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Convening Assessment Report

on the Feasibility of a

Negotiated Rulemaking Process to Develop the

All Appropriate Inquiry Standard Required under the Small Business Liability Relief and Brownfields Revitalization Act (Public Law No. 107-118)

U.S. Environmental Protection Agency
Office of Solid Waste and Emergency Response
Office of Brownfields Cleanup and Redevelopment

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INTRODUCTION

In accordance with the Negotiated Rulemaking Act of 1996, this report describes the findings and recommendations of Susan Podziba, the neutral convener, regarding the feasibility of a negotiated rulemaking process to develop the All Appropriate Inquiry Standard (CERCLA §101(35)(B)), which the U.S. Environmental Protection Agency (EPA) is required to promulgate under the Small Business Liability Relief and Brownfields Revitalization Act (Public Law No. 107-118).

Negotiated rulemaking is a process whereby a committee composed of representatives of stakeholder groups, which will be significantly affected by a proposed rule, is charged with the goal of reaching consensus on the text of the proposed rule. The federal agency responsible for the regulation, "to the maximum extent possible consistent with the legal obligations of the agency, will use the consensus of the committee with respect to the proposed rule as the basis for the rule proposed by the agency for notice and comment"(Negotiated Rulemaking Act of 1996, §563(a)(7)). (See Appendix A for the U.S. EPA Fact Sheet on Negotiated Rulemaking.)

This convening assessment report is divided into sections on background, feasibility, categories of stakeholders, substantive issues by stakeholder group, key issues across stakeholder groups, procedural issues, participation, process design, protocols and procedures, and conclusion.

BACKGROUND

On January 11, 2002, the Small Business Liability Relief and Revitalization Act (Pub. L. No. 107-118), also known as the Brownfields Law, was enacted. The Brownfields Law, among other issues, pertains to the establishment of standards and practices for all appropriate inquiry (§101(35)(B) of CERCLA). The all appropriate inquiry standards and practices are relevant to:

- the innocent landowner defense to CERCLA liability (§101 (35));
- the contiguous property exemption to CERCLA liability (§107(q));
- the bona fide prospective purchaser exemption to CERCLA liability (§107 (r)(1) and 101(40)); and
- the brownfields site characterization and assessment grant programs (§104(k)(2)).

The Brownfields Law requires EPA to establish regulations setting forth "standards and practices" to carry out all appropriate inquiry by January 11, 2004, two years after enactment. In addition, the Brownfields Law establishes an interim standard for the conduct of all appropriate inquiry to be used until EPA promulgates federal standards. For properties purchased after May 31, 1997, Congress established the interim standard as the American Society for Testing Materials (ASTM) 1997 Phase I standard for assessment of properties. EPA is developing a direct final rule to allow for the use of the ASTM 2000 Phase 1 standard as an interim standard for all appropriate inquiry given consistent feedback from stakeholders that the 1997 standard is no longer current industry practice, nor is it readily available.

Susan Podziba of Susan Podziba & Associates, as convener, interviewed approximately sixty representatives of federal, state, county, local, and tribal government; for profit and not-for-profit developers, real estate and environmental attorneys, real estate brokers, bankers and lenders, environmental professionals, environmentalists, environmental justice communities, and insurance companies (See Appendix B for Listing of Interviewees). The purpose of the interviews was to determine the feasibility of a negotiated rulemaking process relative to criteria identified in the Negotiated Rulemaking Act and the U.S. EPA Fact Sheet on Negotiated Rulemaking including:

- the principal categories of stakeholders that will be affected by and are interested in the all appropriate inquiry standard;
- key issues and concerns of stakeholders relative to an all appropriate inquiry standard and the interdependence of interests among stakeholders;
- the likelihood of convening a balanced committee of representatives

of stakeholders, who are willing and able to participate in good faith in the negotiation process;

- individuals and/or organizations that can best represent the views and perspectives of each stakeholder group for the negotiated rulemaking; and
- the likelihood of success of a negotiated rulemaking process to develop federal regulatory standards for implementation of all appropriate inquiry within the required timeframe.

FEASIBILITY

Susan Podziba finds that a negotiated rulemaking process to develop the all appropriate inquiry standard (the standard) has a reasonably good chance of resulting in consensus. Virtually every interviewee believed that a negotiated rulemaking would be successful. Only one person raised concerns about negotiated rulemakings, generally, but stated that given the clear scope of this effort, that is, defining all appropriate inquiry, it is an appropriate application for a negotiated rulemaking.

To be sure, there are differences of opinion on key aspects of the standard, but there is also a convergence of interests on many of its elements. There was a high degree of interest in participating among the interviewees and across all the identified stakeholder groups.

Overall, there is general agreement that the all appropriate inquiry standard should be clear and consistently applied, result in accurate information concerning the environmental conditions of assessed properties, and function to promote and not inhibit brownfields redevelopment.

An additional benefit of using a negotiated rulemaking process is that representatives of all stakeholder groups will have a thorough understanding of the new standard as well as the rationale for its elements. This will be useful as trade associations undertake their role of educating their memberships about the standard and about opportunities inherent in brownfields redevelopment.

No matter how favorable the prospect for consensus, there is always uncertainty in prejudging outcomes of negotiation processes, particularly when potentially opposite points of view must be reconciled. The challenge for the negotiating

committee will be to demonstrate commitment and flexibility to work together as a problem-solving team to develop the standard. The interviewees indicated a willingness to expend the effort necessary to achieve these objectives.

On balance, Susan Podziba, in her capacity as convener, finds that the application of a negotiated rulemaking process to develop the all appropriate inquiry standard has a reasonable likelihood of success, and if successful, will result in a high quality standard that balances the interests of the relevant stakeholders.

CATEGORIES OF STAKEHOLDERS

Susan Podziba identified nine categories of key stakeholders. She recommends that the U.S. Environmental Protection Agency invite representatives from each of the following categories[1] to participate in the negotiated rulemaking:

- Other Federal Agencies[2]
- State Government
- Local Government
- Tribal Government
- Developers: (residential, commercial, industrial, for profit, not-for-profit)
- Bankers and Lenders
- Environmentalists
- Environmental Justice Community
- Environmental Professionals

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1 Some interviewees suggested that ASTM be included as a stakeholder. However, ASTM is an organization devoted to the creation of its own consensus industry standards. This convener recommends that ASTM not have its own negotiator. Individuals affiliated with the development of the ASTM standard are in key positions in their trade associations and highly knowledgeable of the elements of the standard. Therefore, it is highly likely that multiple individuals associated with ASTM will serve on the negotiating committee as representatives of their stakeholder groups.

2 Other federal agencies identified as federal stakeholders were the National Oceanic and Atmospheric Administration (NOAA), Department of Housing and Urban Development (HUD), and Department of Justice (DOJ). NOAA serves as a Trustee for Natural Resource Damages under CERCLA. NOAA will maintain contact with EPA throughout the negotiations, but will not require a separate negotiator. HUD and DOJ have each indicated a preference for participating in the negotiations, but will confer with EPA officials pending a decision to proceed with a negotiated rulemaking.

In addition, the following groups are interested parties with great depth of knowledge relevant to the implementation of the standard. These parties typically represent multiple stakeholders, for example, environmental attorneys and insurance companies include developers, environmental professionals, and state and local governments among their clients at any given time. Thus, it is suggested that the parties listed below serve as resource parties on the negotiating committee, given their ability to analyze the impacts of various options across multiple stakeholders.

- Environmental Attorneys
- Real Estate Brokers
- Environmental Insurance Professionals

SUBSTANTIVE ISSUES: KEY CONCERNS IDENTIFIED BY EPA AND STAKEHOLDER GROUPS

U.S. Environmental Protection Agency

Congress mandated that EPA create an all appropriate inquiry standard to comply with CERCLA §101(35)(B), as amended by the Brownfields Law. The key interests of EPA relative to this standard, and generally reflected in its Brownfields Program, are to protect the environment and public health, support partnerships among brownfields stakeholders, encourage the private-sector marketplace for redevelopment of brownfields properties, and encourage sustainable reuse.

EPA will work to create a standard that satisfies the legal provisions of the statute regarding funding and liability, while promoting environmental protection, economic development, and community revitalization.

Other Federal Agencies

The Department of Housing and Urban Development (HUD) is engaged in activities to promote community revitalization. Among HUD's brownfields programs is its Brownfields Economic Development Initiative (BEDI), which makes grants to stimulate local government and private sector partnerships for the redevelopment of brownfields sites. Other HUD programs provide loan guarantees and mortgage insurance. HUD's key interests are to promote brownfields redevelopment as a strategy for community revitalization and to protect the public

from environmental hazards. In addition, as a mortgage insurer, HUD is concerned about CERCLA liability on foreclosed properties.

The primary interest of the Department of Justice is the enforceability of the statute.

State Environmental Agencies

There is great disparity among states across the country with regard to brownfields programs. Some states include sophisticated site assessment standards within their voluntary cleanup programs whereas others have no programs at all. Some states will likely continue to require prospective purchasers and developers to conduct site assessments under their voluntary cleanup programs to obtain state-provided "no further action" letters. Other states will likely adopt the federal standard for their programs and want the standard to eliminate the need for their states to provide comfort letters or prospective purchaser agreements except under extraordinary conditions.

Some state programs require prospective purchasers to obtain specific information. The investigation must satisfy the state's informational requirements; time limits do not excuse prospective purchasers from meeting such requirements.

In addition, state programs typically require sampling when there is a likelihood of contamination based on past use. Interviewees suggested that there are some activities often undertaken within the context of phase I assessments that they deem unnecessary and other activities not undertaken which they require. For example, some state programs do not require previous owner interviews or a search for surplus sites within a three-mile radius, but do require a review of immediately adjacent properties. These states find that the clarity and certainty provided by their programs have given their states a comparative advantage in attracting developers to brownfields properties.

Returning brownfields properties to beneficial use is a key interest of states. However, states are also concerned about granting undeserved liability relief and then being unable to identify responsible parties to undertake cleanups when contamination is found. Some states have found a significant percentage of properties to be contaminated that were identified as clean properties in assessment reports.

Finally, as brownfields grantees receiving EPA assessment funds, states will have to conduct all appropriate inquiry assessments as required under the Brownfields Law.

Local Government

Local governments will be impacted by the standard in a variety of ways. First, there is great interest in the redevelopment of brownfields, which transform fallow properties into productive use thereby increasing tax rolls. Cites and towns have worked hard to attract developers to their brownfields sites. Local governments have viewed potential liability for new owners at brownfields sites as a barrier to increased redevelopment of brownfields sites and supported the Brownfields Law as a means to removing a barrier to redevelopment.

Local governments are concerned about contamination leaching into soils and groundwater and its potential for impacting human health. In addition, contaminated properties are potential liabilities, which can reduce municipal credit ratings.

As with states, local governments, as brownfields grantees, will be required to conduct all appropriate inquiries under the grant program. Municipalities often become new owners of contaminated properties through purchase, foreclosure for non-payment of taxes, and eminent domain. Thus, local governments are interested in the protection against CERCLA liability that the standard will provide.

Finally, local government interviewees raised the additional concern of their inability to gain access to properties subject to involuntary acquisition through eminent domain, condemnation, and/or non-payment of taxes. Thus, local governments are interested in an exemption from visual inspection and owner interviews for involuntary acquisitions when there is a recalcitrant owner.

Tribal Government

Tribal government will be impacted by the standard in a variety of ways. First, tribes want accurate assessments of contamination of their lands. For some tribes, brownfields programs are designed to de-contaminate and return land to open space. Tribal governments receive brownfields grants and so will be required to conduct all appropriate inquiry assessments under the grant program. Tribal brownfields projects often involve HUD and the Bureau of Indian Affairs, each of which have assessment requirements. Thus, tribal governments want the standard to be clear and well-defined so that it is easily melded with other federal agency requirements.

Tribal governments are concerned about the costs of assessments. Related to cost is a concern that too narrow a definition of environmental professional, that is, who can conduct assessments, could make it more difficult for tribes to access this work.

Developers

Developers want a standard that is clear, predictable, consistently enforced, reasonably inexpensive, and not too time consuming, and which, when complied with, will provide liability protection without reopeners. Clarity is crucial for developers, who fear that a lack of clarity could result in the loss of a credible liability defense.

Developers are motivated to learn about contamination on properties before purchase because if a property is more contaminated than expected, a developer may negotiate a reduced price or choose to invest in an alternative property. They do not see the standard as providing a "pass to existing owners, but rather immunizing new owners who are interested in putting property back into productive use."

The time necessary for an assessment is important to developers because an owner is usually not willing to keep a property off the market long and because a favorable financing package may become unavailable given fluctuating interest rates.

Many interviewees use the ASTM standard for their assessments. They stated that thousands of people know how to conduct these assessments, and are concerned that a changed assessment protocol will result in confusion within the industry. Thus, they want to be sure that any changes will result in significant environmental benefit.

Developers would like to reduce the discretion of environmental professionals and therefore, the need to negotiate assessment workscopes. They fear that rejecting a recommendation in a proposed workscope could leave them vulnerable to a loss of liability protection later. They would like to see a minimum standard for a phase I assessment with triggers for phase II assessments.

Additionally, some interviewees expressed the concern that it may be difficult for EPA to maintain a unified negotiation stance given the involvement of multiple offices within the agency.

Developers do not want the standard to supersede existing state statutory programs, which they point to as programs that have encouraged the cleanup and redevelopment of brownfield sites. Some expressed their satisfaction with rigorous state programs because of the certainty they provide and their use of creative means for dealing with contaminants.

Overall, developers want the standard to achieve the goal of promoting brownfields redevelopment, which will require that assessments not be too costly or time-consuming and that liability relief be sufficiently protective. They want to ensure that the standard is consistent with intent of the Brownfields Law, that is, to promote and not inhibit brownfields redevelopment.

Bankers/Lenders

Bankers and lenders are most interested in limiting risk when making loans. Lenders are protected from CERCLA liability by the secured creditor exemption, but on foreclosed properties they will use the all appropriate inquiry standard as an additional liability protection.

Banks require phase I assessments on properties in order to meet conditions set out by the secondary loan market and by rating agencies, even if their own requirements do not indicate the need for an assessment. As a result, the standard is expected to impact a great percentage of real estate transactions throughout the country.

To reduce risk, banks and lenders support a rigorous standard. However, it is also banks and lenders that typically drive the short time frames for obtaining information because fluctuating interest rates can impact the viability of a deal.

When a phase I assessment indicates a recognized environmental condition, most banks will require a phase II assessment and a resolution of the condition before approving the loan. Progressive banks and lenders have shown a willingness to make loans prior to cleanups, when cleanup plans, consistent with intended future uses, are in place through state programs. For these banks, a lack of willingness to clean a site indicates a negative character issue for the borrower, and the bank would not make the loan. Banks prefer good information on the site, but will also accept insurance policies to protect their loans when good information is not readily available.

Overall, the lending community wants a clear and rigorous standard that results in the information necessary to determine the environmental condition of a property at moderate cost and within a reasonable time frame. They see the challenge of developing the standard as one in which the negotiators identify the difference between necessary information and complexity for the sake of additional work.

Environmentalists

Environmental groups are primarily concerned that the standard require rigorous investigation of sites. They want historical searches to include title search, spills data base, enforcement actions, prior investigations, and visible contaminated areas. They want the standard to trigger sampling when historical searches identify past contamination.

Environmentalists would like to include the possibility of reopeners as a means to motivate complete cleanups. They want to be sure that the standard is not written so broadly as to allow parties to escape from liability and also want some assurances regarding states' abilities to enforce federal standards.

Environmental groups are very supportive of brownfields redevelopment. They prefer brownfields redevelopment to fallow, contaminated properties but want to ensure proper cleanup of contaminated sites.

Environmental Justice Community

The interests of the environmental justice community are similar to those of the environmental groups. However, as the communities where many brownfields sites are located, the environmental justice community raises an additional concern of public notification of contamination and proposed cleanup plans. They would like the standard to include a component defining when and how often the public should be notified of work on a brownfields site. As one interviewee stated, " it is frightening if you live across the street from a lot, and one day people show up in moon suits ."

Environmental Professionals

The stakeholder group of environmental professionals is divided into two camps, primarily according to their preferred definition of an environmental professional.

However, all expressed concerns about the possibility of inexperienced individuals characterizing contaminated sites as clean.

One camp believes strongly that an environmental professional should be defined as a licensed professional engineer, geologist, or hydrogeologist, which are regulated by state boards and require adherence to an ethical responsibility to protect human health and the environment. This camp believes that the standard should enable them to use their professional judgement to determine the necessary workscope required to accurately characterize the site. They state that engineers are familiar with industrial processes and therefore, know what chemicals to look for when an historical search yields information about a manufacturing facility and that geologists have a keen understanding of subsurface conditions. They are concerned that untrained individuals with little experience, who call themselves environmental professionals, will miss visible contaminants and will not know what to look for thereby identifying contaminated sites as free from environmental contamination. Members of this camp stated that assessments should performed by, or under the direction of, licensed professional engineers, geologists, or hydrogeologists.

The other camp wants to define an environmental professional more broadly and based on experience as opposed to a particular academic degree. This group is also concerned about inexperienced individuals potentially missing contamination. They raised the concern that some prospective purchasers simply want an environmental consultant with a liability insurance policy so that if contamination is found later, the purchaser can find recourse under the policy. However, some environmental consultants have begun to limit their own liability to the cost of the report. Some members of this camp want the standard to consist of a very clear step-by-step approach to assessments.

Finally, there is agreement among both camps of environmental professionals that a Phase II assessment requires the professional judgment of individuals with expertise related to the recognized environmental conditions identified in the Phase I assessment.

KEY ISSUES IDENTIFIED ACROSS STAKEHOLDER GROUPS

A primary focus of the all appropriate inquiry negotiations will be the statutory criteria listed in the Brownfields Law §223(2)(B)(iii), which amends CERCLA §101(35). In addition, interviewees across stakeholder categories raised other key issues, which are described below.

Brownfields Law §223(2)(B)(iii) Statutory Criteria:
In promulgating regulations that establish the standards and practices referred to in clause (ii), the Administrator shall include each of the following:

(I) The results of an inquiry by an environmental professional.

(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.

(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.

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

(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.

(VI) Visual inspections of the facility and of adjoining properties.

(VII) Specialized knowledge or experience on the part of the defendant.

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

(IX) Commonly known or reasonably ascertainable information about the property.

(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.

Legal Defense v. Proactive Requirement: The statute requires EPA to develop a standard for all appropriate inquiry, which is a legal defense against CERCLA liability for new owners. This would suggest a limited use for owners defending themselves against CERCLA liability in court. However, the standard will be used proactively as a standard of due diligence to avoid the risk of liability and is likely to be required by lenders for all property transactions where there is any risk of environmental contamination. As one interviewee stated, "Whatever EPA sets will become the de facto pre-market environmental assessment requirement."

General Fear of Change/Industry Disruption: Since the first ASTM standard was developed to "reduce legal uncertainty associated with analyzing and assessing real property and to provide lenders with objective information about a site to conduct proper risk analysis,"[3] it has become the industry standard for most private transactions. The stakeholder groups that use this standard are concerned about the potential for disruption of transactions as the industry moves from a known, to an as yet, unknown set of procedures.

Level of liability relief to be granted: There is not a clear sense among stakeholders of the level of liability relief to be granted under the standard. Some think liability relief will be granted only for clean properties, that is, those determined to have no recognizable environmental conditions. Others assume the assessment will be used to determine recognized environmental conditions for which the new owner will not be liable. Still others expect that if a new owner conducts a cleanup for identified contaminants, the owner will not be liable for any additional past contamination found at the site.

Scope of the Standard: A key question raised by representatives of numerous stakeholder groups related to the scope of the standard is: Will the standard cover only the Phase I Assessment or provide direction for Phase I and Phase II assessments? Some interviewees supported the former and others the latter. In addition, some raised the question of whether or not the standard will include requirements for cleanup when contamination is found. Many interviewees suggested that the standard identify triggers for Phase II assessments. Those supporting a limited scope stated that historically, there has been little agreement on what a Phase II assessment should consist of given the unique aspects of each site.

Brownfields Site Assessments and All Appropriate Inquiry: The linking of these two caused concern for some interviewees who suggested two separate standards.

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3 Crocker, Dianne, Editor, "Conflict-Compromise-Consensus: The Embroiled History of the ASTM ESA Standard," *Environmental Site Assessment Report*, Volume VII, Number 7, July 2002, page 1.

However, the Brownfields Law states that Brownfields Site Assessments are to be performed in accordance with §101(35)(B), which is the regulatory citation for all appropriate inquiry.

Non-CERCLA Contaminants: Given that this regulation will be written to assess CERCLA liability, there are questions about the inclusion of petroleum products, which are specifically excluded under CERCLA as well as other contaminants such as radon, asbestos, lead, and mold. Many lenders require assessments that identify these contaminants as well. Interviewees referred to their use of "ASTM plus," whereby they use the ASTM standard as a starting point and then add a review of additional contaminants to the environmental assessment.

Starting Point for Development of the Standard: There are a number of ways to begin drafting the all appropriate inquiry standard. For example, one could begin with the statutory criteria listed in the Brownfields Law and work to further define each criterium. Other possibilities include beginning with either the ASTM standard or EPA or state documents that outline requirements of Phase I assessments and making revisions to meet the statutory requirements of the Brownfields Law. If the ASTM standard is used as a starting point, EPA will need to sort out copyright and licensing issues given that EPA will publish the eventual rule in the Federal Register, making it publicly available. Some interviewees involved in the development of the ASTM standard hope that it will be made available to be useful to EPA.

National Technology Transfer and Advancement Act (NTTA) Public Law 104-113: Interviewees had various interpretations of the requirements under NTTA, which encourages government use of existing voluntary consensus standards, relative to ASTM 1527. Some interviewees suggested that the Agency must use the ASTM standard if it meets statutory requirements. However, it was also indicated that the current version does not meet all statutory requirements and is currently under review. The process for revising ASTM 1527-97 was accomplished over a two-year period.

Searches for recorded environmental cleanup liens against the facility that are filed under Federal, State, or Local law: A question was raised regarding whether an assessment would require a search through federal, state, and local government agencies or only one of the above. There was some discussion about an administrative response such that EPA might create and maintain a database that lists all the relevant agencies to be contacted or to create a database of all the relevant information.

Informational criteria: Related to the stringency of the eventual standard, there are disagreements concerning the level of information that should be sought versus the level of information that is available. Some raised the idea of a performance based standard such that if one got information from a source, one would not need to review all other sources. Others like the redundancy because it creates the possibility of finding additional issues.

Adjoining Properties: Some interviewees raised the question of when prospective purchasers should be required to include a visual inspection of adjoining properties.

Transaction Screen: ASTM developed a standard for a transaction screen, which is not done by an environmental professional. There are questions about whether or not this abbreviated screen will satisfy the requirements of all appropriate inquiry.

"Shelf Life" of an assessment: Questions were raised about how long an assessment would be considered useful in establishing the all appropriate inquiry liability defense. Some thought the shelf life of an assessment was 6 months, others one year, and still others, longer. This is especially relevant when a site has groundwater contamination and/or migrating plumes.

New Technologies Available: Many interviewees referred to the new, field-based technologies now available, which make sampling both cost effective and timely. Whereas in the past, samples were taken and sent to labs with results provided weeks later, technologies such as geoprobes provide immediate results. It is believed that such technologies provide better information about actual environmental conditions at reasonable cost.

Disclosure: Questions were raised about the disclosure of information obtained during due diligence research. What environmental information is a broker expected or required to disclose about a property to potential buyers? What, if any, information should be made available to the public?

Assessment Activities by Land Uses: Some interviewees suggested that the standard be constructed according to historic land uses. Each land use -- residential, commercial, light industry, heavy industry -- would require a different level of investigation.

Successive Purchasers: Many interviewees raised the question of the transferability of liability relief to a new purchaser.

PROCEDURAL ISSUES RELATED TO THE NEGOTIATED RULEMAKING PROCESS

There are three procedural issues to be considered if EPA decides to proceed with a negotiated rulemaking process to develop the all appropriate inquiry standard.

Schedule. The statute requires the final regulation be promulgated by January 11, 2004. This would suggest that a negotiated rulemaking process should be initiated by January 2003 to ensure enough time for the negotiations as well as the required comment period.

Representation. As required under the Negotiated Rulemaking Act and to ensure accurate representation at the negotiations, EPA is required to publish a Notice of Intent to Negotiate A Rule in the Federal Register, which would include a list of proposed members of the negotiating committee. During the comment period, additional parties may make nominations to the negotiating committee. EPA would decide if there were stakeholder groups that were not represented by the proposed committee members.

Starting Point: EPA will need to decide how to begin the drafting of the regulation. In other words, should the initial draft be a listing of the statutory criteria for all appropriate inquiry, the interim standard, or existing EPA guidance.

PARTICIPATION

Susan Podziba identified nine categories of stakeholders that she recommends the U.S. Environmental Protection Agency invite to participate in the negotiated rulemaking. In addition, there are three categories of resource parties that would provide technical expertise to the Committee.

Most of the interviewees were interested in participating in the negotiated rulemaking. Some had concerns and expertise regarding the actual elements of the standard, and some held broader concerns regarding its rigor, cost, and time requirements. Some simply wanted to participate in order to be able to educate their members and constituents for future transactions.

The actual negotiations will be best served by a negotiating committee that represents and can articulate the actual range of broad and specific interests that

will need to be woven together to reach consensus on the all appropriate inquiry standard. Organizational members of the negotiating committee may consider selecting negotiators to create a committee that includes a combination and balance between individuals who will be directly affected by the standard and staff, who work with large numbers of people in the field and/or communities.

The resource parties have technical expertise that will be useful throughout the negotiations, but are not stakeholder parties in that they do not have a set of interests they will seek to satisfy during the negotiations. Resource parties may participate fully in the deliberations of the committee, but will not have the right to dissent on elements of the regulatory language.

In addition to the U.S. Environmental Protection Agency, it is recommended that the proposed negotiating committee include the following members:

Other Federal Agencies[4]	U.S. Department of Housing and Urban Development U.S. Department of Justice
State Government	Association of State and Territorial Solid Waste Management Officials to identify two negotiators National Association of Attorneys General
Local Government	US Conference of Mayors National Association of Local Government Environmental Professionals
Tribal Government	Gila Tribe, Department of Environmental Quality
Developers	
- Residential	National Association of Home Builders
- Commercial	Real Estate Roundtable
- Industrial	National Association of Industrial and Office Parks
- Not-for-profit	Trust for Public Land National Brownfields Association
Bankers/Lenders	Bank of America Freddie Mac Mortgage Bankers Association

[4] The U.S. Department of Housing and Urban Development and the U.S. Department of Justice have indicated preferences for participation on the negotiating committee, but will consult with EPA before a final decision is made.

Environmentalists	Sierra Club Environmental Defense
Environmental Justice	Center for Public Environmental Oversight Partnership for Sustainable Brownfields Redevelopment
Environmental Professionals	Association of Soil and Foundation Engineers American Society of Civil Engineers National Ground Water Association Wasatch Environmental
Resource Parties	Environmental Attorneys (through the Section of Environment, Energy, and Resources of the American Bar Association) Real Estate Brokers Environmental Insurance Professionals

PROCESS DESIGN

To begin the negotiated rulemaking process, EPA will need to establish a formal advisory committee in accordance with the Federal Advisory Committee Act (FACA). As required under FACA, all meetings of the negotiating committee will be announced in the Federal Register and open to the public.

The negotiated rulemaking process will consist of a series of negotiating committee meetings and communications with and among negotiators between meetings. The process will be managed by a mediator.

Negotiations will begin with a preliminary meeting of all negotiators. The agenda for this meeting will be to prepare a set of organizational protocols, determine informational needs, define the negotiating agenda, determine the drafting method to be used, confirm a schedule of meetings, identify mechanisms for two-way feedback between negotiators and constituents, and articulate key concerns related to the negotiations.

The preliminary meeting will be followed by a series of 5 - 6 negotiating sessions of two - three days each. If the committee decides to make use of a drafting work

group to develop proposals for the committee's review, part of these meetings may be set aside for such drafting.

After initial discussions of negotiators' key interests relative to the all appropriate inquiry standard, EPA will prepare a draft, including blank spaces for those areas which need more discussion before sections can be drafted. During the negotiating sessions, the committee will work its way through the agenda, which will encompass a review of the draft regulation. It is typical in a negotiated rulemaking for some sections of the rule to be more easily resolved than others. For the former, the committee will determine when it has reached "tentative agreements" indicating that the draft is satisfactory pending resolution of all other sections. Tentative agreements are sometimes reviewed after other decisions are made because of the impact of one section on another.

As the series of meetings proceeds, the agenda will consist of the remaining issues for which tentative agreements have not been reached and any tentative agreements, which a committee members ask to review, until all is resolved. The final draft will then be reviewed in total. After agreement is reached on all the regulatory language, EPA will draft the preamble to the proposed rule, which may then be subjected to negotiations until the committee reaches consensus on it.

PROTOCOLS AND PROCEDURES

At its preliminary meeting, the negotiating committee (Committee) will develop procedural ground rules that will govern its discussions and negotiations. The proposed ground rules will cover such matters as the following:

- mission of the negotiating Committee;
- obligations of and protections for Committee members;
- commitments that derive for members as a result of consensus agreements;
- composition of the Committee including its ability to add members, use alternates, have advisors, use workgroups to develop proposals, and caucuses;
- decision-making rule (definition of consensus);
- how to deal with media contacts;

- procedures to ensure the protection of confidential information;
- the recognition that meetings are open to the public;
- the manner in which a record of the sessions will be kept and distributed;
- schedule of meetings and planned completion date; and
- roles and responsibilities of the mediators.

CONCLUSION

Susan Podziba, as convener, finds that use of a negotiated rulemaking process to develop the all appropriate inquiry standard (§101(35)(B) of CERCLA), as required under the Small Business Liability Relief and Revitalization Act (Pub. L. No. 107-118), also known as the Brownfields Law, is feasible and appropriate, and that there is a reasonably good chance of successfully reaching a consensus agreement among stakeholders on this standard.

APPENDIX A

U.S. EPA NEGOTIATED RULEMAKING FACT SHEET

U.S. ENVIRONMENTAL PROTECTION AGENCY
NEGOTIATED RULEMAKING FACT SHEET

WHAT IS A RULE ?

A rule or regulation is the equivalent of an operating or implementation manual for a part of a statute or act of Congress. A rule gives those subject to its requirements more detailed instructions or prohibitions regarding activities that are addressed by the statute.

HOW ARE RULES USUALLY WRITTEN?

Generally a federal agency's staff drafts the text of a proposed rule. After circulation and comment within the agency, the rule will be printed in the Federal Register as a proposed rule. The public is then invited to comment on the rule. After reading and analyzing the public's comment the agency may revise the rule to incorporate suggestions or eliminate problems identified as a result of the analysis. The rule is then published in final form in the Federal Register and becomes effective on the date listed in the notice. It is then incorporated into the government's Code of Federal Regulations, which lists all currently applicable regulations.

WHAT IS NEGOTIATED RULEMAKING?

Negotiated rulemaking is a process which brings together representatives of various interest groups and a federal agency to negotiate the text of a proposed rule. The goal of a negotiated rulemaking proceeding is for the committee to reach consensus on the text of a proposed rule.

HOW IS NEGOTIATED RULEMAKING DIFFERENT?

In a negotiated rulemaking proceeding, a well-balanced group representing the regulated public, community and public interest groups, state and local governments, joins with a representative of the federal agency in a federally chartered advisory committee to negotiate the text or the outline or concept of a rule before it is published as a proposed rule in the Federal Register. If the committee reaches consensus on the rule then the federal agency can use this consensus as a basis for its proposed rule. The proposed rule is still subject to public comment. If consensus is not reached then the agency proceeds with its normal rulemaking activities.

WHAT ARE THE ADVANTAGES OF NEGOTIATED RULEMAKING?

Federal agencies that have used negotiated rulemaking have identified several advantages to developing a rule by negotiation before notice and comment. The regulatory negotiation process allows the interested, affected parties a more direct input into the drafting of the regulation, thus ensuring that the rule is more sensitive to the needs and limitations of both the parties and the agency. Rules drafted by negotiation have been found to be more pragmatic and more easily implemented at an earlier date, thus providing the public with the benefits of the rule while minimizing the negative impact of a poorly conceived or drafted regulation.

Because the negotiating committee includes representatives of the major groups affected by or interested in the rule, the number of public comments is reduced. The tenor of public comment is more moderate. Fewer substantive changes are required before the rule is made final. The committee can draw on the diverse experience and creative skills of the members to

address problems encountered in writing a regulation. Often the group together can propose solutions to difficult problems that no one member could have thought of or believed would work.

HOW ARE RULES SELECTED FOR NEGOTIATED RULEMAKING?

The Negotiated Rulemaking Act of 1996 suggests a number of criteria (see attachment) that a rule should meet to be a candidate for negotiated rulemaking. Generally, the federal agency conducts an internal assessment to determine its own interest in negotiating a rule. If it determines that a negotiation is a possibility, the agency retains a neutral third party facilitator/mediator to conduct a more rigorous assessment of the feasibility. This assessment involves interviews of agency management and staff and conversations with a wide range of organizations and individuals who might be affected by the rule. The facilitator will analyze the information gained about the issues and the parties and make recommendations to the agency regarding the feasibility of negotiating the rule and suggestions for designing the negotiation process. The agency considers the results of the feasibility study and makes a decision whether to proceed.

HOW DOES THE PROCESS WORK?

The federal agency establishes a formal advisory committee under the Federal Advisory Committee Act. A balanced mix of people representing the range of affected parties is invited by the agency to participate. Generally committees are composed of between 12 and 25 members representing both the public and private sectors. A neutral facilitator or mediator is used to manage its meetings and assist the parties in discussions and reaching an agreement.

Meetings are announced in the Federal Register (and sometimes in local or trade press) and are open to observation by members of the public. The number of meetings held depends on how complicated the rule is to draft, how much controversy there is amongst the committee members, and what the deadline is for the rule to be published and implemented.

Generally only the committee members speak during the meetings, although provisions are made for input by members of the audience. Caucuses can be called by committee members to speak with their constituency or with other members of the committee, caucuses may or may not be open to the public observers. Workgroups can be formed by committees to work on subsets of the issues posed by the rule.

Decisions are generally made by consensus, not by majority vote. The Committee discusses and decides upon their own definition of consensus prior to the start of its deliberations. Often the consensus is generally defined as an agreement by all parties that they can live with the provisions of the rule when taken as a whole package.

If consensus is reached, the agency will use it as a basis for their proposed rule. Committee members agree to support the rule as proposed if there are no substantive changes from the consensus agreement.

FOR ADDITIONAL INFORMATION ON REGULATORY NEGOTIATION:
Negotiated Rulemaking Sourcebook, 1995, Administrative Conference of the US; written and edited by David Pritzker and Deborah Dalton. Available from Deborah Dalton (dalton.deborah@epa.gov)

SELECTION CRITERIA for NEGOTIATED RULEMAKING

It is important to screen potential rulemakings to identify instances where negotiation of the rule has a high probability of success. The Negotiated Rulemaking Act of 1996 and past EPA experience suggest the following criteria to screen and select appropriate items. An item need not meet all of these criteria to be qualified as a candidate.

Criteria for the Item

- The proposal should require the resolution of a limited number of interdependent or related issues, none of which involve fundamental questions of value, or extremely controversial national policy.

- The policy implications of the issues to be resolved are more-or-less limited programmatically, i.e., the rulemaking will not establish binding precedents in program areas not encompassed by the negotiations.

- There must be a sufficiently well-developed factual base to permit meaningful discussion and resolution of the issues.

- There should be several ways in which the issues can be resolved.

- There should be a firm deadline imposed upon the negotiations by EPA due to some statutory, judicial or programmatic mechanism. The deadline should provide adequate time for negotiation of the issues.

- Any ongoing litigation does not inhibit the parties' willingness or ability to engage in genuine give-and-take.

Criteria for the Participants

- Those participants interested in or affected by the outcome of the development process should be readily identifiable and relatively few in number. Participants should be able to represent and reflect the interests of their constituencies.

- The parties should have some common goals. They should be in good faith about wanting to participate in negotiations. They should feel themselves as likely, if not more likely, to achieve their overall goals using negotiations as they would through traditional rulemaking.

- Some of the parties should have common positions on one or more of the issues to be resolved which might serve as a basis for agreement during the course of negotiations.

- The parties should view themselves as having an ongoing relationship with the Agency beyond the item under consideration.

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