

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

**Meeting Summary – October 14-16, 2003**

**Agenda Review**

The Committee reviewed and accepted the meeting agenda.

**Review and Approve September 9-10 Meeting Summary**

The Committee reviewed the September 9-10 draft meeting summary and made two editorial changes to it. It was approved as final and will be posted on the EPA website.

**Review of Rule**

Linda Garczynski, Director, EPA's Office of Brownfields Cleanup and Redevelopment (OBCR) thanked the AAI Reg Neg Committee for all the hard work it has done to date. She also described the interagency and OMB review processes that will follow the negotiated rulemaking sessions.

**Review of Draft Regulatory Language**

The Committee reviewed the revised draft regulatory language provided by EPA for the criteria identified in Section 223(2)(B)(iii). The draft language incorporated the key concepts discussed at the September 9-10 meeting and the September 18 and 29 conference calls concerning AAI objectives and performance factors.

To date, the Committee has reached tentative agreements on all sections of the draft regulation except the following:

**SUBPART B, Definitions including:**

**§312.10 (b) Environmental Professional**

**SUBPART C, Standards and Practices**

**§312.20 All Appropriate Inquiries**

**§312.21 (d) Results of an inquiry by an environmental professional  
(definition of certification or other term to use)**

**§312.26 Reviews of Federal, State, and Local Government Records**

**§312.31 Obviousness of Presence of Contamination**

**§312.1 Purpose, applicability, and scope**

Tentative agreement was reached on this section after the Committee made a few editorial changes.

**§312.10 Definition of an Environmental Professional**

The Committee discussed the numerous issues regarding the definition of Environmental Professional (EP) including:

- Clarify EP as supervisor of work such that others can perform AAI tasks;
- Limit the definition of EP to persons who may undertake site assessments;
- Experience requirements;

- Educational requirements;
- Grandparent clause for those without required degree, but with depth of experience supervising environmental site assessments; and
- Applicability of state licensing laws.

EPA reiterated that it cannot agree to a definition of “environmental professional” that would require the Agency to develop a process for reviewing and approving private certifying programs. To do so would require a lengthy and on-going mechanism for determining which programs were acceptable as well as ensuring that there were no changes, over time, in the requirements of approved programs.

Environmental Site Assessment Professional: The Committee decided to use the statutory language, “Environmental Professional,” to avoid the need to define additional terms.

Experience Requirements: The Committee discussed experience requirements for licensed geologists and engineers. Some supported requiring fewer years of experience than those for individuals with science or engineering degrees, given the years of experience required to obtain a license. There was also discussion of the confusion stemming from the term “increasing responsibilities.”

Required Degrees: The Committee agreed to require a baccalaureate degree or higher degree from an accredited institution of higher education. However, there is still disagreement concerning acceptable academic disciplines. Some Committee members want to require a relevant science degree, some support more specific science degrees, and still others support allowing non-science degrees.

Grandparent Clause: If a science degree is required, then some Committee members support creating a grandparent clause to enable those without science degrees, who have experience in preparing quality site assessments, to continue to do so. The Committee discussed a proposal that would require 10 years of experience including performance of 100 site assessments. Some Committee members opposed such a clause because of concerns about low-quality environmental site assessments. The Committee also discussed the possibility of including two options in the proposed rule and specifically asking for public comment on the issue.

Applicability of State Licensing Laws: The Committee discussed the need to ensure that individuals do not violate state laws concerning the licenses required to provide professional opinions and recommendations, for example, concerning subsurface conditions.

### **§312.20 All Appropriate Inquiries**

The Committee reached a tentative agreement on all of this section except §312.20(d), which pertains to de minimis conditions or releases.

This section outlines the overall objectives and performance factors for All Appropriate Inquiry and includes requirements for identifying the impact of data gaps and notification requirements pertaining to hazardous releases. Committee members discussed the performance-based approach to the standard, which was generally interpreted to mean that persons seeking CERCLA liability protections will be compliant with the AAI requirements if their site assessments meet the objectives and performance factors of this section.

Sampling: The Committee discussed the need for an EP to identify data gaps and determine the significance of such data gaps on an AAI assessment. The Committee agreed to insert language in the regulation suggesting that sampling and analysis may be used to address data gaps.

De Minimis Conditions: EPA's Office of General Counsel will work to develop language that would provide an exclusion from the AAI requirements for small or de minimis quantities of hazardous substances that would not impose environmental conditions or result in releases, for example, white out spilled in a desk drawer.

#### **§312.21 Results of inquiry by an Environmental Professional**

The Committee discussed the components of an AAI report, including an opinion regarding the presence of likely presence of releases or threatened releases of hazardous substances to the subject property and certification as to the completeness of the AAI.

Some Committee members raised concerns about "certification" being interpreted as a warranty or guarantee. Committee members will consult with organizational attorneys regarding the proposed definition of certification.

#### **§312.22 Additional Inquiries**

A tentative agreement was reached on this section. The Committee made editorial changes to clarify the information that must be given to the EP by the user or potential defendant.

#### **§312.23 Interviews with past and present owners, operators, and occupants**

The Committee reached a tentative agreement on this section. The key issues included clarification of "abandoned properties;" linking interviews to the objectives and performance factors of §312.20; and the inclusion within §312.30 of the option of interviewing neighbors to gain commonly known information in cases where a property is not abandoned.

#### **§312.24 Reviews of historical sources of information**

A tentative agreement was reached on this section. Reviews of historical sources will be linked to the objectives and performance factors of §312.20.

### **§312.26 Reviews of Federal and State, and Local government records**

The Committee considered two proposals for determining appropriate minimum search distances for accessing environmental threats from nearby properties. One option is to assign search distances for each category of information sought. The other option is to assign search distances by categories of potential hazards on properties. The Committee may use a hybrid of the two approaches. A task group was assigned the task of drafting such a hybrid approach. In addition, the Committee clarified the factors an EP may consider when modifying the search distance.

### **§312.27 Visual inspection of the facility and of adjoining properties**

The Committee reached a tentative agreement on this section. The key issues discussed included what should be inspected; visual inspections of adjoining properties; and how to create a limited provision to allow for the liability defense when an on-site visual inspection is impossible due to physical limitations, remote location, or other inability to gain access to the subject property.

There was general agreement that the standard should allow for an exemption from the on-site visual inspection requirement in limited circumstances. The standard would require that a good faith effort be taken to gain access to the subject property; that any exemption be confined to extenuating circumstances beyond “mere refusal” for access to the site; and that the regulation require documentation of efforts taken to gain access for an on-site inspection and how information obtained through other criteria compensate for the lack of an on-site visual inspection.

The Committee agreed to link the visual inspection to the objectives outlined in §312.20(b). Concerning inspection of adjoining properties, EPA stated that potential buyers and environmental professionals can request access to adjacent properties, but owners are not required to provide such access. Therefore, the standard will allow for visual inspection of adjoining properties from points adjacent to property lines.

### **§312.30 Commonly known or reasonably ascertainable information**

The Committee reached a tentative agreement on this section after deciding to include interviews with neighbors and other sources of information within it.

### **§312.31 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 members agreed to the elements of this section subject to feedback from others in their organizations. The key issue discussed was the question of EP recommendations regarding additional appropriate investigation. Some Committee members were concerned that environmental professional recommendations might mandate a Phase II inquiry prior to purchase. Ultimately, the Committee agreed that the report should include professional

opinions offered by EPs regarding appropriate investigation to detect potential contamination.

### **Discussion of Additional Issues**

The Committee discussed additional issues related to the rule that have not been addressed as part of the criteria including shelf life/reuse of existing AAI reports; references to existing industry standards; and definitions.

**Shelf Life/Reuse of Existing AAI Reports:** The Committee agreed that the information in an AAI report may be used for 6 months if there have been no changes in the conditions of the property since the information was gathered. AAI reports may be updated to include newly available information and “relevant specialized knowledge” (§312.28). Committee members voiced concerns that re-use of a report, without specific permission, would infringe on the contractual relationship between the environmental professional and the original client.

**References to Existing Industry Standards:** EPA explained that eventually the regulation will include references to industry standards that comply with the final rule, either in part or in total. EPA will develop this information after the draft rule is published.

**Definitions:** Committee members were asked to send suggestions regarding any terms that should be defined in the standard and their associated suggested definitions to Patricia by Friday, October 24. She will send draft definitions to the Committee prior to the November meeting and Committee members will be asked to send suggested revisions to her.

### **Public Comment (October 14-16)**

Time was made available for public comment during each of the three days of the meeting. There were no public comments.

### **Discussion with ICF Consulting about Regulatory Impact Analysis**

Aleksandra Simic of ICF Consulting answered Committee members’ questions regarding how costs and benefits will be represented in ICF’s regulatory impact analysis model for the AAI rule. She invited Committee members to contact her with additional suggestions.

### **Logistics**

**Schedule and Location:** The next AAI Reg Neg Committee meeting will be held on November 12-14, 2003 at the National Association of Home Builders, 1201 15th Street, NW, Washington, DC. Please note that this meeting is scheduled for two and half days, ending at 12:30 pm on Friday, November 14.

### **Next Steps**

**Documents:** Facilitators will distribute a draft meeting summary and a draft agenda prior to the November 12-14 meeting. The approved version of the September 9-10 meeting summary will be posted on the EPA website.

**Regulatory Language:** EPA will revise the draft regulatory language to reflect the discussions of this meeting, including the tentative agreements reached. The revised draft will be distributed to Committee members prior to the November 12-14 meeting. Committee members with substantive concerns on sections for which there is already a tentative agreement should email them to the facilitator prior to the November meeting.

**Task Group on minimum search distances for reviews of federal, state, and local government records:** A task group will work to develop the hybrid proposal for the minimum search distances prior to the November 12-14 meeting.

**U.S. Environmental Protection Agency  
All Appropriate Inquiry Negotiated Rulemaking Committee  
October 14-16, 2003  
Attendance**

Committee Members:

Kathy Blaha, Trust for Public Land  
Eric Block, National Groundwater Association  
Abbi Cohen, Mortgage Bankers Association of America  
John Watson (alternate), National Brownfield Association  
Tom Crause, Illinois Environmental Protection Agency (ASTSWMO)  
Karl Kalbacher, Maryland Department of the Environment (ASTSWMO)  
Julie Kilgore, Wasatch Environmental, Inc.  
David Lourie, ASFE  
Stephen Luftig, U.S. Environmental Protection Agency  
Martin Mitchell National Association of Home Builders  
Roger Platt, Real Estate Roundtable  
Lenny Siegel, Center for Public Environmental Oversight  
Julie Sheehan, The US Conference of Mayors  
Carol Brown (alternate), The US Conference of Mayors  
Deeohn Ferris, Partnership for Sustainable Brownfields Redevelopment  
Vernice Miller-Travis, West Harlem Environmental Action  
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  
Suzan Morang, Cherokee Nation/ITEC  
, International Municipal Lawyers Association  
Jim Johnson (alternate), American Society of Civil Engineers

Patricia Overmeyer, US EPA, Designated Federal Official  
Deborah Dalton, US EPA, Conflict Prevention and Resolution Center  
Susan Podziba, Susan Podziba & Associates, Facilitator  
Alexis Gensberg, Susan Podziba & Associates, Facilitator

Resource Participants:

Sara Beth Watson, American Bar Association, Section of Environment  
Pam Barker (alternate), ABA Section of Environment  
Dan Smith, ASTM

U. S. Environmental Protection Agency

Sven-Erik Kaiser, EPA / Office of Brownfields Cleanup and Redevelopment

Helen Keplinger, EPA / Office of Site Remediation Enforcement  
Bob Myers, EPA/ Office of Site Remediation and Technology Innovation  
[attendance list to be added]

Public  
[attendance list to be added]