

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

Draft Meeting Summary – June 10-11, 2003

Agenda Review

The Committee reviewed and accepted the meeting agenda.

Review and Adopt Ground Rules

The Committee reviewed the draft Ground Rules and made one change to correct the name of a Committee member. The ground rules were approved as final and will be posted on the EPA website.

Review and Approve April 29-30 Meeting Summary

The Committee reviewed the April 29-30 draft meeting summary and made two editorial changes to it. It was approved as final and will be posted on the EPA website.

Flow Chart Work Group Report

Karl Kalbacher of the Maryland Department of the Environment reported on the discussions of the work group regarding the possibility of a tiered approach to the All Appropriate Inquiry standard. The work group concluded that the concept of a flow chart or tiered approach should be tabled until the Committee develops further defining details of the AAI criteria.

State and Federal Brownfield Guidelines and ASTM Standards Presentation

Jay Pendergrass, Senior Attorney and Director of the Center for State, Local and Regional Environmental Programs, Environmental Law Institute and Charles Bartsch, Senior Policy Analyst, Northeast-Midwest Institute, gave a presentation summarizing a number of state, federal, and ASTM approaches to the ten statutory criteria for conducting All Appropriate Inquiry. Copies of PowerPoint slides were distributed, as were copies of the full report prepared by ELI, NEMW and SRA Technologies summarizing the standards and guidances reviewed.

Review of Draft Regulatory Language

The Committee reviewed draft regulatory language provided by EPA, including parts of the Introduction, Definitions, and Standards & Practices. The draft language incorporated the key concepts discussed at the April 29-30 meeting concerning Criteria I and II (as identified in Section 223(2)(B)(iii) of the Brownfields Law.)

EPA reminded the Committee of the ASTM copyright of the 1527-97 and 1527-00 standards, which EPA will respect in writing the AAI regulation.

Criterion I: The results of an inquiry by an environmental professional.

The Committee reviewed a number of options for defining environmental professional (EP), which were submitted by Committee members. Overall, the Committee is seeking to balance rigor and flexibility without creating a major change in the market concerning who can conduct environmental site assessments. Since all appropriate inquiry is a defense to potential liability under the Superfund Law, individuals purchasing services from an EP want to be assured that the definition of an EP will protect them from substandard work, but will also need to confirm the reputation of the individual or firm hired.

The Committee agreed to the concept of a list of equivalencies of credentials for defining the EP. The credentials will include various licenses, certifications, academic degrees, and practical experience. Most Committee members agreed that the most important EP qualification for conducting all appropriate inquiry is a significant number of years of practical experience conducting environmental site assessments. In addition, the Committee discussed that environmental professionals' competencies should be appropriate to the type of assessment being performed. The Committee discussed the concept of requiring the AAI to be supervised and/or certified by an EP, but conducted, at least in part, by individuals with lesser qualifications. A work group will convene prior to the July meeting to review a pre-draft of the revised draft regulatory language.

Criterion II: 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 the information that needs to be gathered through interviews and whether to require or suggest interviews of adjacent property owners and occupants. Committee members discussed the usefulness of interviewing adjacent owners and occupants, especially for abandoned properties in urban areas to determine historical uses of the site. Concerns were raised regarding the definition of adjacent, especially in densely populated areas. In addition, the Committee discussed the use of professional judgment to determine a reasonable number of interviews. Some Committee members raised concerns about confidentiality requirements of companies considering the purchase of properties. A work group will continue to review these issues and others related to this criterion prior to the July meeting.

Discussion of Issues

The Committee engaged in preliminary discussions of the eight remaining criteria identified in Section 223(2)(B)(iii) of the Brownfields Law. There was discussion of the need to review each criterion and then integrate the ten to achieve the overall goals of all appropriate inquiry.

Criterion III: Reviews of historical sources, such as chain of title documents, aerial photographs, building department records, and land use records, to

determine previous uses and occupancies of the real property since the property was first developed.

The Committee discussed the goal of developing a continuous record of land uses at a site to assemble a comprehensive review of the potential for past and on-going releases of hazardous substances. Committee members discussed the concept of offering some illustrative examples of documents or information that should be obtained, rather than listing particular documents or databases in the regulation. The EP would then be expected to use professional judgment to determine what documents to search; when enough data has been collected; and identify information gaps.

Criterion IV: Searches for recorded environmental cleanup liens against the facility that are filed under Federal, State, or local law.

The Committee discussed the objective of this criterion as identifying recorded past releases and cleanups of hazardous substances on or near the subject property. In addition, some members stated that the regulation should require the identification of institutional controls imposed on the property.

Criterion V: Reviews of Federal, State, and local government records, waste disposal records, underground storage tank records, and hazardous waste handling, generation, treatment, disposal, and spill records, concerning contamination at or near the facility.

The Committee discussed the distances from the site for which to search records, the number of records to search, and time allowed for the search. Committee members discussed setting a minimum search distance; allowing discretion to increase or decrease the search area based on site conditions; and that the records searched lead to "comprehensive and relevant" information within a reasonable time frame.

Criterion VI: Visual inspections of the facility and of adjoining properties

Committee members discussed the differences between "visual inspection" and "observation," but agreed that the objective of this criterion is to seek visual evidence of past or potential releases of hazardous substances. Committee members raised questions concerning the visual inspection of large tracts of rural lands; the problems posed by an inability to gain access to a property (primarily for local governments); and the problem of gaining access to adjoining properties for visual inspections.

Criterion VII: Specialized knowledge or experience on the part of the defendant. [Defendant or owner cannot hide information not uncovered by environmental professional]

The Committee agreed that this criterion is a statement of the responsibility of the landowner to provide known information of hazardous environmental conditions on or near the property. Questions raised by the Committee included: is the EP required to interview the party ordering the report; is certification attesting to the provision of all specialized knowledge required; and does

specialized knowledge refer to the defendant's professional expertise or to knowledge of the property?

Criterion VIII: The relationship of the purchase price to the value of the property, if the property was not contaminated.

Committee members agreed that most environmental professionals do not have the expertise to appraise properties. EPA explained that the rule may define some criteria as part of Criterion I (Results of an inquiry by an environmental professional) and may list other requirements as the responsibility of the "user" or other parties. Members discussed various reasons why a purchase price may be below market value; others stated that purchase prices significantly below market value should be explained or considered to possibly reflect knowledge of contamination.

Criterion IX: Commonly known or reasonably ascertainable information about the property.

The Committee discussed possible sources of "commonly known" information such as local word-of-mouth, newspapers, internet searches, and local interviews. Some Committee members explained that this criterion was designed as a "legal catch all" to prevent a defendant's claim of ignorance of a past release if obvious information exists to fill a data gap.

Criterion X: The degree of obviousness of the presence or likely presence of contamination at the property, and the ability to detect the contamination by appropriate investigation.

The Committee discussed the intent of this criterion including the possibility of sampling when data gaps exist; the need for further investigation if all required activities undertaken suggests a property is clean, but "obvious" information points to the possibility of contamination; and whether "obvious" and "appropriate" requires interviewing neighbors.

Additional Issues

Phase II Triggers: The Committee discussed whether or not findings of past releases of hazardous substances should trigger sampling or a phase II investigation. Some Committee members stated that the Brownfields Law requirements for "all appropriate care" suggest that there is no need for such triggers in all appropriate inquiry.

Public Notice: Questions were raised regarding public notice of AAI assessment findings.

Public Comments (June 10 & 11)

Gene Smary, ABA Section of Environment, provided information regarding Michigan's statute on phase I assessments. Keith Hagg, DynCorp CSC, requested that the public be provided with copies of the draft materials distributed at the meeting. Charles Creales, GZA, spoke to the process of identifying past occupants. Robert Barber, Environmental Data Resources,

provided information about the large number of government, state and local databases routinely checked by environmental professionals.

Logistics

Schedule and Location: The next AAI Reg Neg Committee meeting is July 8-9, 2003 at the Hotel Washington, 15th St. and Pennsylvania Ave. NW.

Communication: A Committee member's constituents should communicate with the member only, and the member should decide what constituent information to forward to the Committee. This will eliminate an overload of information sent to Committee members.

Next Steps

Alternates: Alternates will be included on the email list. Alternates' contact information should be sent to Patricia Overmeyer.

Documents: Facilitators will distribute a draft meeting summary and a draft agenda prior to the July 8-9 meeting. The approved versions of the April 29-30 meeting summary and the ground rules will be posted on the EPA website.

Regulatory Language: EPA will revise the regulatory language for Criteria I and II based on this meeting's discussions, and compose a first draft for the other criteria. The next draft will be sent to the full Committee at least one week prior to the July 8-9 meeting.

Environmental Professional Work Group: will hold a conference call on June 20th, 11:00 am -1:00 pm EDT to further discuss the issues and revised regulatory language for Criterion I. EPA will distribute the revisions resulting from the June 10-11 meeting to this work group before June 20th. Revisions resulting from the June 20th conference call will be incorporated into the document sent to the full Committee.

Interviews Work Group: will hold a conference call on July 1st, 2:00-4:00 p.m. EDT to further discuss issues related to Criterion II.

Resource Participant: The Committee recommended to EPA that Environmental Data Resources be added as a resource participant.

**U.S. Environmental Protection Agency
All Appropriate Inquiry Negotiated Rulemaking Committee
June 10-11, 2003
Attendance**

Committee Members:

Kathy Blaha, Trust for Public Land
Eric Block, National Groundwater Association
James Johnston (alternate), American Society of Civil Engineers
Clifford Case, International Municipal Lawyers Association
Abbi Cohen, Mortgage Bankers Association of America
John Watson (alternate), National Brownfield Association
Tom Crause, Illinois Environmental Protection Agency (ASTSWMO)
Jim Tripp, 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
Carol Brown (alternate), The US Conference of Mayors
Jeff Telego, Environmental Bankers Association
Barry Trilling, National Association of Industrial and Office Properties
Matt Ward, National Association of Local Government Environmental Professionals
Julie Wolk, U.S. Public Interest Research Group
Kelly Novak, National Association of Development Organizations
Tony Brown, International Council of Shopping Centers
David Luick (alternate), International Council of Shopping Centers

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:

Sara Beth Watson, American Bar Association
Russell Riggs, National Association of Realtors
Kevin Matthews, AIG Environmental
Dan Smith, ASTM

Public

Rob Barber, EDR
B.K. Schaffer, GSA
Ruth Ludder, DOI
Amy Edwards, Holland & Knight
Holly Hill, Troutman Sanders
Jennifer Wilbur, US EPA
Erin Perkins, US EPA
Robert Myers, EPA Superfund
Christine Reimer, NGWA
Barry Galef, ICF Consulting
Allyn Finegold, SRA
Bruce Lundgren, NAHB
Lara Mathews, Blank Rome
Jackie Tenusak, US EPA OSWER
Mike Mittelholzer, NAHB
Geoff Koss, Inside EPA
Charles Crealase, GZA
Charles Bartsch, Northeast-Midwest Institute
John Martin, GSA
Keith Hagg, DynCorp
Emilia Olivarez, Georgia Power Co.
Eric Wieser, BPI News
Gene Smary, ABA Section of Environment
Catherine Tunis, EPA OPEI
Denise Stranko, Chesapeake Bay Foundation
Jess Plonka, US EPA OIG
Shawna Gillespie, US EPA
Charlie Grizzle, International Council of Shopping Centers
Helen Keplinger, EPA