

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

Meeting Summary – July 8-9, 2003

Agenda Review

The Committee reviewed and accepted the meeting agenda.

Review and Approve June 10-11 Meeting Summary

The Committee reviewed the June 10-11 draft meeting summary and made one editorial change. It was approved as final and will be posted on the EPA website.

April 29-30 Meeting Summary

A Committee member proposed changes to the already final April 29-30 meeting summary. As an exception, the Committee agreed to make one change to that meeting summary.

In addition, the Committee briefly discussed the list of interests raised during the April meeting, which were ultimately not included in the Mission Statement of its Ground Rules. One member felt strongly this list should have been reflected in the meeting summary whereas others remembered that the more general goal statement was used because the list of interests was considered incomplete.

The statement that was discussed at the April meeting, but not included in the Committee's mission statement was:

"The Team will work to create standards and practices that balance the concerns of all stakeholders such that it is clear and thorough, accounts for community needs, provides certainty, finality and flexibility, is cost effective, and time sensitive and will be minimally disruptive to established market practices."

EPA Comments

Steve Luftig thanked the Committee members for their time and efforts to date to develop the AAI standards and stated that the work group conference calls were helpful for drafting proposals. He also stated that the change of EPA Administrator will not affect the work of the AAI Reg Neg Committee.

Review of Draft Regulatory Language

The Committee reviewed draft regulatory language provided by EPA for all ten criteria identified in Section 223(2)(B)(iii) of the Brownfields Law. The draft language incorporated the key concepts discussed at the June 10-11 meeting and the work group discussions on criteria 1 and 2 (environmental professional and interviews).

EPA reminded the Committee that the draft regulatory language provided for the Committee's use in these meetings is a general interpretation of the

Committee's and its subgroups' previous discussions, and has not been reviewed or approved by EPA's Office of General Counsel.

Criterion III: Reviews of historical sources...

The Committee discussed the goal of an historical search as the need to determine whether or not there were releases or threatened releases on subject properties. This led to questions regarding whether the regulations should stipulate how far back in time the EP and/or purchaser must research land use history. The Committee discussed whether to stipulate a particular date or whether to require that land use history be researched back to the date when the property was first developed. Some Committee members suggested that the regulation stipulate that a full history of a property's uses be determined "to the extent possible."

The committee discussed what terminology should be used in the regulatory language to depict the goal of the inquiry. The committee discussed using the terms "releases or potential releases," "releases and activities that could cause releases," and "releases and threatened releases." EPA stated that its Office of General Counsel is of the opinion that the terminology should be "releases and threatened releases" to be consistent with the statute. The Committee agreed that the regulation should be consistent with the statute and consistent language should be used throughout the regulatory language.

In addition, the Committee discussed the transferability of an assessment or parts of an assessment from one owner of a property to subsequent purchasers. For example, should a prospective purchaser be permitted to use the results of an assessment prepared for the previous owner or update parts of a previously completed assessment of the subject property, rather than conduct an entirely new assessment of the property? The Committee discussed the importance of a new purchaser conducting an independent assessment to ensure the quality and reliability of the assessment, versus the cost advantages of adopting the results of a previously prepared assessment. Several Committee members pointed out that a determination of the transferability of previous assessment results should best be based upon if and how a property's use and potential conditions may have changed between assessments, rather than determined solely based on the period of time that elapses between property transfers.

Criterion IV: Searches for recorded environmental cleanup liens

The Committee discussed necessary and available governmental sources of information on environmental liens. Some members pointed out that in some cases, environment liens may be recorded in land records whereas in other cases, environmental liens may be filed with courts. A few Committee members raised concerns about the potential for private party contracts to stipulate limitations on land uses because of environmental contamination. Information regarding such private party contracts is not within the public domain. In addition, the Committee discussed whether a search for institutional controls should be included in this criterion. The Committee discussed whether the search for

recorded environmental liens should be the responsibility of the environmental professional (EP) or the responsibility of the purchaser. The Committee also discussed the need for this information to be provided to the EP, if it is collected by the purchaser.

Criterion V: Reviews of Federal, State, and local government records, ...

Committee members discussed whether to insert specific types of documents that must be obtained and /or specific data sources that must be consulted in the regulatory language, or to provide a general performance measure in the regulatory language and not name specific documents or sources, except in guidance or preamble language. The Committee had an extensive discussion of the examples of records and data bases that should be reviewed, including databases maintained by federal and state government agencies and the use of databases developed and maintained by private companies that may catalogue government records. Some Committee members supported referencing specific sections of the ASTM E1527 standard that provides guidance on identifying and obtaining information from government and privately maintained databases. Some Committee members suggested providing examples of the kinds of information to look for in the regulatory language and not cite the names of specific databases.

The Committee also discussed the need to search government records for information on adjacent properties and how to determine which “adjacent properties” are subject to the requirements of this criterion. Options discussed included properties located 1) within a fixed search distance, such as one mile; 2) within appropriate distances given geologic conditions such as the flow of ground water; and 3) according to potential exposure or migration pathways of contaminants.

The Committee also discussed whether or not to include a search for institutional controls within this criterion. The Committee discussed the difficulties in finding adequate sources of information on institutional controls. Institutional controls are not generally identified through environmental due diligence. However, some states and privately-developed databases are being developed to track institutional controls.

A member of the public stated that institutional controls, which are legal or administrative restrictions on land use, generally are identified during chain of title searches and a search for institutional controls should be required as part of the regulation. The member of the public stated that 22 states track institutional controls in some manner. Institutional controls can provide useful information for determining the likelihood of past environmental releases.

Some Committee members drafted specific language for this criterion for inclusion in the revised draft.

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

Committee members discussed the importance of conducting a visual inspection of the subject property during the conduct of all appropriate inquiry. Concerns were raised regarding how to address situations where a complete visual inspection of a property cannot be completed. For example, when the current owner refuses access to the property, or when it is not possible to do a thorough walk through of an entire property, for example, large tracts of forest land or a site with dangerous physical conditions.

The Committee discussed a range of issues and options regarding properties and situations where visual inspections may be difficult to undertake. Potential solutions offered for cases where access to the property may be difficult to obtain included: 1) a carve out for public entities; 2) defining a “high bar” for circumstances in which non-on-site visual inspections would be allowed; 3) defining visual inspection to include views from the perimeters of adjacent properties; 4) requiring explanations for those instances when an EP cannot get access to the site and the consequences of not getting on the site on the assessment; and 5) finding other ways to show there is no contamination on the site.

Some Committee members agreed to work on examples of extreme circumstances to illustrate the kinds of situations in which on site inspections cannot be accomplished in order to protect against creating an incentive for owners to refuse access to potential purchasers of properties.

For some Committee members, an owner’s refusal to provide access to a property would likely lead them to not buy the property. Others stated that in the case of municipalities, an inability to get liability protection due to an inability to gain access to the site, would likely lead to brownfield properties remaining undeveloped in their communities.

The Committee also discussed the importance of conducting a visual inspection of adjoining properties as part of the all appropriate inquiry and whether the visual inspection can be done from the property perimeter. The Committee discussed the potential difficulties in getting access to adjacent properties.

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 discussed the need to clarify that the specialized knowledge or experience referred to is related to the subject property and activities undertaken on it. Some Committee members stressed the need for the inquiry to reflect both the specialized knowledge of the purchaser and the purchaser’s knowledge specific to the property being bought.

In addition, there was a discussion of how the “defendant’s” specialized knowledge would be transferred to the EP during preparation of the assessment.

Some Committee members suggested that in court, the onus would be on the purchaser to prove that s/he had no reason to know of the contamination later found on the property.

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

There was a great deal of discussion concerning how one determines the reasonableness of a purchase price and whether or not it reflects the market value of the property. Some Committee members stated that current practice is to appraise properties assuming no contamination.

There was a discussion of whether the purchase price of donated property is \$0 or if under these circumstances there is no purchase price and therefore an assessment of purchase price versus market value is not necessary. The Committee discussed the need to clarify when land donations are made, but also the need for non-profit organizations that accept land donations to be aware of its potential for contamination and their own potential for liability.

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

Some Committee members interpreted this criterion to mean that the EP should certify the completeness of the report and argued that this criterion does not warrant a separate section in the regulations. Other committee members stated that liability insurers may not allow environmental professionals to certify the results of an assessment. Some Committee members suggested that this statutory criterion was describing the standard to be met in conducting research to comply with all of the other statutory criteria. Therefore, it may be best to restate the criterion as a performance standard for the inquiry in the regulatory language. The Committee discussed whether the performance standards should apply to both the EP and the purchaser, or just to the EP's efforts for the inquiry.

There was a great deal of discussion about the definition of "commonly known or reasonably ascertainable." Some Committee members suggested referencing the ASTM definitions.

Committee members discussed the importance of obtaining and using "commonly known" information about a property that may be available from neighbors and members of the community surrounding the subject property. Committee members offered stories in which development occurred on properties that people in the community knew to be contaminated and others in which "rumors" led to additional work, which confirmed the rumors to be false. Some Committee members suggested that additional interviews with community members be required if gaps in information concerning threatened or actual releases of hazardous substances existed. Others suggested offering a list of examples of ways to obtain this information to provide boundaries on such requirements. Other members stated that EPs need a clear way of knowing they have obtained "reasonably ascertainable" information.

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.

Committee members discussed a number of interpretations of this criterion. Some suggested that it means that sampling should be required if there are data gaps. Still others interpreted this criterion as a legal catchall such that a person claiming liability relief would need to prove why s/he had no reason to know of the contamination.

The Committee members discussed when all appropriate inquiry ends and when appropriate care begins. Some thought that sampling should be part of AAI and that it should include transition steps to appropriate care. Others thought that since AAI must be done prior to purchase, sampling and analysis of findings should be part of appropriate care, after purchase.

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

The Committee discussed both the degree and years of experience required for an EP. Some thought a degree in a relevant scientific discipline is necessary to ensure that the EP is qualified to interpret the results of the inquiry and develop conclusions and recommendations based upon the results; others thought that a person with a non-related science degree, but with many years of experience, should be allowed to continue conducting phase I assessments. Draft regulatory language suggested by the subgroup included a requirement that the EP have a science degree and 6 years of "progressive" experience. Some Committee members indicated that 6 years of experience may be too restrictive. The committee discussed options of requiring 3, 4, or 5 years of experience. A Committee member offered to research the number of years required for state PE and PG licenses.

The Committee also discussed the question of state registration programs for EPs versus state licensing and certifications programs. Concern was raised regarding state programs for which no attempt is made to determine the validity of self-reported information. A Committee member offered to review state certification, registration, and licensing programs.

Criterion II: Interviews with past and present owners, operators, and occupants of the facility ...

The Committee discussed who, beyond the current owner or occupant of the subject property, should be interviewed to obtain information on history and use of the property. The Committee discussed whether or not the regulation should include a requirement to interview adjacent property owners, or neighbors, to obtain information on abandoned properties.

Public Comments (July 8-9)

Amy Edwards of Holland & Knight commented on requiring searches for institutional controls as part of AAI and current and future data bases designed to track institutional controls.

Logistics

Schedule and Location: The next AAI Reg Neg Committee meeting is September 9-10, 2003 at EPA East –1200 Constitution Avenue NW, Conference Room 1117A, Washington, DC.

Next Steps

Documents: The facilitator will distribute a draft meeting summary and a draft agenda prior to the September meeting. The approved versions of the April 29-30 and June 10-11 meeting summaries will be posted on the EPA website.

Regulatory Language: EPA will revise the regulatory language for all sections based on this meeting's discussions. The next draft will be sent to the full Committee in August.

Presentation: EPA will provide a presentation at the September meeting on the process required of EPA upon conclusion of the Committee's negotiations.

Homework: NALGEP will email the Committee examples of the extreme circumstances of owners' refusals to allow access to a property. ASTSWMO will provide information on state licensing, registration, and certification programs for EPs. ASCE will provide information on the range of years experience required for state PE and PG licenses.

Additional Issues: MBA will develop an initial list of additional issues that will require further discussion on the part of the Committee.

**U.S. Environmental Protection Agency
All Appropriate Inquiry Negotiated Rulemaking Committee
July 8-9, 2003
Attendance**

Committee Members:

Dorothy Stookey, Trust for Public Land
Eric Block, National Groundwater Association
Carol Bowers, American Society of Civil Engineers
Clifford Case, International Municipal Lawyers Association
Michael Davis (alternate), International Municipal Lawyers Association
Abbi Cohen, Mortgage Bankers Association of America
John Watson (alternate), National Brownfield Association
Ken Kloo (alternate) New Jersey Department of Environmental Protection (ASTSWMO)
Andy Darrell, Environmental Defense
Karl Kalbacher, Maryland Department of the Environment (ASTSWMO)
Julie Kilgore, Wasatch Environmental, Inc.
David Lourie, ASFE
Stephen Luftig, U.S. Environmental Protection Agency
Bruce Lundegren (Alternate), National Association of Home Builders
Roger Platt, Real Estate Roundtable
Lenny Siegel, Center for Public Environmental Oversight
Bob Hersh (alternate), Center for Public Environmental Oversight
Judy Sheahan (alternate), The US Conference of Mayors
Carol Brown (alternate), The US Conference of Mayors
Bill Tryon (alternate), 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, Section of Environment
Pam Barker (alternate), ABA Section of Environment
Dan Smith, ASTM

Public

Ruth Ludder, DOI
Amy Edwards, Holland & Knight
Holly Hill, Troutman Sanders
Robert Myers, EPA Superfund
Christine Reimer, NGWA
Aleksandra Simic, ICF Consulting
Allyn Finegold, SRA
Mike Mittelholzer, NAHB
Geoff Koss, Inside EPA
Charles Crealase, GZA
Keith Hagg, DynCorp
Emilia Olivarez, Georgia Power Co.
Shawna Gillespie, EPA OBCR
Charlie Grizzle, International Council of Shopping Centers
Mark Oberndorf, NADA
Steve Langel, IWP News
Nicole Sign, EBA
Heather Gray Torres, EPA Region III
Stephanie Stevens, EPA OGC
Kris Swanson, ASTSWMO
Erma Broomfield, Blank Rome
Allison Fennell, Blank Rome
Michael Charles, ASCE
Bill Garber, Appraisal Institute
Meredith Preston, BNA
Steve Engel, IWP News
Katie Schwarting, MBA
David Mohon, Southern Company
Michelle Fetterman, Steptoe Johnson
Erica Johnson, Steptoe Johnson
Hunter Hodges, Steptoe Johnson