry” negotiation were received between March 6 and April 7, 2003. Today’s public meeting is the final stage of the comment period.

4. A FACA charter is filed containing information on the organizations and members who will serve on the committee. The FACA committee for “all appropriate inquiry” will be chartered soon. The “Notice of Establishment” was published in the *Federal Register* during the week of April 7, 2003.

5. Most FACA committees meet five to ten times. The FACA committee for “all appropriate inquiry” will hold its first meeting April 29–30, 2003, and it is expected the group will meet five or six times before the December 30, 2003, deadline for the meetings to conclude.

There are two applicable federal laws for negotiated rulemaking—The Negotiated Rulemaking Act of 1996 and the FACA. The Negotiated Rulemaking Act recommends that a mediator be selected. Ms. Podziba will be the mediator managing the process, dialogue, and negotiations. She is serving as a neutral third party, not as an advocate.

Structure of the FACA Committee Meetings

During the FACA committee meetings, deliberations will occur in open session; however, the public may offer comments only during designated times. Parties are also encouraged to pass issues through FACA committee members. Summaries of all FACA committee meetings are required and will be posted on EPA’s Web site. The committee will determine its own protocols at the first meeting including its own definition of the word “consensus.” If the group reaches consensus on a proposed rule, the content will be presented as the final rule and comments will be solicited.

Members of the FACA committee are serving without compensation, and EPA appreciates the time members will spend on this effort. Rules generated through negotiated rulemakings are typically clearer, easy to comply with, and protective of the environment.

Summary of Convening Report Findings and Decision to Proceed with Negotiated Rulemaking

Susan Podziba, the neutral facilitator retained for the regulatory negotiation, explained that it is important to conduct internal and stakeholder assessments to determine whether a regulatory negotiation is feasible. Discussions with EPA management and staff were held to define the goal and intent of EPA in going forward with a regulatory negotiation. The goal is to develop a federal standard for “all appropriate inquiry,” and the intent is to promulgate a rule whether or not the regulatory negotiation is successful.

More than 60 stakeholder interviews were conducted with a wide variety of trade associations and practitioners. Stakeholder categories were developed, and a second tier of interviews were conducted as other interests were identified. The diversity of views within each stakeholder category was considered during this interview process. Ms. Podziba identified key issues as well as key dynamics that would affect the process, such as having a December 30, 2003, deadline for

reaching consensus. In addition, Ms. Podziba examined whether the agenda of issues involved was complex enough to justify expending resources on a regulatory negotiation.

Summary of the Convening Report

The following stakeholders were interviewed for the convening report:

- Federal, state, tribal and local governments
- Development community (commercial, industrial, residential, and non-profit developers)
- Bankers and lenders
- Environmental justice community
- Environmental organizations
- Environmental professionals

Environmental insurance representatives, brokers, and attorneys were also interviewed; however, these stakeholders will be considered resource participants in the process, not members of the FACA committee. The American Bar Association's Section of Environment, Energy, and Resources is one group that will be a resource participant to the committee.

Issues

All interviewees agreed on the common public goal that brownfields redevelopment should be promoted. Interviewees also agreed that the federal standard for "all appropriate inquiry" should be clear and provide certainty. Those stakeholders interviewed had different opinions on the rigor of the standard, the cost of complying with the standard, the scope of the standard, the standard's shelf life, and timing of public participation requirements.

Feasibility of Success

Ms. Podziba determined that a regulatory negotiation to develop an "all appropriate inquiry" standard has a good chance of success, based on the following criteria:

1. The FACA committee is composed of a manageable number of stakeholders (20–25 individuals will participate).
2. All organizations can be represented on the committee.
3. There are complex issues for discussion.
4. The issue is suitable for decision making because there is a statutory deadline.
5. Those interviewed believe this is a good opportunity to undertake a regulatory negotiation.
6. EPA is willing to participate and sponsor the effort.
7. There are no alternative means to determine a federal standard, and the regulatory negotiation creates a forum to bring the relevant stakeholders together.
8. There is a firm deadline of December 31, 2003, to reach consensus on a standard.

Federal Representation on the FACA Committee

Steve Luftig, EPA's Office of Solid Waste and Emergency Response, is the federal government's representative on the FACA committee. In this role, he represents all EPA offices and also all other federal agency partners. Mr. Luftig is the chair of the FACA committee and will start and end each meeting as well as approve all meeting minutes. The first FACA meeting

will be held in EPA East in Washington, D.C., April 29–30, 2003. All FACA meetings are open to the public and will include designated times for public comments.

II. Comments and Questions

Participants raised questions, sought clarification, and offered suggestions regarding the negotiated rulemaking for “all appropriate inquiry.” These remarks and EPA’s responses (where questions were asked or clarification sought) are summarized below.

FACA Committee Membership and Process

- A question was asked as to whether all FACA meetings will be held in Washington, D.C.
 - All meetings will be held in Washington, D.C., because a majority of the committee members are based there and this limits travel time and expenses.
- Clarification was sought on the role of the resource participants identified (environmental insurance representatives, brokers, and attorneys) and whether these groups will provide comments at some point during negotiations.
 - In past regulatory negotiations, official resource participants who have a wealth of knowledge in an area have been designated. Some of these participants have been involved in specific workgroups of the FACA committee or have been asked to provide information during deliberations on specific topics in which they have expertise. Resource participants do not have a vote on the consensus agreement. Their roles will vary depending on the participant. The role of resource participants is an innovation and will be discussed further in the first meeting of the FACA committee.
- A question was asked as to how public comments received to date have impacted the committee.
 - The public comment period ended on April 7, 2003, and all comments were reviewed. Comments were received on both what should and should not be included in the final rule. Other comments were provided on interests the public did not believe were represented on the FACA committee. EPA is still receiving comments and will respond as appropriate but there will not be a response to comments document.
- A comment was made that there is no FACA committee member who represents small, rural governments and communities. The suggestion was made to include the National Association of Development Organizations as a member representing this interest.
- A question was asked as to whether groups who are not participating as full FACA committee members can be involved in workgroups the committee may form.
 - A decision has not been made on whether to allow workgroup participation by other organizations, and different determinations have been made in past regulatory negotiations. The FACA committee would need to discuss this in

determining its set of protocols. No workgroups of the full FACA committee have been established.

- Organizations not participating in the FACA committee are also encouraged to participate in the public comment periods during the FACA meetings or contact individual committee members who represent similar interests.
- A question was asked as to whether the individual members of the FACA committee have been identified and when the list of members will be publicly available.
 - To date, EPA has identified 22 organizations as members of the FACA committee and is considering public comments received on additional members. A March 6, 2003, *Federal Register* “Notice of Intent to Negotiate Proposed Rule on All Appropriate Inquiry” lists the organizations that have been invited to participate. Letters were sent to these organizations, and they are currently providing the names of the individuals who will represent them on the FACA committee. The names of these individuals will be made available on EPA’s Web site.

Regulatory Negotiation Procedures

- Clarification was sought on a concept noted in the March 6 *Federal Register* “Notice of Intent to Negotiate Proposed Rule on All Appropriate Inquiry” regarding discussing issues related to the proposed rule only in the negotiated rulemaking forum.
 - This concept applies predominately to legislative or judicial action during the period of regulatory negotiation. Committee members are asked to negotiate in good faith. It is anticipated that representatives will consult with their organizations and stakeholders through a variety of forums.
- A question was asked as to what will occur after the FACA committee has completed its work.
 - Once the committee reaches consensus, it will be dissolved. The agreement will be finalized and reviewed by EPA’s Office of General Counsel, EPA Administrator’s Office, and the Office of Management and Budget before it becomes final. In addition, a preamble will be drafted and EPA will ensure that requirements of any other applicable federal laws are met. The proposed rule will then be published, followed by a public comment period. FACA committee members are permitted to provide comments in the public record. All comments will be analyzed, any changes will be made, and the final rule will be published.
 - On occasion, changes in the rule need to be made if new information becomes available that must be considered. In this case, FACA committee members may be contacted.

Involvement of Federal Partners

- Clarification was sought on the process for the federal partners to provide information to Mr. Luftig, the federal government’s representative on the FACA committee.
 - A federal partner working group has been formed and a meeting has been held. To date, participating agencies have included the National Oceanic and Atmospheric Administration of the Department of Commerce, the Department of Housing and Urban Development, the Forest Service of the Department of Agriculture, the Department of Justice and the Army Corps of Engineers of the Department of Defense. Other federal agencies interesting in participating should contact Patricia Overmeyer, EPA/OBCR, at 202-566-2744 or overmeyer.patricia@epa.gov.
- A question was asked as to whether federal government lending agencies have been included in the federal partners working group.
 - EPA would like to include these agencies in the federal partners working group. Representatives from the Federal Housing Administration of the Department of Housing and Urban Development have participated and efforts have been made to contact other federal financial institutions. Other federal agencies interesting in participating should contact Patricia Overmeyer, EPA/OBCR, at 202-566-2744 or overmeyer.patricia@epa.gov.

Content of Interim and Final “All Appropriate Inquiry” Standards

- A question was asked as to whether the issue of institutional controls will be addressed by the FACA committee.
 - The FACA committee will determine if there is a need to collect information on institutional controls within the confines of the regulation. However, consideration of institutional controls is part of conducting “all appropriate inquiry.”
- A clarification was sought as to what “all appropriate inquiry” standard currently applies.
 - The interim standard (current ASTM E1527-97 or 2000 standards) will be in effect until EPA develops a federal standard that is published in the final rule.
- A clarification was sought on the standard by which recipients of brownfields grants must comply once funds are awarded.
 - Once grants are awarded, the current standard in effect will apply. The new standard will not be retroactive. From the date the final rule takes effect, grantees must comply with the new standard.
- A question was asked regarding the impact of a federal standard for conducting “all appropriate inquiry” on small entities, in reference to Executive Order 12866. Under this Order, EPA must determine whether a regulatory action is “significant” and, therefore, should be reviewed by the Office of Management and Budget.
 - At this time EPA does not believe that the impact of a federal standard for conducting “all appropriate inquiry” will have an annual effect of more than \$100 million on small entities since “all appropriate inquiry” activities are already

carried out. However, a new standard could have a significant policy effect, and an evaluation will be conducted if it appears that a significant number of small businesses will be impacted by the final rule.

- Clarification was sought on how to qualify as a bona fide prospective purchaser under the Brownfields Law.
 - A bona fide prospective purchaser can purchase a property after conducting “all appropriate inquiry,” performing “due care,” and taking “reasonable steps” to prevent release and exposure to a release. The March 6, 2003 guidance issued by OSRE describes bona fide prospective purchaser exemption circumstances.

List of Participants

Don Allen, DPRA, Inc.
Elizabeth Anderson, DPRA, Inc.
Kathy Blaha, Trust for Public Land
Laureen McMurray Boyle, Academy of
Certified Hazardous Materials Managers
Carol Brown, City of Chicago
Amy Edwards, Holland and Knight
Allyn Finegold, SRA International, Inc.
Keith Hagg, Dyncorp/CSC Corporation
Cathy Hartman, DPRA, Inc.
Constance Hill, Federal Highway
Administration
Jim Johnston, Association for the Success of
Professional Firms Improving the Natural
and Built Environments
Stephen Langel, *Inside Washington*
Lucy Liew, Department of the Army/BRAC
Bruce Lundgren, National Association of
Home Builders
Donald Masisak, North Central
Pennsylvania Regional Planning
Commission
Pat McGuckin, Satisfi
Deborah McKinnon, Mortgage Bankers
Association
Kelly Novak, National Association of
Development Organizations
Matt Placky, SRA International, Inc.
Anne Politis, DPRA, Inc.
Meredith Preston, Bureau of National
Affairs
Jennifer Riccio, Environmental Data
Registry
Russell Riggs, National Association of
Realtors
Katie Schwarting, Mortgage Bankers
Association
Nicole Singh, Environmental Bankers
Association
Fritz Seifert, American Premier
Underwriters
Dan Smith, American Society for Testing
and Materials
Mark Smith, U.S. Department of Justice
Sarah Smith, Paul Hasting LLP
Mary Sivage, U.S. Department of
Transportation, Office of Surface
Transportation Policy
Dean Jeffery Telago, Environmental
Bankers Association
Blake Velde, U.S. Department of
Agriculture
Gene Watson, SECOR International
Sara Beth Watson, Steptoe and
Johnson/American Bar Association
Section on Environment, Energy, and
Resources
Julie Wolk, U.S. Public Interest Research
Group
Susan Bromm, Office of Site Remediation
Enforcement
Deborah Dalton, Office of General Counsel,
Conflict Prevention and Dispute
Resolution Center
Linda Garczynski, Director, Office of
Brownfields Cleanup and Redevelopment
(OBCR)
Sven-Erik Kaiser, OBCR
Steve Luftig, Office of Solid Waste and
Emergency Response
Patricia Overmeyer, OBCR
Susan Podziba, Podziba and Associates