

RESPONSE TO COMMENT DOCUMENT
ALL APPROPRIATE INQUIRIES REGULATION

October 2005

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Background and Purpose of Document

Background

On January 11, 2002, President Bush signed into law the Small Business Liability Relief and Brownfields Revitalization Act (the Brownfields Amendments). The Brownfields Amendments amend the Comprehensive Environmental Recovery, Compensation, and Liability Act (CERCLA) by increasing funding for assessing and cleaning up brownfields sites, clarifying CERCLA liability protections for certain landowners, and enhancing State and Tribal response programs.

The Brownfields Amendments require the Environmental Protection Agency (the Agency) to develop regulations establishing standards and practices for conducting "all appropriate inquiries" and promulgate the standards within two years of its enactment. The AAI standards and practices provide a framework for assessing the previous ownership, uses, and environmental conditions of a property. The standards and practices are applicable to any prospective commercial property owner who may want to claim liability protection for a release or threatened release of a hazardous substance as an innocent landowner, a contiguous property owner, or a bona fide prospective purchaser. The standards and practices also are applicable to persons conducting site characterizations and assessments with the use of Federal brownfields grants.

Congress included in the Brownfields Amendments a list of criteria that the Agency must address in developing standards and practices for conducting all appropriate inquiries (section 101(35)(2)(B)(ii)). In addition, as part of the Brownfields Amendments, Congress established the ASTM International Standard E1527-97 (entitled "Standard Practice for Environmental Site Assessments: Phase I Environmental Site Assessment Process") as an interim standard for all appropriate inquiries, until the Agency promulgates final federal regulatory standards.

The Agency determined that the regulatory negotiation process was the best way to develop the proposed Federal standards and practices for conducting all appropriate inquiries and established the Negotiated Rulemaking Committee for All Appropriate Inquiries. The Committee, composed of 25 members representing parties of interest in the rulemaking, held six multiple-day meetings over the course of seven months, beginning in April 2003. During the Committee's deliberations, the general public had many opportunities to comment on the Committee's draft regulatory language, including the opportunities to provide written comments and make oral presentations to the Committee. On November 14, 2003, the Committee arrived at a consensus document representing its recommendation for a proposed regulation.

The Agency used the Committee's consensus language as a basis for the All Appropriate Inquiries proposed rule and published the proposed rule in the Federal Register on August 26, 2004 (69 **FR** 52542). The Agency also established a 90-day comment period requesting comments from the public on the proposed requirements for conducting all

appropriate inquiries and the Agency's analysis of the potentially impacted entities. The proposed rule and the background documents were made available to the public in the Agency's docket. During the public comment period, the Agency held three public meetings on the proposed All Appropriate Inquiries rule, in St. Louis on September 22, Washington D.C. on October 20, and San Francisco on November 18.

During the comment period, which ended on November 30, 2004, the Agency received 430¹ comments from interested stakeholders, including the comments submitted during the three public meetings. Commenters who indicated that they currently are performing environmental site assessments (ESAs) submitted over 70 percent of the public comments. Close to 40 percent of those commenters were members of professional organizations which have educational and certification requirements for their members. Less than 10 percent of the comments received by the Agency were submitted by Federal, State, Tribal, and Local governments, environmental groups, and academic institutions. Approximately the same number of comments was submitted by businesses which solicit or provide services to the ESA industry and/or real estate industry (e.g., lawyers, appraisers, financial institutions, developers). The rest of the comments were submitted by anonymous commenters.

The Agency received the highest number of comments on the proposed definition of environmental professional (EP). Although a large number of commenters agreed that the rule should establish some minimum requirements for EPs, they disagreed on how stringent those requirements should be. The Agency received comments on all of the proposed requirements for performing all appropriate inquiries with the highest number of comments addressing the requirements for considering the relationship of the purchase price to the value of the property.

The Agency reviewed and considered all public comments received in response to the proposed rule. Based upon input provided in the public comments, the Agency made some modifications to the regulatory language and the Economic Impact Analysis (EIA). An explanation of the regulatory changes is included in the preamble to the final rule. A summary of the changes made to the EIA are provided in an Addendum to the EIA developed for the proposed rule. The Addendum and the EIA are available in the docket for the final rule.

Purpose of Document

This document presents the public comments received in response to the proposed All Appropriate Inquiries rule and the Agency's response to each comment. The comment response document is organized by category of issues raised by the public in response to the proposed rule, preamble, and the EIA.

This document does not present the comments in their entirety. Rather, each issue section contains relevant excerpts of the comments that address each particular issue. For clarity, every comment excerpt is identified by: (1) the name of the person or

¹ The Agency received 439 comment letters of which nine letters were duplicates.

organization that submitted the comment, (2) the unique comment number assigned to each comment by the Agency, and (3) an unique comment excerpt number.

Each comment excerpt is followed by the Agency's response. The responses clarify how the comments were considered in the final rule.

The public can view the comment letters in their entirety at the Agency docket. The comment letters are available electronically in the EDOCKET index at <http://www.epa.gov/edocket>, under Docket ID No. SFUND-2004-0001. The public also can view the comment letters in hard copy at the EPA Docket Center, EPA West Building, Room B102, 1301 Constitution Ave., N.W., Washington, D.C. This docket facility is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding Federal holidays. The telephone number for the Public Reading Room is (202) 566-1744, and the telephone number for the OSWER Docket is (202) 566-0276.

SECTION 1: Proposed Rule – General Opinion

1.1 General Opinion of the Proposed Rule

1.1.1 General Support of the Proposed Rule

Commenter Organization Name: Dailey, Christopher W

Comment Number: 0036

Excerpt Number: 1

Excerpt Text:

As an environmental professional I would like to extend my support to the proposed All Appropriate Inquiry (AAI) rule published in the Federal Register on August 26, 2004. While the ASTM E-1527-2000 Phase I Environmental Site Assessment (ESA) Standard served well as an interim measure, it allowed too much interpretation over who could perform a Phase I ESA and how it should be done. The AAI rule will set a high benchmark for the brownfield industry and help ensure environmental protection for developers who wish to pursue redevelopment of potentially contaminated properties.

Response:

The Environmental Protection Agency thanks the commenter for the stated support for the proposed rule.

Commenter Organization Name: TXU

Comment Number: 0268

Excerpt Number: 1

Excerpt Text:

TXU supports EPA's development of all appropriate inquiries standards. Most of the proposed regulatory language is acceptable and will be beneficial in TXU's conduct of all appropriate inquiries.

Response:

The Environmental Protection Agency thanks the commenter for the stated support for the proposed rule.

Commenter Organization Name: Albin, Dave

Comment Number: 0325

Excerpt Number: 1

Excerpt Text:

We have long needed to establish a minimum level of qualifications for individuals performing environmental assessments, particularly those done in preparation for property transactions. The proposed rule accomplishes that goal and for this reason I support it.

Response:

The Environmental Protection Agency thanks the commenter for the stated support for the proposed rule.

Commenter Organization Name: Cassidy, Daniel

Comment Number: 0389

Excerpt Number: 1

Excerpt Text:

The EPA's proposed rules for All Appropriate Inquiry (AAI) transfer criteria for due diligence activity from the current private sector consensus standards of practice to federal government regulation. I fully support this transfer which will help ensure a level of professionalism and quality appropriate for this very important type of environmental investigation.

Response:

The Environmental Protection Agency thanks the commenter for the stated support for the proposed rule.

Commenter Organization Name: Kehres

Comment Number: 0395

Excerpt Number: 1

Excerpt Text:

The EPAs proposed rules for All Appropriate Inquiry (AAI) transfer criteria for this due diligence activity from the current private sector consensus standards of practice to federal government regulation. I enthusiastically support this transfer, which will help ensure a level of professionalism and quality appropriate for this important type of environmental investigation.

Response:

The Environmental Protection Agency thanks the commenter for the stated support for the proposed rule.

Commenter Organization Name: MBA

Comment Number: 0401

Excerpt Number: 2

Excerpt Text:

MBA and its members support EPA's proposed regulation, which establishes that AAI is met through the performance of an ASTM Phase I environmental site assessment.

Response:

The Environmental Protection Agency thanks the commenter for the stated support for the proposed rule.

Commenter Organization Name: Morse, Catherine

Comment Number: 0413

Excerpt Number: 1

Excerpt Text:

This is to advise that I support the proposed rules for All Appropriate Inquiry (AAI) which transfers criteria for this due diligence activity from the current private sector consensus standards of practice to federal government regulation. I believe that this change will assist in bringing a high degree of professionalism to this type of environmental inquiry.

Response:

The Environmental Protection Agency thanks the commenter for the stated support for the proposed rule.

Commenter Organization Name: Freeman & Giler

Comment Number: 0417

Excerpt Number: 10

Excerpt Text:

The new AAI Rule will require more time to conduct environmental due diligence, more rigorous pre-qualification of EPs, increased collaboration between the User and the EP and greater disclosure of detailed transactional information to the EP (e.g., purchase price, title, commonly known information, specialized knowledge of the parties). We support USEPA's efforts to standardize the AAI process, and we encourage USEPA to ensure that the final AAI Rule will allow AAI to dove-tail with other environmental assessments relevant to property transactions (e.g., asbestos inspections, radon testing, wetlands delineations, regulatory compliance audits) so that AAI can continue to be a relevant, worthwhile exercise.

Response:

The Environmental Protection Agency thanks the commenter for the stated support for the proposed rule.

Commenter Organization Name: Hoskins, Herbert

Comment Number: 0428

Excerpt Number: 1

Excerpt Text:

The EPA's proposed rules for All Appropriate Inquiry (AAI) transfer criteria for this due diligence activity from the current private sector consensus standards of practice to federal government regulation. I enthusiastically support this transfer, which will help ensure a level of professionalism and quality appropriate for this important type of environmental investigation. In general the transition is coherent and reasonable;

Response:

The Environmental Protection Agency thanks the commenter for the stated support for the proposed rule.

Commenter Organization Name: Mittelholzer, Michael

Comment Number: PM-0207-0002

Excerpt Number: 1

Excerpt Text:

However, before I discuss some of the merits of the proposed rule for the land development and construction industry, it is important to remember the importance of today's proposed rule to the implementation of a significant environmental statute, the Small Business Liability and Brownfields Revitalization Act, commonly referred to as the Brownfields Law. NAHB supports the proposed rule for three main reasons:

First: The proposed rule implements a key provision of the recently passed brownfields law that clarifies what specific actions a landowner must take prior to taking title to a property to determine the potential presence of environmental contamination.

Second: The proposed rule is consistent with the criteria established by Congress under the recently enacted brownfields law. I believe that's found in Section 223(d).

Three: Promulgation of the rule will provide landowners with the means to demonstrate they qualify for the important federal liability protections CERCLA Super Fund granted under the brownfields law.

Response:

The Environmental Protection Agency thanks the commenter for the stated support for the proposed rule.

1.1.1.1 *Adopt the Rule as Proposed*

Commenter Organization Name: Malivuk, John

Comment Number: 0060

Excerpt Number: 2

Excerpt Text:

In summary, I favor the AAI rule as proposed. I urge the Agency to adopt the rule as proposed.

Response:

The Environmental Protection Agency thanks the commenter for the stated support for the proposed rule.

EPA notes that the final rule includes a few revisions from the proposed rule to address concerns raised by public commenters. Please see section III of the preamble to the final rule for a summary of these revisions.

Commenter Organization Name: Van Reenen, Dirk

Comment Number: 0070

Excerpt Number: 1

Excerpt Text:

I fully support the All Appropriate Inquiry rule.

Response:

The Environmental Protection Agency thanks the commenter for the stated support for the proposed rule.

Commenter Organization Name: None

Comment Number: 0082

Excerpt Number: 1

Excerpt Text:

I support AAI!!

Response:

The Environmental Protection Agency thanks the commenter for the stated support for the proposed rule.

Commenter Organization Name: Jeffers, Larry A

Comment Number: 0084

Excerpt Number: 1

Excerpt Text:

As a Professional Engineer who provides and uses environmental services, I am in full

support of this proposed rule. This proposed AAI rule under consideration here does the following: "Encourages project/client/public sensitivity by permitting the flexibility derived from a performance-based approach instead of a prescriptive approach. The rule would be applicable to any type of property." Sets minimum qualification criteria for environmental professionals (EPs). "Allows for professional judgment, which is critical in the proper evaluation of the risk associated with a particular site." Requires a broader scope of environmental inquiry by building on and significantly improving the existing process (ASTM E-1527) that is familiar to many clients (users) who have all appropriate inquiry studies performed. This approach enhances the process and the familiarity will help avoid 'confusion' among users and will also help reduce or limit the cost impacts. "Provides the public with the confidence that AAI studies will be protective of human health and the environment that does not currently exist with the ASTM process." While not perfect, this rule would result in 'raising the bar' on the quality of AAI studies, as there are enough safeguards and protections within the proposed rule. We urge you to pass and implement this rule in the best interest of the public at large.

Response:

The Environmental Protection Agency thanks the commenter for the stated support for the proposed rule.

Commenter Organization Name: McHugh, Dan

Comment Number: 0085

Excerpt Number: 2

Excerpt Text:

In my opinion, the proposed AAI rule should be approved as is with no changes. Negotiated rules all have some weaknesses depending on the point of view but this proposed rule seems reasonable and will definitely improve the quality of ESAs in the industry.

Response:

The Environmental Protection Agency thanks the commenter for the stated support for the proposed rule.

EPA notes that the final rule includes a few revisions from the proposed rule to address concerns raised by other public commenters. Please see section III of the preamble to the final rule for a summary of these revisions.

Commenter Organization Name: Fulk, Kevin J

Comment Number: 0086

Excerpt Number: 1

Other Sections: NEW - 2.1.1.2 - The proposed minimum requirements will improve quality of ESAs

Excerpt Text:

I support the proposed rule because it establishes minimum qualifications for an

environmental professional and will provide a better approach for developers / landowners to handle redevelopment on brownfield sites in our nations urban areas than what currently exists.

The minimum qualifications for an environmental professional will help the industry apply a higher level of qualifications/experience to solve environmental issues for real estate development and redevelopment. This EPA legislation should also give developers a higher level of confidence to tackle brownfields sites, which will significantly aid in "protecting human health and the environmental" for generations to come.

I urge the Agency to adopt the rule as proposed.

Response:

The Environmental Protection Agency thanks the commenter for the stated support for the proposed rule.

EPA notes that the final rule includes a few revisions from the proposed rule to address concerns raised by other public commenters. Please see section III of the preamble to the final rule for a summary of these revisions.

Commenter Organization Name: CERCLA Research Center Subcommittee

Comment Number: 0103

Excerpt Number: 1

Excerpt Text:

The Focus Group stands in support of the proposed rule for all appropriate inquiries as written. It is reflective of the issues and concerns identified and addressed in the negotiated rulemaking process, and as such represents a step forward in protecting human health and the environment in a manner that does not hinder the productive reuse of properties at which the perception of risk poses a barrier.

Response:

The Environmental Protection Agency thanks the commenter for the stated support for the proposed rule.

EPA notes that the final rule includes a few revisions from the proposed rule to address concerns raised by other public commenters. Please see section III of the preamble to the final rule for a summary of these revisions.

Commenter Organization Name: Crocetti, Charles

Comment Number: 0110

Excerpt Number: 3

Other Sections: NEW - 6.7 - Negotiated rulemaking committee/process

Excerpt Text:

The proposed rule was developed based on the work of a Negotiated Rulemaking

Committee represented by a wide spectrum of interests, including the American Society of Civil Engineers, the National Groundwater Association, and ASFE. The latter groups represent, I believe, some of the premiere technical/trade organizations in the environmental industry, and each serves as a valuable resource for the dissemination of technical information and research relative to environmental work.

In summary, I urge EPA to adopt the All Appropriate Inquiry rule as proposed. I very much appreciate the opportunity to comment on the proposed rule.

Response:

The Environmental Protection Agency thanks the commenter for the stated support for the proposed rule.

EPA notes that the final rule includes a few revisions from the proposed rule to address concerns raised by other public commenters. Please see section III of the preamble to the final rule for a summary of these revisions.

Commenter Organization Name: ASCE

Comment Number: 0126

Excerpt Number: 1

Excerpt Text:

The American Society of Civil Engineers (ASCE) is pleased to comment in strong support of the regulation proposed on August 26, 2004, to establish federal standards and practices for conducting "all appropriate inquiries" required under sections 101 (35)(B)(ii) and (iii) of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA). U.S. EPA, Proposed Rule, Standards and Practices for All Appropriate Inquiries, 69 Fed. Reg. 52,542.

The proposed rule would establish specific regulatory requirements and standards for conducting all appropriate inquiries into the previous ownership, uses, and environmental conditions of a property for the purposes of meeting the all appropriate inquiries provisions necessary to qualify for certain landowner liability protections under CERCLA. The standards and practices proposed today also would be applicable to persons conducting site characterization and assessments with the use of grants awarded under CERCLA Section 104(k)(2)(B).

ASCE was privileged to participate in the consensus process established by the Agency to draft the proposed rule to be adopted in compliance with the Small Business Liability Relief and Brownfields Redevelopment Act, Pub. L. 107-118, Jan. 11, 2002, 115 Stat. 2356. The regulation proposed on August 26 fairly represents the interests of a broad coalition of engineering, commercial professional, technical, and environmental organizations. When fully implemented, the regulation will ensure the expeditious cleanup of thousands of abandoned properties that then will be safely returned to productive use.

Response:

The Environmental Protection Agency thanks the commenter for the stated support for the proposed rule.

Commenter Organization Name: Anonymous

Comment Number: 0281

Excerpt Number: 1

Excerpt Text:

I am an environmental professional working in the Brownfields industry. I want to offer my support for the AAI proposed rule. We need to maintain a strong standard that is implemented by environmental professionals.

Response:

The Environmental Protection Agency thanks the commenter for the stated support for the proposed rule.

Commenter Organization Name: Webster, O. Christopher

Comment Number: 0285

Excerpt Number: 2

Excerpt Text:

I urge the Agency to adopt it as proposed.

Response:

The Environmental Protection Agency thanks the commenter for the stated support for the proposed rule.

EPA notes that the final rule includes a few revisions from the proposed rule to address concerns raised by other public commenters. Please see section III of the preamble to the final rule for a summary of these revisions.

Commenter Organization Name: Engels, Joseph

Comment Number: 0287

Excerpt Number: 2

Excerpt Text:

Please adopt the rule as written.

Response:

The Environmental Protection Agency thanks the commenter for the stated support for the proposed rule.

EPA notes that the final rule includes a few revisions from the proposed rule to address concerns raised by other public commenters. Please see section III of the preamble to the final rule for a summary of these revisions.

Commenter Organization Name: Foppe Technical Group

Comment Number: 0289

Excerpt Number: 1

Other Sections: NEW - 2.1.1.2 - The proposed minimum requirements will improve quality of ESAs

Excerpt Text:

As an environmental company that performs AAI, we would like to add our voice in support of the proposed rule. It is imperative that the technical nature of a Phase I be performed by well trained, competent professionals. The proposed rules elevated the requirements to a necessary level to ensure that competent work is performed.

Response:

The Environmental Protection Agency thanks the commenter for the stated support for the proposed rule.

Commenter Organization Name: Less, James

Comment Number: 0290

Excerpt Number: 5

Excerpt Text:

In summary, I am in favor of the AAI rule as proposed, and I urge the Agency to adopt it as proposed.

Response:

The Environmental Protection Agency thanks the commenter for the stated support for the proposed rule.

EPA notes that the final rule includes a few revisions from the proposed rule to address concerns raised by other public commenters. Please see section III of the preamble to the final rule for a summary of these revisions.

Commenter Organization Name: Moors, Scott

Comment Number: 0298

Excerpt Number: 3

Excerpt Text:

I am in favor of the AAI rule as proposed, and I urge the Agency to adopt it as proposed.

Response:

The Environmental Protection Agency thanks the commenter for the stated support for the proposed rule.

EPA notes that the final rule includes a few revisions from the proposed rule to address concerns raised by other public commenters. Please see section III of the preamble to the final rule for a summary of these revisions.

Commenter Organization Name: Farnsworth, Sam

Comment Number: 0299

Excerpt Number: 1

Excerpt Text:

I support the implementation of the Proposed Rule for AAI.

Response:

The Environmental Protection Agency thanks the commenter for the stated support for the proposed rule.

Commenter Organization Name: QORE, Inc

Comment Number: 0307

Excerpt Number: 1

Other Sections: NEW - 2.1.1.2 - The proposed minimum requirements will improve quality of ESAs

Excerpt Text:

I think this is a good and necessary standard. Minimum qualification criteria for environmental professionals must be set. The public will be provided with the confidence that AAI studies will be protective of human health and the environment that does not currently exist with the ASTM process. I am pleased to support the AAI rule.

Response:

The Environmental Protection Agency thanks the commenter for the stated support for the proposed rule.

Commenter Organization Name: Privette, Kevin

Comment Number: 0309

Excerpt Number: 1

Excerpt Text:

As a professional engineer and practicing consultant for 16 years, I request that the proposed AAI rule be approved and implemented.

Response:

The Environmental Protection Agency thanks the commenter for the stated support for the proposed rule.

Commenter Organization Name: May, Thomas

Comment Number: 0310

Excerpt Number: 3

Excerpt Text:

I am in favor of the AAI rule as proposed, and I urge the Agency to adopt it as proposed.

Response:

The Environmental Protection Agency thanks the commenter for the stated support for the proposed rule.

EPA notes the today's final rule includes a few revisions from the proposed rule to address concerns raised by other public commenters. Please see section III of the preamble to the final rule for a summary of these revisions.

Commenter Organization Name: Griebel, Russell

Comment Number: 0316

Excerpt Number: 2

Excerpt Text:

I am in favor of the AAI rule as proposed, and I urge the Agency to adopt it as proposed.

Response:

The Environmental Protection Agency thanks the commenter for the stated support for the proposed rule.

EPA notes that the final rule includes a few revisions from the proposed rule to address concerns raised by other public commenters. Please see section III of the preamble to the final rule for a summary of these revisions.

Commenter Organization Name: CE&MT

Comment Number: 0318

Excerpt Number: 1

Excerpt Text:

I do agree with the proposed rules. As the president of a geotechnical engineering firm routinely engaged in ESA's, we support the proposed rules.

Response:

The Environmental Protection Agency thanks the commenter for the stated support for the proposed rule.

Commenter Organization Name: QORE, Inc

Comment Number: 0324

Excerpt Number: 1

Other Sections: NEW - 2.1.1 - Support of the proposed minimum requirements

Excerpt Text:

We have long needed to establish a minimum level of qualifications for individuals performing environmental assessments, particularly those done in preparation for property transactions. The proposed rule accomplishes that goal and for this reason I support it.

Response:

The Environmental Protection Agency thanks the commenter for the stated support for the proposed rule.

Commenter Organization Name: Schultz, Michael

Comment Number: 0331

Excerpt Number: 5

Excerpt Text:

In summary, I am in favor of the AAI rule as proposed, and I urge the Agency to adopt it as proposed.

Response:

The Environmental Protection Agency thanks the commenter for the stated support for the proposed rule.

EPA notes that the final rule includes a few revisions from the proposed rule to address concerns raised by other public commenters. Please see section III of the preamble to the final rule for a summary of these revisions.

Commenter Organization Name: Lourie Consultants

Comment Number: 0353

Excerpt Number: 1

Excerpt Text:

Patricia, as you know, I represented ASFE/The Best People on Earth and environmental professionals on the negotiated rulemaking committee that developed the language in the proposed AAI rule. As such, I support the proposed rule and urge its adoption by the EPA.

Response:

The Environmental Protection Agency thanks the commenter for the stated support for the proposed rule.

Commenter Organization Name: Lourie Consultants

Comment Number: 0353

Excerpt Number: 7

Excerpt Text:

In summary, I am in favor of the AAI rule as proposed, and I urge the EPA to adopt it as proposed.

Response:

The Environmental Protection Agency thanks the commenter for the stated support for the proposed rule.

EPA notes that the final rule includes a few revisions from the proposed rule to address concerns raised by other public commenters. Please see section III of the preamble to the final rule for a summary of these revisions.

Commenter Organization Name: Denton, Robert

Comment Number: 0381

Excerpt Number: 5

Excerpt Text:

In summary, I am in favor of the AAI rule as proposed, and I urge the Agency to adopt it as proposed.

Response:

The Environmental Protection Agency thanks the commenter for the stated support for the proposed rule.

EPA notes that the final rule includes a few revisions from the proposed rule to address concerns raised by other public commenters. Please see section III of the preamble to the final rule for a summary of these revisions.

Commenter Organization Name: Gallagher, Paul

Comment Number: 0383

Excerpt Number: 2

Excerpt Text:

I am in favor of the AAI rule as proposed. I urge the Agency to adopt it as proposed.

Response:

The Environmental Protection Agency thanks the commenter for the stated support for the proposed rule.

EPA notes that the final rule includes a few revisions from the proposed rule to address concerns raised by other public commenters. Please see section III of the preamble to the final rule for a summary of these revisions.

Commenter Organization Name: Dohms, Peter

Comment Number: 0384

Excerpt Number: 5

Excerpt Text:

In summary, I am in favor of the AAI rule as proposed, and I urge the Agency to adopt it as proposed.

Response:

The Environmental Protection Agency thanks the commenter for the stated support for the proposed rule.

EPA notes that the final rule includes a few revisions from the proposed rule to address concerns raised by other public commenters. Please see section III of the preamble to the final rule for a summary of these revisions.

Commenter Organization Name: Stejer, Warham

Comment Number: 0385

Excerpt Number: 1

Excerpt Text:

I would like voice my support for the All Appropriate Inquiry (AAI) Standard proposed by the EPA.

Response:

The Environmental Protection Agency thanks the commenter for the stated support for the proposed rule.

Commenter Organization Name: Stejer, Warham

Comment Number: 0385

Excerpt Number: 2

Excerpt Text:

It would be a mistake to abandon enactment of the All Appropriate Inquiry standard based on the negative sentiments expressed by individuals who would no longer qualify as "environmental professionals," because they lack the education and/or experience that would be needed to conduct brownfield studies.

Response:

The Environmental Protection Agency thanks the commenter for the stated support for the proposed rule.

EPA notes that the final rule includes a few revisions from the proposed rule, including the proposed definition of environmental professional to address concerns raised by other public commenters. Please see section III of the preamble to the final rule for a summary of these revisions.

Commenter Organization Name: Heywood, Johanna

Comment Number: 0387

Excerpt Number: 5

Excerpt Text:

In summary, I am in favor of the AAI rule as proposed, and I urge the Agency to adopt it as proposed.

Response:

The Environmental Protection Agency thanks the commenter for the stated support for

the proposed rule.

EPA notes that the final rule includes a few revisions from the proposed rule to address concerns raised by other public commenters. Please see section III of the preamble to the final rule for a summary of these revisions.

Commenter Organization Name: Alizadeh, Ed

Comment Number: PM-0127-0001

Excerpt Number: 1

Excerpt Text:

I want to just give a couple of comments regarding the rule. First of all, I think it provides clarity for purchasers. The creation of the bona fide prospective purchaser of defense and contiguous property owner of defense will promote property transfers and redevelopment of properties to their best use.

Those have been considerable hindrances to development in the past, and I think clarifying that in this rule is of benefit to prospective purchasers. I also think the rule enhances public confidence in environmental assessments and redevelopment of brownfields by creating a definition for environmental professional, which I know is a difficult definition to arrive at, but by creating specific education, experience, and certification requirements, the rule provides the public with confidence that the studies will be protective of human health and the environment.

I also think it provides public confidence because the rule expands the database review requirements and provides for a nonprescriptive approach and allows for engineering or professional judgment in terms of what assessments should be done.

That will result in more data being reviewed, which will provide more confidence in the findings and conclusions and recommendations that are put forward, based on these assessments.

Response:

The Environmental Protection Agency thanks the commenter for the stated support for the proposed rule.

Commenter Organization Name: Alizadeh, Ed

Comment Number: PM-0127-0001

Excerpt Number: 2

Other Sections: NEW - 3.13.4 - Shelf life should be extended beyond 180 days/one year

Excerpt Text:

Lastly, I think the rule -- By extending the time period that the inquiries were good from six months to a year will result in being a benefit for developers. Frequently developers from start to finish take much longer than six months before the deal is finalized, and by extending that to a year, will provide a benefit to developers who are trying to redevelop

brownfield properties. In summary, the rule makes redeveloping brownfields sites more attractive to potential developers. It sets minimum criteria for environmental professionals, which enhances the public confidence, and although through the AAI studies, the fees will potentially increase due to the added research requirements, it will enhance the confidence and will be protective of human health and the environment.

Response:

The Environmental Protection Agency thanks the commenter for the stated support for the proposed rule. The final rule retains and clarifies the requirement that all appropriate inquiries be conducted within one year prior to the date of acquisition of the property, with certain aspects updated within 180 days.

1.1.1.2 Support of the Performance Standard

Commenter Organization Name: Franz, Barry

Comment Number: 0068

Excerpt Number: 1

Other Sections: NEW - 6.1 - EPA should adopt ASTM standard rather than develop separate regulations

Excerpt Text:

Some key points of the AAI rule that I like is the fact that the AAI rule encourages a performance-based approach rather than a "prescriptive/mandatory" application of a standard (e.g. ASTM E1527-00). This approach allows an environmental professional to resolve data gaps based upon the professional's experience. Another critical aspect of the AAI rule that I like and appreciate, is the definition of what constitutes an environmental professional and what qualifications one should have.

However, I am not entirely convinced that we need the AAI rule. The ASTM Standard, E1 527-00, has served as the de facto standard for a number of years and is recognized by the real estate and financial communities as an acceptable demonstration for environmental due diligence. Although I have a number of issues with the ASTM Standard, I can not state that it has not worked to the satisfaction of my clients, and the real estate and financial communities. It has performed reasonable in defining the overall environmental risk posed by a site.

In summary, if we must have a promulgated regulation, then the AAI rule as proposed is acceptable. However, I believe that the clarifications made in the rule could be adopted into the existing ASTM standard and this standard would serve just as well.

Response:

The Environmental Protection Agency thanks the commenter for the stated support for the proposed rule.

With regard to the use of the ASTM E1527-2000 standard, prior to the development of the proposed rule, EPA determined that the ASTM E1527-2000 standard was inconsistent with applicable law. Since publication of the proposed rule, ASTM International has updated its E1527 Phase I Environmental Site Assessment Process to address the inconsistencies. EPA has determined that the updated standard is compliant with the statute criteria and consistent with the final rule. Therefore, in the final rule, EPA is referencing the standards and practices developed by ASTM International and known as Standard E1527-05 and entitled "Standard Practice for Environmental Site Assessments: Phase I Environmental Site Assessment Process." Persons conducting all appropriate inquiries may use the procedures included in the ASTM E1527-05 standard to comply with the final rule.

Commenter Organization Name: Van Reenen, Dirk

Comment Number: 0070

Excerpt Number: 2

Excerpt Text:

I am pleased that the proposed AAI rule establishes definitions of "environmental professional" and encourages use of professional judgment. I have seen too many examples of environmental site assessments performed by marginally or unqualified individuals that seem to consider an assessment to be little more than filling out a checklist. I believe that the proposed rule will improve the quality of environmental site assessments. I also am pleased that the proposed rule encourages a performance-based approach rather than the mandatory use of a standard. In my opinion, this will result in a higher quality assessment and fewer reports that are merely the regurgitation of a checklist.

Response:

The Environmental Protection Agency thanks the commenter for the stated support for the proposed rule.

It is the Agency's contention that the performance-based approach effectuates Congressional intent. The language used by Congress in describing the action to be taken under this rule is "all appropriate inquiries." Because each property for which all appropriate inquiries is undertaken is unique, "appropriate" inquiries for one property may not be "appropriate" for another. This uniqueness requires differing approaches. Therefore, the final rule is promulgated in a manner that allows the flexibility needed to engage in all appropriate inquiries for any property. The purpose behind establishing a performance standard for the conduct of all appropriate inquiries is to allow for a comprehensive assessment of available information about the potential environmental conditions at a property, while avoiding duplicative requirements. Sections 312.20(e) and (f) of the final rule set forth objectives for the all appropriate inquiries investigation and performance factors for obtaining the information established within the objectives. As explained in the preamble to the proposed rule, the advantage of a performance-based approach over a checklist approach to conducting the inquiries is that multiple sources of information need not be consulted for the same information.

The final rule (as did the proposed rule) encourages environmental professionals to use discretion and professional judgment in determining the best sources of information and the best manner in which to obtain information, given the objectives of the regulations and the specific characteristics of the property being assessed. EPA anticipates that this flexible approach will encourage the efficient use of resources in the case of properties that may not require as rigorous of an investigation due to available information about a property or particular knowledge about a property that may not be available in the case of other properties, while at the same time maintaining adequate standards to ensure environmental protection in the case of all properties.

Commenter Organization Name: Thacker, Barry K

Comment Number: 0071

Excerpt Number: 3

Other Sections: NEW - 3.12.2 - The rule should not require sampling and analysis

Excerpt Text:

Furthermore, I support the AAI rule changes because they encourage a performance-based approach, rather than a prescriptive "mandatory" application of a "standard," and allow for the environmental professional to resolve data gaps based on his or her experience.

Response:

The Environmental Protection Agency thanks the commenter for the stated support for the proposed rule.

EPA notes that the final rule includes a few revisions from the proposed rule to address concerns raised by other public commenters. Please see section III of the preamble to the final rule for a summary of these revisions.

Please also see response to comment number 0070, excerpt 2.

Commenter Organization Name: Freitag, George A

Comment Number: 0072

Excerpt Number: 3

Excerpt Text:

The proposed rule also is vastly superior to what is currently performed for property transactions because it: (1) uses a performance-based approach instead of a prescriptive approach, and (2) broadens the scope of the environmental inquiry on those sites where it is beneficial or needed.

Response:

The Environmental Protection Agency thanks the commenter for the stated support for the proposed rule.

Please also see response to comment number 0070, excerpt 2.

Commenter Organization Name: Engels, Joseph G

Comment Number: 0088

Excerpt Number: 1

Excerpt Text:

As a practicing environmental professional with close to 25 years of experience evaluating and remediating brownfield sites, I am encouraged by the proposed All Appropriate Inquiry rule. In particular, I am encouraged by the performance based approach that is proposed, rather than the current prescriptive ASTM approach. As proposed, AAI investigations should be designed by qualified professionals based on specific circumstances, site conditions and past and future uses of the property. Qualified

professionals provide their opinions based on their education, experience and technical expertise. The establishment of minimum education and experience standards for environmental professional qualifications are long overdue in this area of practice. Recognition of licensing/certification by state or federal agencies is also a very positive aspect of the rule because it adds the aspect associated with protecting the public welfare that is intrinsic to these licensing programs.

Response:

The Environmental Protection Agency thanks the commenter for the stated support for the proposed rule.

Please also see response to comment number 0070, excerpt 2.

Commenter Organization Name: Simon, Richard M

Comment Number: 0089

Excerpt Number: 4

Other Sections: NEW - 3.12.2 - The rule should not require sampling and analysis

Excerpt Text:

I like the fact that the AAI rule encourages a performance-based approach, rather than a prescriptive 'mandatory' application of a 'standard,' and allows for the environmental professional to resolve data gaps based on his or her experience. I also believe that the broader scope of environmental inquiry and wider application of the rule will result in the development of more thorough scopes of services, contracts, and reports. This result will be of significant benefit to my firm, the client, and most of all, the public.

Response:

The Environmental Protection Agency thanks the commenter for the stated support for the proposed rule.

Please see response to comment number 0070, excerpt 2.

Commenter Organization Name: Sanborn, Head & Associates, Inc

Comment Number: 0090

Excerpt Number: 1

Excerpt Text:

We support EPA's proposed rule based on the following reasons: 'The proposed rule clearly establishes minimum qualification criteria for environmental professionals that are consistent with the level of education/experience typically necessary to collect and interpret environmental data, and develop conclusions and recommendations based on analysis of the data collected.' The proposed rule builds upon and advances the standard of practice for environmental inquiry related to property transactions, and allows for the exercise of professional judgment in evaluating the environmental risks potentially posed by conditions at a Site, rather than following a prescriptive approach. 'The proposed rule

was developed based on the work of a Negotiated Rulemaking Committee represented by a wide spectrum of interests, including the American Society of Civil Engineers, the National Groundwater Association, and ASFE.

Response:

The Environmental Protection Agency thanks the commenter for the stated support for the proposed rule.

EPA notes that the final rule includes a few revisions from the proposed rule to address concerns raised by other public commenters. Please see section III of the preamble to the final rule for a summary of these revisions.

Commenter Organization Name: Crocetti, Charles

Comment Number: 0110

Excerpt Number: 2

Excerpt Text:

The proposed rule builds upon and advances the standard of practice for environmental inquiry related to property transactions, and allows for the exercise of professional judgment in evaluating the environmental risks potentially posed by conditions at a Site, rather than following a prescriptive approach.

Response:

The Environmental Protection Agency thanks the commenter for the stated support for the proposed rule.

Please see response to comment number 0070, excerpt 2.

Commenter Organization Name: NSPE

Comment Number: 0230

Excerpt Number: 12

Excerpt Text:

The proposed objectives and performance factors for an all appropriate inquiries requirements (page 52558-52559).

The objectives and performance factors described in the proposed rule (§312.20(d), §312.20 (e), §312.23(a), §312.23(c), §312.23(d), §312.24, §312.26, §312.27, and §312.30) are generally in keeping with the standards currently utilized by environmental professionals to perform all appropriate inquiries and therefore are reasonable.

Response:

The Environmental Protection Agency thanks the commenter for the stated support for the proposed rule.

Please see response to comment number 0070, excerpt 2.

Commenter Organization Name: Diamond, Jason

Comment Number: 0251

Excerpt Number: 1

Excerpt Text:

Overall, I support the AAI rule, as I believe it will significantly improve the environmental inquiry process by providing performance-based requirements and broadening the scope of an environmental inquiry to a degree that will be much more protective of human health and the environment, while promoting the productive use of properties subject to the Brownfields Revitalization Act.

Response:

The Environmental Protection Agency thanks the commenter for the stated support for the proposed rule.

Please see response to comment number 0070, excerpt 2.

Commenter Organization Name: NGWA

Comment Number: 0265

Excerpt Number: 1

Excerpt Text:

The proposed rules emphasize a site-specific, performance based approach that provides for flexibility and the exercise of professional judgment. The rule's approach achieves environmental and public health protection while moving sites into productive use efficiently and cost effectively.

Response:

The Environmental Protection Agency thanks the commenter for the stated support for the proposed rule.

Please see response to comment number 0070, excerpt 2.

Commenter Organization Name: Belaire, Kent

Comment Number: 0267

Excerpt Number: 4

Excerpt Text:

The AAI rule improves the existing environmental inquiry process because it encourages a performance-based approach instead of a prescriptive approach and broadens the scope of the environmental inquiry where it is needed. The performance-based approach provides for flexibility by allowing studies to be designed for the specific circumstances associated with a property. The broader scope will result in studies that will be protective of human health and the environment and promote the productive use of properties subject to the Brownfields Revitalization Act.

In summary, I support the AAI rule.

Response:

The Environmental Protection Agency thanks the commenter for the stated support for the proposed rule.

Please see response to comment number 0070, excerpt 2.

Commenter Organization Name: GZA GeoEnvironmental

Comment Number: 0279

Excerpt Number: 1

Excerpt Text:

I support adoption of the proposed all appropriate inquiry rule because it emphasizes a performance based approach, sets minimum criteria for environmental professionals (it is about time this was implemented) and allows for professional judgement. With over 20-years of experience in environmental and engineering consulting, I find it refreshing that USEPA has established minimum requirements for an environmental profession. It is important that these minimum standards not be relaxed.

Response:

The Environmental Protection Agency thanks the commenter for the stated support for the proposed rule.

Please see response to comment number 0070, excerpt 2.

Commenter Organization Name: Billington, Edward

Comment Number: 0284

Excerpt Number: 2

Other Sections: NEW - 3.12.2 - The rule should not require sampling and analysis

Excerpt Text:

I also support the fact that the AAI rule encourages a performance-based approach, rather than a mandatory application of a prescriptive standard, and allows for the environmental professional to resolve data gaps based on his or her experience. The broader scope of environmental inquiry and wider application of the rule should result in the development of more thorough scopes of services, contracts, and reports. I believe the result will be of significant benefit to the public.

Response:

The Environmental Protection Agency thanks the commenter for the stated support for the proposed rule.

Please see response to comment number 0070, excerpt 2.

Commenter Organization Name: Webster, O. Christopher

Comment Number: 0285

Excerpt Number: 1

Excerpt Text:

As a professional engineer I support the proposed rule. The proposed rule uses a performance-based approach instead of prescriptive-based approach, and as such, recognizes that the professional needs to develop the AAI studies to address the specific circumstances posed by the property and past uses.

Response:

The Environmental Protection Agency thanks the commenter for the stated support for the proposed rule.

Please see response to comment number 0070, excerpt 2.

Commenter Organization Name: Willis, George

Comment Number: 0288

Excerpt Number: 1

Other Sections: NEW - 2.1.1.2 - The proposed minimum requirements will improve quality of ESAs

Excerpt Text:

I like the fact that it sets a minimum qualification and criteria level for the professionals in the environmental practice area. It is performance based and includes an education component which is not unlike the successful professional practices found in the engineering industry. The use of professional judgement in evaluating site risk is imperative and supported by the rule. If adopted, the All Appropriate Inquiry Rule should go a long way towards improving the quality of the practitioners in the field and more significantly, actually protecting human health and the environment.

Response:

The Environmental Protection Agency thanks the commenter for the stated support for the proposed rule.

Please see response to comment number 0070, excerpt 2.

Commenter Organization Name: Less, James

Comment Number: 0290

Excerpt Number: 4

Other Sections: NEW - 1.1.1.4 - The proposed rule balances concerns of the stakeholders without compromising the environment

Excerpt Text:

The proposed rule also is vastly superior to what is currently performed for property transactions because it: (1) uses a performance-based approach instead of a prescriptive

approach, and (2) broadens the scope of the environmental inquiry on those sites where it is beneficial or needed. The rule's performance-based approach recognizes that AAI studies must be designed for the specific circumstances posed by a property and its past uses. This approach also makes the rule flexible so that it can be applied to any type of property. The broader scope of the environmental inquiry provides users (our clients) and the public with the confidence that AAI studies will be protective of human health and the environment and promote productive use of properties subject to the Brownfields Law. Thus, it appears that the proposed rule balances the concerns of the many parties involved in property transactions without compromising the environment now or in the future.

Response:

The Environmental Protection Agency thanks the commenter for the stated support for the proposed rule.

EPA notes that the final rule includes a few revisions from the proposed rule to address concerns raised by other public commenters. Please see section III of the preamble to the final rule for a summary of these revisions.

Please see response to comment number 0070, excerpt 2.

Commenter Organization Name: Whitaker, Robert

Comment Number: 0297

Excerpt Number: 1

Other Sections: NEW - 1.1.1.3 - The proposed rule will improve quality of ESAs

Excerpt Text:

I urge you to adopt the proposed Rule. It will serve to raise the bar for personnel credentials and establish a performance based approach to environmental services that promotes professional judgment instead of a one size fits all "cookbook" approach. The environmental professional services industry has taken an unfortunate turn toward becoming a cottage industry in recent years and it is in the public interest to curtail this trend. The proposed rule will build on the success of the process established in the current ASTM standard and provide the public and end users of these services with a better understanding of what the process entails. In summary approving this rule is a win-win proposal for the profession and the public.

Response:

The Environmental Protection Agency thanks the commenter for the stated support for the proposed rule.

EPA notes that the final rule includes a few revisions from the proposed rule to address concerns raised by other public commenters. Please see section III of the preamble to the final rule for a summary of these revisions.

Please also see response to comment number 0070, excerpt 2.

Commenter Organization Name: Moors, Scott

Comment Number: 0298

Excerpt Number: 1

Other Sections: NEW - 2.1.1 - Support of the proposed minimum requirements

Excerpt Text:

I support the proposed rule and I urge the Agency to adopt it as proposed. The proposed AAI rule: ?? Encourages project/client/public sensitivity by permitting the flexibility derived from a performance-based approach instead of a prescriptive approach. The rule would be applicable to any type of property. ?? Sets minimum qualification criteria for environmental professionals (EPs). ?? Allows for professional judgment, which is critical in the proper evaluation of the risk associated with a particular site. ?? Requires a broader scope of environmental inquiry by building on and significantly improving the existing process (ASTM E-1527) that is familiar to many clients (users) who have all appropriate inquiry studies performed. This approach enhances the process and the familiarity will help avoid ?gconfusion?h among users and will also help reduce or limit the cost impacts.

Response:

The Environmental Protection Agency thanks the commenter for the stated support for the proposed rule.

EPA notes that the final rule includes a few revisions from the proposed rule to address concerns raised by other public commenters. Please see section III of the preamble to the final rule for a summary of these revisions.

Please also see response to comment number 0070, excerpt 2.

Commenter Organization Name: Davis, Colin

Comment Number: 0300

Excerpt Number: 1

Other Sections: NEW - 2.1.1 - Support of the proposed minimum requirements

Excerpt Text:

I am in support of the proposed AAI rule due to: It establishes minimum qualification criteria for environmental professionals. Allows for professional judgement in evaluation of risk associated with a site. Encourages project/client/public sensitivity by permitting the flexibility derived from a performance based approach instead of a perspective approach. Broader scope of study by improving the current standard defined in ASTM E1527.

Response:

The Environmental Protection Agency thanks the commenter for the stated support for the proposed rule.

EPA notes that the final rule includes a few revisions from the proposed rule, including

revisions to the proposed definition of an environmental professional, to address concerns raised by other public commenters. Please see section III of the preamble to the final rule for a summary of these revisions.

Please also see response to comment number 0070, excerpt 2.

Commenter Organization Name: Erb, Ronald

Comment Number: 0301

Excerpt Number: 1

Other Sections: NEW - 2.1.1 - Support of the proposed minimum requirements

Excerpt Text:

I would like to add my support to the proposed rule for Standards and Practices for All Appropriate Inquiry. I believe this service should be handled by persons with a minimum of training and expertise as outlined in the proposed rule. Site specific, performance based approaches are important in the type of work performed by environmental professionals.

Response:

The Environmental Protection Agency thanks the commenter for the stated support for the proposed rule.

EPA notes that the final rule includes a few revisions from the proposed rule, including revisions to the proposed definition of an environmental professional, to address concerns raised by other public commenters. Please see section III of the preamble to the final rule for a summary of these revisions.

Please also see response to comment number 0070, excerpt 2.

Commenter Organization Name: Anonymous

Comment Number: 0303

Excerpt Number: 1

Other Sections: NEW - 2.1.1 - Support of the proposed minimum requirements

Excerpt Text:

I approve of the proposed rule for AAI. The prescriptive approach currently used in the ASTM method is not applicable to many projects/sites; therefore, a more flexible approach, as is proposed in the AAI is an improvement. The AAI proposed rule also sets minimum qualifications for professions conducting the inquiries that are more appropriate to the inquiry process.

Response:

The Environmental Protection Agency thanks the commenter for the stated support for the proposed rule.

Please see response to comment number 0070, excerpt 2.

Commenter Organization Name: May, Thomas

Comment Number: 0310

Excerpt Number: 2

Excerpt Text:

I also support the proposed rule because it uses a performance-based approach instead of a prescriptive approach. The rule's performance-based approach recognizes that AAI studies must be designed for the specific circumstances posed by a property and its past uses. This approach also makes the rule flexible so that it can be applied to any type of property.

Response:

The Environmental Protection Agency thanks the commenter for the stated support for the proposed rule.

Please see response to comment number 0070, excerpt 2.

Commenter Organization Name: Schultz, Michael

Comment Number: 0331

Excerpt Number: 4

Other Sections: NEW - 1.1.1.4 - The proposed rule balances concerns of the stakeholders without compromising the environment

Excerpt Text:

The proposed rule is also vastly superior to what is currently performed for property transactions for two reasons: 1. A performance-based approach instead of a prescriptive approach is employed, which recognizes that AAI studies must be designed for the specific circumstances posed by a property and its past uses. This approach also makes the rule flexible so that it can be applied to any property type. 2. It broadens the scope of the environmental inquiry on those sites where it is beneficial or needed. The broader scope of the environmental inquiry provides users (our clients) and the public with the confidence that AAI studies will protect human health and the environment and promote productive use of properties subject to the Brownfields Law. The proposed rule appears to balance the concerns of many parties involved in property transactions without compromising the environment now or in the future.

Response:

The Environmental Protection Agency thanks the commenter for the stated support for the proposed rule.

EPA notes that the final rule includes a few revisions from the proposed rule to address concerns raised by other public commenters. Please see section III of the preamble to the final rule for a summary of these revisions.

Please see response to comment number 0070, excerpt 2.

Commenter Organization Name: McKerr, Thomas

Comment Number: 0347

Excerpt Number: 8

Excerpt Text:

Objectives and Performance Factors. Well done.

Response:

The Environmental Protection Agency thanks the commenter for the stated support for the proposed rule.

Commenter Organization Name: Lourie Consultants

Comment Number: 0353

Excerpt Number: 6

Other Sections: NEW - 1.1.1.4 - The proposed rule balances concerns of the stakeholders without compromising the environment

Excerpt Text:

I am convinced that the proposed AAI rule is vastly superior to what is currently performed for property transactions because it: (1) uses a performance-based approach instead of a prescriptive approach, and (2) broadens the scope of the environmental inquiry on those sites where it is beneficial or needed. The broader scope of the environmental inquiry provides users and the public with the confidence that AAI studies will be protective of human health and the environment and promote productive use of properties subject to the Brownfields Law. Thus, it appears that the proposed rule balances the concerns of the many parties involved in property transactions without compromising the environment now or in the future.

Response:

The Environmental Protection Agency thanks the commenter for the stated support for the proposed rule.

Please see response to comment number 0070, excerpt 2.

Commenter Organization Name: Smith, Michael

Comment Number: 0360

Excerpt Number: 4

Excerpt Text:

I like the fact that the AAI rule encourages a performance-based approach, rather than a prescriptive "mandatory" application of a "standard," and allows for the environmental professional to resolve data gaps based on his or her experience. I also believe that the broader scope of environmental inquiry and wider application of the rule will result in the development of more thorough scopes of services, contracts, and reports. This result will be of significant benefit to my firm, the client, and most of all, the public.

Response:

The Environmental Protection Agency thanks the commenter for the stated support for the proposed rule.

Please see response to comment number 0070, excerpt 2.

Commenter Organization Name: SCANA

Comment Number: 0373

Excerpt Number: 8

Excerpt Text:

In the preamble (page 52559, 1st column), the Agency states that the proposed performance factors in §312.20(e) are "guidelines to be followed in conjunction with the performance objectives for the all appropriate inquiries." It is recommended that the Agency incorporate language in the regulation to clearly state that these are guidelines.

Response:

The regulatory language at 40 CFR 312.20(f) states "In performing each of the standards and practices set forth in this subpart and to meet the objectives stated in paragraph (e) of this section, the persons identified under section 312.1(b) or the environmental professional as defined in section 312.10 (as appropriate to the particular standard and practice) **must seek to...**" (emphasis added). By including in the regulatory language the phrase "must seek to" the Agency designates the performance factors as guidelines or objectives for how to perform the all appropriate inquiries in compliance with the statutory criteria and the regulatory objectives established in the final rule.

Commenter Organization Name: Denton, Robert

Comment Number: 0381

Excerpt Number: 4

Other Sections: NEW - 1.1.1.4 - The proposed rule balances concerns of the stakeholders without compromising the environment

Excerpt Text:

The rule's performance-based approach recognizes that AAI studies must be designed for the specific circumstances posed by a property and its past uses. This approach also makes the rule flexible so that it can be applied to any type of property with sufficient specificity to focus on the relevant environmental conditions that may exist at that property. The broader scope of the environmental inquiry provides users (our clients) and the public with the confidence that AAI studies will be protective of human health and the environment and promote productive use of properties subject to the Brownfields Law. Thus, it appears that the proposed rule balances the concerns of the many parties involved in property transactions without compromising the environment now or in the future.

Response:

The Environmental Protection Agency thanks the commenter for the stated support for the proposed rule.

EPA notes that the final rule includes a few revisions from the proposed rule to address concerns raised by other public commenters. Please see section III of the preamble to the final rule for a summary of these revisions.

Please see response to comment number 0070, excerpt 2.

Commenter Organization Name: Dohms, Peter

Comment Number: 0384

Excerpt Number: 4

Other Sections: NEW - 1.1.1.4 - The proposed rule balances concerns of the stakeholders without compromising the environment

Excerpt Text:

The proposed rule also is vastly superior to what is currently performed for property transactions because it: (1) uses a performance-based approach instead of a prescriptive approach, and (2) broadens the scope of the environmental inquiry on those sites where it is beneficial or needed. The rule's performance-based approach recognizes that AAI studies must be designed for the specific circumstances posed by a property and its past uses. This approach also makes the rule flexible so that it can be applied to any type of property. The broader scope of the environmental inquiry provides users (our clients) and the public with the confidence that AAI studies will be protective of human health and the environment and promote productive use of properties subject to the Brownfields Law. Thus, it appears that the proposed rule balances the concerns of the many parties involved in property transactions without compromising the environment now or in the future.

Response:

The Environmental Protection Agency thanks the commenter for the stated support for the proposed rule.

Please see response to comment number 0070, excerpt 2.

Commenter Organization Name: Heywood, Johanna

Comment Number: 0387

Excerpt Number: 4

Other Sections: NEW - 1.1.1.4 - The proposed rule balances concerns of the stakeholders without compromising the environment

Excerpt Text:

The proposed rule also is vastly superior to what is currently performed for property transactions because it: (1) uses a performance-based approach instead of a prescriptive approach, and (2) broadens the scope of the environmental inquiry on those sites where it is beneficial or needed. The rule's performance-based approach recognizes that AAI studies must be designed for the specific circumstances posed by a property and its past uses. This approach also makes the rule flexible so that it can be applied to any type of

property. The broader scope of the environmental inquiry provides users (our clients) and the public with the confidence that AAI studies will be protective of human health and the environment and promote productive use of properties subject to the Brownfields Law. Thus, it appears that the proposed rule balances the concerns of the many parties involved in property transactions without compromising the environment now or in the future.

Response:

The Environmental Protection Agency thanks the commenter for the stated support for the proposed rule.

Please see response to comment number 0070, excerpt 2.

Commenter Organization Name: Intertox

Comment Number: 0396

Excerpt Number: 5

Excerpt Text:

-The proposed objectives and performance factors for the all appropriate inquiries requirements.

--While we agree it is important to approach an all appropriate inquiry with a concise set of objectives and performance factors, we believe that too much stress is placed here on the approach rather than stressing the quality of investigation. It is our experience that information relevant to one criterion is rarely collected more than once. Therefore, we believe it is sufficient to establish in a final rule that the environmental professional will determine the best process and sequence for collecting and analyzing all required information. We are aware, however, from years of experience that the sequence of information gathering is more efficient if historical resources are reviewed first, followed by a review of government databases and records, and then the site visit. Characterizing the historic uses of a site and identifying listed sites within a ½ mile radius of the subject property sets the stage for a more complete site visit. In addition, although Intertox opposes this, if sampling and analysis is determined to be an acceptable activity in the all appropriate inquiry, then knowing the background of the site will help determine where sampling should occur on a property.

Response:

The Environmental Protection Agency thanks the commenter for the stated support for the proposed rule.

Please see response to comment number 0070, excerpt 2.

The Agency notes that the final rule includes no requirements to conduct sampling and analysis as part of the all appropriate inquiries investigation.

Commenter Organization Name: Rybak, John Thomas

Comment Number: 0412

Excerpt Number: 4

Excerpt Text:

3) Proposed objective and performance factors for AAI

a) Page # 52578

b) View: I support the objective and performance factors. Objective and performance factors are designed to achieve a higher standard of Phase I report, and more consistent Phase I product in order to allow the legal system to apply an AAI standard for purchasers of contaminated land.

c) Assumptions: The current voluntary standard (ASTM) is not sufficient for AAI and not consistently applied in the practice of Phase I reports.

d) Burden: Will require the EP firms to reformat their Phase I reports and alter their report preparation process. This may increase report costs slightly.

Response:

The Environmental Protection Agency thanks the commenter for the stated support for the proposed rule.

Please see response to comment number 0070, excerpt 2.

EPA agrees with the commenter that the requirements included in the final rule will slightly increase the costs of performing an environmental site assessment over the current cost of performing an assessment in compliance with the ASTM E1527-2000 standard.

Commenter Organization Name: Tryon, Bill

Comment Number: 0418

Excerpt Number: 1

Excerpt Text:

Discussion of Scope - One positive outcome of EPA's development of a definition of AAI is promotion of industry discussion. In recent years, much of the environmental industry has moved toward a formulaic approach to environmental investigation, frequently completing certain steps without an apparent understanding for the significance of the findings of the investigation. Hopefully, the implementation of EPA's standard will result in completion of more thoughtful investigations.

Response:

The Environmental Protection Agency thanks the commenter for the stated support for the proposed rule.

Commenter Organization Name: Haley and Aldrich

Comment Number: 0432

Excerpt Number: 1

Excerpt Text:

In general, we support the All Appropriate Inquiry rule; in particular the performance based approach that is proposed, rather than the current prescriptive ASTM approach. We support the notion that the proposed rule requires that the opinions provided should be by qualified professionals and not just anyone with limited training can conduct such an assessment contains. We also agree with the lack of requirements regarding the length, structure, or specific format of a written report;

Response:

The Environmental Protection Agency thanks the commenter for the stated support for the proposed rule.

EPA notes that the final rule includes a few revisions from the proposed rule, including revisions to the proposed definition of an environmental professional, to address concerns raised by other public commenters. Please see section III of the preamble to the final rule for a summary of these revisions.

Please see response to comment number 0070, excerpt 2.

Commenter Organization Name: McLeod, Jeff

Comment Number: 0444

Excerpt Number: 5

Excerpt Text:

312.24, 312.25 and 312.26

Each of these sections addresses documents to be reviewed in conducting AAIs. It is refreshing to have some latitude in the regulations to exercise professional judgement as to how to conduct the inquiries addressed in these Parts. However I can foresee circumstances where EPs could reach different conclusion based on their professional judgement which could lead to legal battles.

Response:

The Environmental Protection Agency thanks the commenter for the stated support for the proposed rule.

Please see response to comment number 0070, excerpt 2.

If more than one environmental professional conducts environmental inquiries at a particular property and the environmental professionals reach different conclusions regarding conditions indicative of releases or threatened releases of hazardous substances at the property, it is the responsibility of prospective landowner, with whom the liability

for releases may rest, to resolve the differences in opinion. In such cases, the prospective landowner may want to evaluate the merits of conducting additional investigations.

Commenter Organization Name: Grissom, Glen

Comment Number: PM-0127-0009

Excerpt Number: 1

Excerpt Text:

I believe the standard has several good points to offer, including the definition of environmental professional, as a very positive step, to keep work product high.

I also move that if it was a positive step that these standards were specifically designed to meet the CERCLA's all appropriate inquiries standard, so there can be no question down the road on a project, whether they're going to be covered under this standard, like under the current ASTM standard.

I believe it's also positive that the standard emphasizes several information sources that aren't currently stressed, such as low purchase price, environment liens, and engineering controls, especially given the changes that are going in the environmental field, before moving toward corrective actions, where things such as environmental liens and engineering controls are becoming much more common.

And lastly, I believe that it is positive, it is a result based standard, rather than simply a checklist of items to review, and you just - you go through the checklist, you did everything that was there, and you're done, whether you actually produced a good product or not.

Response:

The Environmental Protection Agency thanks the commenter for the stated support for the proposed rule.

EPA notes that the final rule includes a few revisions from the proposed rule, including revisions to the proposed definition of an environmental professional, to address concerns raised by other public commenters. Please see section III of the preamble to the final rule for a summary of these revisions.

Please see response to comment number 0070, excerpt 2.

1.1.1.3 The Proposed Rule Will Improve Quality of Environmental Site Assessments

Commenter Organization Name: Virginia Geotechnical Services

Comment Number: 0034

Excerpt Number: 1

Other Sections: NEW - 2.1.1.2 - The proposed minimum requirements will improve quality of ESAs

Excerpt Text:

I am in support of the proposed rule for Standards and Practices for AAI. The qualifications section, in particular, has long been needed and will vastly improve the quality of environmental assessments by setting an appropriate level of qualifications and experience for persons holding themselves out as an "environmental professional." Because ASTM has proven it cannot address the qualifications issue, EPA is the only appropriate venue that can set this standard.

Response:

The Environmental Protection Agency thanks the commenter for the stated support for the proposed rule.

EPA notes that the final rule includes a few revisions from the proposed rule, including revisions to the proposed definition of an environmental professional, to address concerns raised by other public commenters. Please see section III of the preamble to the final rule for a summary of these revisions.

Commenter Organization Name: Cooper, Ivan A

Comment Number: 0047

Excerpt Number: 3

Excerpt Text:

Third, the proposed rule builds on and significantly improves the existing environmental inquiry process for property transactions. This will allow me to continue to be able to provide the expertise and experience that I have gained doing ASTM E-1527 studies, and therefore continue to enhance my value to my firm. Not having to learn a whole new process will also ensure the cost-effectiveness of my services.

Fourth, those who perform the best are likely to get the most work. I believe that the Rule will be successful in "raising the bar" on the quality of AAI studies, because there are enough safeguards and protections within the proposed rule to make clients far more concerned about peoples' qualifications.

In summary, I am in favor of the AAI rule as proposed.

Response:

The Environmental Protection Agency thanks the commenter for the stated support for

the proposed rule.

EPA notes that the final rule includes a few revisions from the proposed rule, including revisions to the proposed definition of an environmental professional, to address concerns raised by other public commenters. Please see section III of the preamble to the final rule for a summary of these revisions.

Commenter Organization Name: Vellone, Daniel A

Comment Number: 0048

Excerpt Number: 3

Excerpt Text:

The proposed rule also is vastly superior to what is currently performed for property transactions because it broadens the scope of the environmental inquiry on those sites where it is beneficial or needed. The rule's performance-based approach recognizes that AAI studies must be designed for the specific circumstances posed by a property and its past uses. This approach also makes the rule flexible so that it can be applied to any type of property. The broader scope of the environmental inquiry provides users and the public with the confidence that AAI studies will be protective of human health and the environment and promote productive use of properties subject to the Brownfield's Law. This can only be accomplished effectively if licensed Professional Engineers and Geologists are in Responsible Charge of the AAI process.

In summary, I am in favor of the AAI rule as proposed, and I urge the Agency to adopt it as proposed.

Response:

The Environmental Protection Agency thanks the commenter for the stated support for the proposed rule.

EPA notes that the final rule includes a few revisions from the proposed rule, including revisions to the proposed definition of an environmental professional, to address concerns raised by other public commenters. Please see section III of the preamble to the final rule for a summary of these revisions. The final rule, as did the proposed rule, allows for persons who are not a licensed professional engineer or a licensed professional geologist to qualify as environmental professionals if they meet certain educational and experience qualifications.

Please see response to comment number 0070, excerpt 2.

Commenter Organization Name: Tedlock, Rowley R

Comment Number: 0051

Excerpt Number: 1

Excerpt Text:

I support the proposed rule for many reasons including the minimum education and

experience qualifications for "environmental professionals" conducting AAI studies. The proposed rule builds on and improves the existing environmental inquiry process for property transactions.

I am in favor of the AAI rule as proposed, and I urge the Agency to adopt it as proposed.

Response:

The Environmental Protection Agency thanks the commenter for the stated support for the proposed rule.

EPA notes that the final rule includes a few revisions from the proposed rule, including revisions to the proposed definition of an environmental professional, to address concerns raised by other public commenters. Please see section III of the preamble to the final rule for a summary of these revisions.

Commenter Organization Name: Worcester, Alfred P

Comment Number: 0065

Excerpt Number: 1

Other Sections: NEW - 1.1.1.5 - The cost impacts of the proposed rule will not be significant

Excerpt Text:

I support the proposed rule for many reasons, some of which are expressed here.

The proposed rule builds on and significantly improves the existing environmental inquiry process for property transactions. This is a wise and important approach for many reasons. Because the general concept will be familiar to the service providers ("environmental professionals") and the users, the transition to the new rule should be relatively straightforward and result in a minimum of disruption to the marketplace. Also, while the cost of conducting an inquiry according to the proposed AAI rule will likely be a little more than the cost associated with the current process, the cost impacts should be minor and the resulting benefits will be significant.

Response:

The Environmental Protection Agency thanks the commenter for the stated support for the proposed rule.

EPA notes that the final rule includes a few revisions from the proposed rule, including revisions to the proposed definition of an environmental professional, to address concerns raised by other public commenters. Please see section III of the preamble to the final rule for a summary of these revisions.

Commenter Organization Name: Roark, Michael

Comment Number: 0081

Excerpt Number: 1

Excerpt Text:

I believe the proposed AAI rule will be a great improvement over the existing ASTM Phase I ESA standard.

Response:

The Environmental Protection Agency thanks the commenter for the stated support for the proposed rule.

Commenter Organization Name: Cheeks, J. Richard

Comment Number: 0083

Excerpt Number: 3

Excerpt Text:

Third, the proposed rule builds on and significantly improves the existing environmental inquiry process for property transactions. This will allow me to continue to be able to provide the expertise and experience that I have gained doing ASTM E-1527 studies, and therefore continue to enhance my value to my firm. Not having to learn a whole new process will also ensure the cost-effectiveness of my services.

Fourth, those who perform the best are likely to get the most work. I believe that the Rule will be successful in "raising the bar" on the quality of AAI studies, because there are enough safeguards and protections within the proposed rule to make clients far more concerned about peoples' qualifications.

In summary, I am in favor of the AAI rule as proposed. I urge the Agency to adopt it as proposed.

Response:

The Environmental Protection Agency thanks the commenter for the stated support for the proposed rule.

EPA notes that the final rule includes a few revisions from the proposed rule, including revisions to the proposed definition of an environmental professional, to address concerns raised by other public commenters. Please see section III of the preamble to the final rule for a summary of these revisions.

Commenter Organization Name: Ferguson, Jim

Comment Number: 0203

Excerpt Number: 1

Excerpt Text:

It is high time that the technical soundness of Phase I Environmental Site Assessments is brought up to an acceptable standard. The proposed rule for All Appropriate Inquiries (AAI) as published in the August 26th Federal Register is a major improvement toward that end.

Response:

The Environmental Protection Agency thanks the commenter for the stated support for the proposed rule.

Commenter Organization Name: Roeser, Daniel

Comment Number: 0249

Excerpt Number: 1

Excerpt Text:

The EPA's proposed rules for All Appropriate Inquiry (AAI) transfer criteria for this due diligence activity from the current private sector consensus standards of practice to federal government regulation. I enthusiastically support this transfer, which will help ensure a level of professionalism and quality appropriate for this important type of environmental investigation. In general the transition is coherent and reasonable

Response:

The Environmental Protection Agency thanks the commenter for the stated support for the proposed rule.

Commenter Organization Name: NW EnviroSearch

Comment Number: 0272

Excerpt Number: 1

Excerpt Text:

Thank you for developing criteria and I standards on a national basis for the completion of Phase I Environmental Site Assessments. For many years we have observed the disparity between the quality and competency [of the reports and those preparing the documents within the environmental industry.

Response:

The Environmental Protection Agency thanks the commenter for the stated support for the proposed rule.

Commenter Organization Name: Whitaker, Robert

Comment Number: 0297

Excerpt Number: 1

Other Sections: NEW - 1.1.1.2 - Support of the performance standard

Excerpt Text:

I urge you to adopt the proposed Rule. It will serve to raise the bar for personnel credentials and establish a performance based approach to environmental services that promotes professional judgement instead of a one size fits all "cookbook" approach. The environmental professional services industry has taken an unfortunate turn toward becoming a cottage industry in recent years and it is in the public interest to curtail this trend. The proposed rule will build on the success of the process established in the current ASTM standard and provide the public and end users of these services with a better

understanding of what the process entails. In summary approving this rule is a win-win proposal for the profession and the public.

Response:

The Environmental Protection Agency thanks the commenter for the stated support for the proposed rule.

EPA notes that the final rule includes a few revisions from the proposed rule, including revisions to the proposed definition of an environmental professional, to address concerns raised by other public commenters. Please see section III of the preamble to the final rule for a summary of these revisions.

Commenter Organization Name: Moors, Scott

Comment Number: 0298

Excerpt Number: 2

Excerpt Text:

Provides the public with the confidence that AAI studies will be protective of human health and the environment that does not currently exist with the ASTM process. While not perfect, will be successful in raising the bar on the quality of AAI studies, as there are enough safeguards and protections within the proposed rule.

Response:

The Environmental Protection Agency thanks the commenter for the stated support for the proposed rule.

Commenter Organization Name: Griebel, Russell

Comment Number: 0316

Excerpt Number: 1

Other Sections: NEW - 1.1.1.5 - The cost impacts of the proposed rule will not be significant

Excerpt Text:

I support the proposed rule for many reasons, some of which are expressed here. The proposed rule builds on and significantly improves the existing environmental inquiry process for property transactions. This is a wise and important approach for many reasons. Because the general concept will be familiar to the service providers (environmental professionals) and the users, the transition to the new rule should be relatively straightforward and result in a minimum of disruption to the marketplace. Also, while the cost of conducting an inquiry according to the proposed AAI rule will likely be a little more than the cost associated with the current process, the cost impacts should be minor and the resulting benefits will be significant.

Response:

The Environmental Protection Agency thanks the commenter for the stated support for the proposed rule.

EPA notes that the final rule includes a few revisions from the proposed rule, including revisions to the proposed definition of an environmental professional, to address concerns raised by other public commenters. Please see section III of the preamble to the final rule for a summary of these revisions.

Commenter Organization Name: Herin

Comment Number: 0329

Excerpt Number: 1

Excerpt Text:

I have been involved with as many as 300 environmental due diligence projects a year. As part of this I have seen a wide range of due diligence products provided by consultants. In particular, I have been concerned with the "bargain basement" Phase I ESA (claiming to meet ASTM E1527 standards) which probably does little to protect the user. In fact, typical reasons these products are so inexpensive include: the preparer has limited experience; the preparer takes advantage of the vagueness of the ASTM standard by "cutting corners" to keep the price down; and the user is an uninformed buyer (thus, some users unwittingly treat due diligence services as a commodity).

I applaud EPA's efforts for helping to better define AAI and, thereby, to protect the user.

Response:

The Environmental Protection Agency thanks the commenter for the stated support for the proposed rule.

Commenter Organization Name: Lourie Consultants

Comment Number: 0353

Excerpt Number: 2

Excerpt Text:

My firm and I personally provide a variety of environmental services for our clients; these services cover a broad range of project types with various degrees of complexity for clients in the commercial, retail, municipal, and industrial sectors. I know better than most that even the apparently simplest brownfield engagement or environmental site assessment can pose latent risks. The only way that I've found to deal effectively with those risks is by relying on professionals who have the education, training, experience, and good judgment needed to know what to do when the situation they encounter differs from one described in some guide or standard or that is outside the specific range of past experience. For that reason, I fought for and am pleased that the proposed rule establishes realistic near- and long-term definitions of "environmental professional." Furthermore, the proposed rule allows for and even requires the application of the professional judgment needed to help consider and safeguard the public trust. Overall, the proposed AAI rule "raises the bar" such that better assessments will be performed.

Response:

The Environmental Protection Agency thanks the commenter for the stated support for

the proposed rule.

EPA notes that the final rule includes a few revisions from the proposed rule, including revisions to the proposed definition of an environmental professional, to address concerns raised by other public commenters. Please see section III of the preamble to the final rule for a summary of these revisions.

Please see response to comment number 0070, excerpt 2.

Commenter Organization Name: Osuch, Debra

Comment Number: 0365

Excerpt Number: 1

Excerpt Text:

I support the EPA's proposed rules for All Appropriate Inquiry (AAI). The proposed rules transfer criteria for this due diligence activity from private sector consensus standards of practice to federal government regulation. I believe the proposed rules will help ensure a higher level of professionalism and quality needed for this type of environmental property assessments.

Response:

The Environmental Protection Agency thanks the commenter for the stated support for the proposed rule.

EPA notes that the final rule includes a few revisions from the proposed rule, including revisions to the proposed definition of an environmental professional, to address concerns raised by other public commenters. Please see section III of the preamble to the final rule for a summary of these revisions.

Commenter Organization Name: Intertox

Comment Number: 0396

Excerpt Number: 6

Other Sections: NEW - 3.12 - Data gaps

Excerpt Text:

-The proposed provisions for addressing data gaps.

--Lack of information or the inability to obtain information on a site is a common problem. This is often caused by project limitations as reflected in scope and budget. However, Phase I ESA reports have traditionally not included detail about data gaps. Therefore, we believe this proposed requirement will result in better reports and provide report recipients with greater detail upon which liability minimizing decisions can be made.

Response:

The Environmental Protection Agency thanks the commenter for the stated support for

the proposed rule.

Commenter Organization Name: Templeton, Sharon

Comment Number: 0407

Excerpt Number: 1

Other Sections: NEW - 1.1.1.5 - The cost impacts of the proposed rule will not be significant

Excerpt Text:

The proposed rule builds on and significantly improves the existing environmental inquiry process for property transactions. While the cost of conducting an inquiry according to the proposed AAI rule will likely be a little more than the cost associated with the current process, the cost impacts should be minor and the resulting benefits will be significant.

Response:

The Environmental Protection Agency thanks the commenter for the stated support for the proposed rule.

EPA agrees with the commenter that the requirements included in the final rule will only slightly increase the costs of performing an environmental site assessment over the current cost of performing an assessment in compliance with the ASTM E1527-2000 standard.

Commenter Organization Name: Rybak, John Thomas

Comment Number: 0412

Excerpt Number: 1

Excerpt Text:

It is Branch Bank and Trust's general position of support for the proposed AAI Phase I Standards. Since its inception approximately 15 years ago the Environmental Phase I industry has been without a regulatory standard for these reports, and this has lead to a vast array of report types, quality, and professionals preparing these reports. ASTM has been a good guidance document, but it contains many vague areas, lacks a standard in other areas, and is only voluntarily adhered to. Not all users of the Phase I possess the expertise to evaluate if their Phase I report meets the current guideline, or if the consultant the hired adequately represented their interests. Many users of the report simply mark a task completed, that the Phase I has been done. But to what standard, and is that standard even applicable or sufficient to cover their risks and preserve the various CERCLA Defenses? How can a CERCLA Defense be sufficiently developed based on a suspect foundation? The simple task of obtaining a Phase I under the current guidelines, especially one of poor quality, may not prove adequate in a court of law, and certainly may not sufficiently evaluate the environmental risks at the real property.

Over the past ten years I've personally reviewed thousands of Phase I reports for several National Financial Lending Institutions. Not all Phase I reports are created equal. In the

vacuum of a Regulatory Standard quality and consistency vary greatly. There are many good and ethical firms conducting high quality Phase I report for a fair price. However there are also many firms who don't fit that definition of quality and ethics. It is our hope that through the AAI Phase I process the industry will see equalization in the Phase I Report Standard, and an increase in overall quality of this product. We may experience an increase in cost or timing, but this would be reasonable for a higher quality product. For a long time the Appraisal Industry has been regulated, leaving no question as to the Standards that need to be met. The Environmental Phase I industry faces many of the report quality and consistency problems that faced the appraisal industry prior to being regulated.

Response:

The Environmental Protection Agency thanks the commenter for the stated support for the proposed rule.

EPA agrees with the commenter that the requirements included in the final rule will only slightly increase the costs of performing an environmental site assessment over the current cost of performing an assessment in compliance with the ASTM E1527-2000 standard.

EPA agrees that the performance standards will increase the standard by which Phase I reports are conducted. However, the Agency also notes that there may still be varying degrees of quality in Phase I reporting and encourages prospective landowners to carefully select who they trust or employ to conduct all appropriate inquiries. Also, merely conducting all appropriate inquiries will not satisfy the provisions of CERCLA necessary to establish a defense to liability relief. Once acquiring a property, landowners must comply with the continuing obligations established in the statute to qualify for liability protection as a bona fide prospective purchaser, innocent landowner or contiguous property owner.

Commenter Organization Name: Langston, Jeff

Comment Number: PM-0127-0006

Excerpt Number: 1

Other Sections: NEW - 2.1.1.2 - The proposed minimum requirements will improve quality of ESAs

Excerpt Text:

And I just want to mention that I'm in favor of the proposed rule, and for the reasons - the favorable reasons that have been mentioned by others. I don't want to restate those, but specifically, I do want to comment on the definition of the environmental professional that the rule would require, and I believe that that definition for the environmental professional would result in increased quality of the environment assessment and the due diligence reports.

Response:

The Environmental Protection Agency thanks the commenter for the stated support for

the proposed rule.

EPA notes that the final rule includes a few revisions from the proposed rule, including revisions to the proposed definition of an environmental professional, to address concerns raised by other public commenters. Please see section III of the preamble to the final rule for a summary of these revisions.

1.1.1.4 *The Proposed Rule Balances Concerns of the Stakeholders without Compromising the Environment*

Commenter Organization Name: Cooper, Ivan A

Comment Number: 0047

Excerpt Number: 2

Excerpt Text:

Second, I live and work in communities that have environmentally impacted sites. The broader scope of the environmental inquiry provides users (our clients) and the public with the confidence that AAI studies will be protective of human health and the environment, and promote productive use of properties consistent with the intent of the Small Business Liability Relief and Brownfields Revitalization Act (the Act). In other words, it appears that the proposed Rule balances the concerns of the many parties involved in property transactions without compromising the environment now or in the future.

Response:

The Environmental Protection Agency thanks the commenter for the stated support for the proposed rule.

Commenter Organization Name: Thacker, Barry K

Comment Number: 0071

Excerpt Number: 1

Excerpt Text:

I have reviewed your proposed All Appropriate Inquiry (AAI) rule changes and I support them. Cleaning up brownfields so they can be returned to productive use is an important national effort. I think your proposed changes will enable brownfields to be revitalized while taking care of environmental issues, too.

Response:

The Environmental Protection Agency thanks the commenter for the stated support for the proposed rule.

Commenter Organization Name: Cheeks, J. Richard

Comment Number: 0083

Excerpt Number: 2

Excerpt Text:

Second, I live and work in communities that have environmentally impacted sites. The broader scope of the environmental inquiry provides users (our clients) and the public with the confidence that AAI studies will be protective of human health and the environment, and promote productive use of properties consistent with the intent of the Small Business Liability Relief and Brownfields Revitalization Act (the Act). In other words, it appears that the proposed Rule balances the concerns of the many parties

involved in property transactions without compromising the environment now or in the future.

Response:

The Environmental Protection Agency thanks the commenter for the stated support for the proposed rule.

Commenter Organization Name: Simon, Richard M

Comment Number: 0089

Excerpt Number: 1

Excerpt Text:

Your proposed All Appropriate Inquiry (AAI) rule seems to accomplish what America needs: Revitalizing brownfields while taking care of environmental issues, too.

Response:

The Environmental Protection Agency thanks the commenter for the stated support for the proposed rule.

Commenter Organization Name: Less, James

Comment Number: 0290

Excerpt Number: 4

Other Sections: NEW - 1.1.1.2 - Support of the performance standard

Excerpt Text:

The proposed rule also is vastly superior to what is currently performed for property transactions because it: (1) uses a performance-based approach instead of a prescriptive approach, and (2) broadens the scope of the environmental inquiry on those sites where it is beneficial or needed. The rule's performance-based approach recognizes that AAI studies must be designed for the specific circumstances posed by a property and its past uses. This approach also makes the rule flexible so that it can be applied to any type of property. The broader scope of the environmental inquiry provides users (our clients) and the public with the confidence that AAI studies will be protective of human health and the environment and promote productive use of properties subject to the Brownfields Law. Thus, it appears that the proposed rule balances the concerns of the many parties involved in property transactions without compromising the environment now or in the future.

Response:

The Environmental Protection Agency thanks the commenter for the stated support for the proposed rule.

EPA notes that the final rule includes a few revisions from the proposed rule, to address concerns raised by other public commenters. Please see section III of the preamble to the final rule for a summary of these revisions.

Please see response to comment number 0070, excerpt 2.

Commenter Organization Name: Schultz, Michael

Comment Number: 0331

Excerpt Number: 4

Other Sections: NEW - 1.1.1.2 - Support of the performance standard

Excerpt Text:

The proposed rule is also vastly superior to what is currently performed for property transactions for two reasons: 1. A performance-based approach instead of a prescriptive approach is employed, which recognizes that AAI studies must be designed for the specific circumstances posed by a property and its past uses. This approach also makes the rule flexible so that it can be applied to any property type. 2. It broadens the scope of the environmental inquiry on those sites where it is beneficial or needed. The broader scope of the environmental inquiry provides users (our clients) and the public with the confidence that AAI studies will protect human health and the environment and promote productive use of properties subject to the Brownfields Law. The proposed rule appears to balance the concerns of many parties involved in property transactions without compromising the environment now or in the future.

Response:

The Environmental Protection Agency thanks the commenter for the stated support for the proposed rule.

EPA notes that the final rule includes a few revisions from the proposed rule, to address concerns raised by other public commenters. Please see section III of the preamble to the final rule for a summary of these revisions.

Please see response to comment number 0070, excerpt 2.

Commenter Organization Name: Lourie Consultants

Comment Number: 0353

Excerpt Number: 5

Excerpt Text:

-Other objections falsely claim the proposed EP definition, if promulgated, will lead to substantially increased costs, business failures, and/or some other form of business disruption, e.g., the rule will put small firms out of business or the cost of complying with the AAI rule will be too great. The composition of the AAI rulemaking committee included parties that represented all types and sizes of firms over a large geographic area that are involved with real estate transactions. As such, great efforts were made to accommodate many business-related concerns, while still holding paramount the need to protect the public and environment.

The proposed EP definition probably received the most discussion of any one issue during the rulemaking process. The proposed EP definition, like the rest of the proposed

rule, contains compromises.

Response:

EPA thanks the commenter for the stated support of the proposed rule. As the commenter states and as the Agency pointed out in the preamble to the proposed rule, the proposed definition of environmental professional represented a balance of interests held by EPA and the other members of the Negotiated Rulemaking Committee. EPA notes that the final rule includes revisions to the proposed definition of environmental professional to reflect issues raised by other public commenters. Please see section III of the preamble to the final rule for a summary of these changes.

Commenter Organization Name: Lourie Consultants

Comment Number: 0353

Excerpt Number: 6

Other Sections: NEW - 1.1.1.2 - Support of the performance standard

Excerpt Text:

I am convinced that the proposed AAI rule is vastly superior to what is currently performed for property transactions because it: (1) uses a performance-based approach instead of a prescriptive approach, and (2) broadens the scope of the environmental inquiry on those sites where it is beneficial or needed. The broader scope of the environmental inquiry provides users and the public with the confidence that AAI studies will be protective of human health and the environment and promote productive use of properties subject to the Brownfields Law. Thus, it appears that the proposed rule balances the concerns of the many parties involved in property transactions without compromising the environment now or in the future.

Response:

The Environmental Protection Agency thanks the commenter for the stated support for the proposed rule.

EPA notes that the final rule includes a few revisions from the proposed rule, to address concerns raised by other public commenters. Please see section III of the preamble to the final rule for a summary of these revisions.

Please see response to comment number 0070, excerpt 2.

Commenter Organization Name: Smith, Michael

Comment Number: 0360

Excerpt Number: 1

Excerpt Text:

I appreciate all the hard work provided by the committee and EPA staff in developing a workable All Appropriate Inquiry (AAI) rule that will allow professional judgment while requiring the professional has the experience to make the judgment call. Cleaning up brownfields is vitally important to the United States. Doing so will revitalize decayed,

often inner-city areas, bringing jobs and opportunities there, which will help reduce the need for more roads, more public transit, and cars. The social consequences can be tremendous. So can the economic impact and the valuable dampening effect brownfields revitalization can have on urban sprawl. As valuable as all these objectives may be, however, achieving them at the expense of the environment would be unacceptable. Your proposed All Appropriate Inquiry rule seems to accomplish what America needs: Revitalizing brownfields while taking care of environmental issues, too.

Response:

The Environmental Protection Agency thanks the commenter for the stated support for the proposed rule.

EPA notes that the final rule includes a few revisions from the proposed rule, to address concerns raised by other public commenters. Please see section III of the preamble to the final rule for a summary of these revisions.

Please see response to comment number 0070, excerpt 2.

Commenter Organization Name: Denton, Robert

Comment Number: 0381

Excerpt Number: 4

Other Sections: NEW - 1.1.1.2 - Support of the performance standard

Excerpt Text:

The rule's performance-based approach recognizes that AAI studies must be designed for the specific circumstances posed by a property and its past uses. This approach also makes the rule flexible so that it can be applied to any type of property with sufficient specificity to focus on the relevant environmental conditions that may exist at that property. The broader scope of the environmental inquiry provides users (our clients) and the public with the confidence that AAI studies will be protective of human health and the environment and promote productive use of properties subject to the Brownfields Law. Thus, it appears that the proposed rule balances the concerns of the many parties involved in property transactions without compromising the environment now or in the future.

Response:

The Environmental Protection Agency thanks the commenter for the stated support for the proposed rule.

EPA notes that the final rule includes a few revisions from the proposed rule, to address concerns raised by other public commenters. Please see section III of the preamble to the final rule for a summary of these revisions.

Please see response to comment number 0070, excerpt 2.

Commenter Organization Name: Dohms, Peter

Comment Number: 0384

Excerpt Number: 4

Other Sections: NEW - 1.1.1.2 - Support of the performance standard

Excerpt Text:

The proposed rule also is vastly superior to what is currently performed for property transactions because it: (1) uses a performance-based approach instead of a prescriptive approach, and (2) broadens the scope of the environmental inquiry on those sites where it is beneficial or needed. The rule's performance-based approach recognizes that AAI studies must be designed for the specific circumstances posed by a property and its past uses. This approach also makes the rule flexible so that it can be applied to any type of property. The broader scope of the environmental inquiry provides users (our clients) and the public with the confidence that AAI studies will be protective of human health and the environment and promote productive use of properties subject to the Brownfields Law. Thus, it appears that the proposed rule balances the concerns of the many parties involved in property transactions without compromising the environment now or in the future.

Response:

The Environmental Protection Agency thanks the commenter for the stated support for the proposed rule.

EPA notes that the final rule includes a few revisions from the proposed rule, to address concerns raised by other public commenters. Please see section III of the preamble to the final rule for a summary of these revisions.

Please see response to comment number 0070, excerpt 2.

Commenter Organization Name: Heywood, Johanna

Comment Number: 0387

Excerpt Number: 4

Other Sections: NEW - 1.1.1.2 - Support of the performance standard

Excerpt Text:

The proposed rule also is vastly superior to what is currently performed for property transactions because it: (1) uses a performance-based approach instead of a prescriptive approach, and (2) broadens the scope of the environmental inquiry on those sites where it is beneficial or needed. The rule's performance-based approach recognizes that AAI studies must be designed for the specific circumstances posed by a property and its past uses. This approach also makes the rule flexible so that it can be applied to any type of property. The broader scope of the environmental inquiry provides users (our clients) and the public with the confidence that AAI studies will be protective of human health and the environment and promote productive use of properties subject to the Brownfields Law. Thus, it appears that the proposed rule balances the concerns of the many parties involved in property transactions without compromising the environment now or in the

future.

Response:

The Environmental Protection Agency thanks the commenter for the stated support for the proposed rule.

EPA notes that the final rule includes a few revisions from the proposed rule, to address concerns raised by other public commenters. Please see section III of the preamble to the final rule for a summary of these revisions.

Please see response to comment number 0070, excerpt 2.

1.1.1.5 The Cost Impacts of the Proposed Rule Will Not Be Significant

Commenter Organization Name: Vellone, Daniel A

Comment Number: 0048

Excerpt Number: 2

Excerpt Text:

The proposed rule builds upon, and significantly improves, the existing environmental inquiry process for commercial property transactions. I believe this to be a wise and important approach for many reasons. Because the general concept will be familiar to the service providers ("environmental professionals") and the users, the transition to the new rule should be relatively straightforward and result in a minimum of disruption to the marketplace. Furthermore, while the economic cost of conducting an inquiry according to the proposed AAI rule may be slightly more expensive than the current process, the cost impacts should be negligible in comparison to the resulting benefits.

Response:

The Environmental Protection Agency thanks the commenter for the stated support for the proposed rule. EPA agrees that the cost of complying with the final rule will not be significantly different from the cost of complying with the ASTM E1527-2000 standard.

Commenter Organization Name: Worcester, Alfred P

Comment Number: 0065

Excerpt Number: 1

Other Sections: NEW - 1.1.1.3 - The proposed rule will improve quality of ESAs

Excerpt Text:

I support the proposed rule for many reasons, some of which are expressed here.

The proposed rule builds on and significantly improves the existing environmental inquiry process for property transactions. This is a wise and important approach for many reasons. Because the general concept will be familiar to the service providers ("environmental professionals") and the users, the transition to the new rule should be relatively straightforward and result in a minimum of disruption to the marketplace. Also, while the cost of conducting an inquiry according to the proposed AAI rule will likely be a little more than the cost associated with the current process, the cost impacts should be minor and the resulting benefits will be significant.

Response:

The Environmental Protection Agency thanks the commenter for the stated support for the proposed rule. EPA agrees that the cost of complying with the final rule will not be significantly different from the cost of complying with the ASTM E1527-2000 standard.

Commenter Organization Name: Freitag, George A

Comment Number: 0072

Excerpt Number: 1

Excerpt Text:

I support the proposed rule for many reasons, some of which are expressed here. The proposed rule builds on and significantly improves the existing environmental inquiry process for property transactions. This is a wise and important approach for many reasons. Because the general concept will be familiar to the service providers ('environmental professionals') and the users, the transition to the new rule should be relatively straightforward and result in a minimum of disruption to the marketplace. Also, while the cost of conducting an inquiry according to the proposed AAI rule will likely be a little more than the cost associated with the current process, the cost impacts should be minor and the resulting benefits will be significant.

Response:

The Environmental Protection Agency thanks the commenter for the stated support for the proposed rule. EPA agrees that the cost of complying with the final rule will not be significantly different from the cost of complying with the ASTM E1527-2000 standard.

Commenter Organization Name: Less, James

Comment Number: 0290

Excerpt Number: 1

Excerpt Text:

The proposed rule builds on and significantly improves the existing environmental inquiry process for property transactions. This is a wise and important approach for many reasons. Because the general concept will be familiar to the service providers ("environmental professionals") and the users, the transition to the new rule should be relatively straightforward and result in a minimum of disruption to the marketplace.

Response:

The Environmental Protection Agency thanks the commenter for the stated support for the proposed rule. EPA agrees that the cost of complying with the final rule will not be significantly different from the cost of complying with the ASTM E1527-2000 standard, resulting in minimum disruption of the marketplace.

Commenter Organization Name: Less, James

Comment Number: 0290

Excerpt Number: 2

Excerpt Text:

Also, while the cost of conducting an inquiry according to the proposed AAI rule will likely be a little more than the cost associated with the current process, the cost impacts should be minor and the resulting benefits will be significant.

Response:

The Environmental Protection Agency thanks the commenter for the stated support for the proposed rule. EPA agrees that the cost of complying with the final rule will not be significantly different from the cost of complying with the ASTM E1527-2000 standard.

Commenter Organization Name: Griebel, Russell

Comment Number: 0316

Excerpt Number: 1

Other Sections: NEW - 1.1.1.3 - The proposed rule will improve quality of ESAs

Excerpt Text:

I support the proposed rule for many reasons, some of which are expressed here. The proposed rule builds on and significantly improves the existing environmental inquiry process for property transactions. This is a wise and important approach for many reasons. Because the general concept will be familiar to the service providers (environmental professionals) and the users, the transition to the new rule should be relatively straightforward and result in a minimum of disruption to the marketplace. Also, while the cost of conducting an inquiry according to the proposed AAI rule will likely be a little more than the cost associated with the current process, the cost impacts should be minor and the resulting benefits will be significant.

Response:

The Environmental Protection Agency thanks the commenter for the stated support for the proposed rule. EPA agrees that the cost of complying with the final rule will not be significantly different from the cost of complying with the ASTM E1527-2000 standard.

Commenter Organization Name: Schultz, Michael

Comment Number: 0331

Excerpt Number: 1

Excerpt Text:

The proposed rule builds on and significantly improves the existing environmental inquiry process for property transactions. This is a wise and important approach for many reasons. Because the general concept will be familiar to the service providers ("environmental professionals") and the users, the transition to the new rule should be relatively straightforward and result in minimum disruptions to the marketplace.

Response:

The Environmental Protection Agency thanks the commenter for the stated support for the proposed rule. EPA agrees that the cost of complying with the final rule will not be significantly different from the cost of complying with the ASTM E1527-2000 standard, resulting in minimum disruptions to the marketplace.

Commenter Organization Name: Schultz, Michael

Comment Number: 0331

Excerpt Number: 2

Excerpt Text:

Although the cost of conducting an inquiry according to the proposed AAI rule will likely be slightly more than the cost associated with the current process, the cost impacts should be minor and the resulting benefits will be significant.

Response:

The Environmental Protection Agency thanks the commenter for the stated support for the proposed rule. EPA agrees that the cost of complying with the final rule will not be significantly different from the cost of complying with the ASTM E1527-2000 standard.

Commenter Organization Name: Denton, Robert

Comment Number: 0381

Excerpt Number: 1

Excerpt Text:

-The proposed rule builds on and significantly improves the existing environmental inquiry process for property transactions. This is a wise and important approach for many reasons. Because the general concept will be familiar to the service providers ("environmental professionals") and the users, the transition to the new rule should be relatively straightforward and result in a minimum of disruption to the marketplace.

Response:

The Environmental Protection Agency thanks the commenter for the stated support for the proposed rule. EPA agrees that the cost of complying with the final rule will not be significantly different from the cost of complying with the ASTM E1527-2000 standard, resulting in minimum disruptions to the marketplace.

Commenter Organization Name: Denton, Robert

Comment Number: 0381

Excerpt Number: 2

Excerpt Text:

Also, while the cost of conducting an inquiry according to the proposed AAI rule will likely be a little more than the cost associated with the current process, the cost impacts should be minor and the resulting benefits will be significant.

Response:

The Environmental Protection Agency thanks the commenter for the stated support for the proposed rule. EPA agrees that the cost of complying with the final rule will not be significantly different from the cost of complying with the ASTM E1527-2000 standard.

Commenter Organization Name: Dohms, Peter

Comment Number: 0384

Excerpt Number: 1

Excerpt Text:

The proposed rule builds on and significantly improves the existing environmental inquiry process for property transactions. This is a wise and important approach for many reasons. Because the general concept of AAI will be familiar to the service providers ("environmental professionals") and the users, the transition to the new rule should be relatively straightforward and result in a minimum of disruption to the marketplace.

Response:

The Environmental Protection Agency thanks the commenter for the stated support for the proposed rule. EPA agrees that the cost of complying with the final rule will not be significantly different from the cost of complying with the ASTM E1527-2000 standard, resulting in minimum disruption to the marketplace.

Commenter Organization Name: Dohms, Peter

Comment Number: 0384

Excerpt Number: 2

Excerpt Text:

Also, while the cost of conducting an inquiry according to the proposed AAI rule will likely be a little more than the cost associated with the current process, the cost impacts should be minor and the resulting benefits will be significant.

Response:

The Environmental Protection Agency thanks the commenter for the stated support for the proposed rule. EPA agrees that the cost of complying with the final rule will not be significantly different from the cost of complying with the ASTM E1527-2000 standard.

Commenter Organization Name: Heywood, Johanna

Comment Number: 0387

Excerpt Number: 1

Excerpt Text:

The proposed rule builds on and significantly improves the existing environmental inquiry process for property transactions. This is a wise and important approach for many reasons. Because the general concept will be familiar to the service providers ("environmental professionals") and the users, the transition to the new rule should be relatively straightforward and result in a minimum of disruption to the marketplace.

Response:

The Environmental Protection Agency thanks the commenter for the stated support for the proposed rule. EPA agrees that the cost of complying with the final rule will not be significantly different from the cost of complying with the ASTM E1527-2000 standard, resulting in a minimum disruption to the marketplace.

Commenter Organization Name: Heywood, Johanna

Comment Number: 0387

Excerpt Number: 2

Excerpt Text:

Also, while the cost of conducting an inquiry according to the proposed AAI rule will likely be a little more than the cost associated with the current process, the cost impacts should be minor and the resulting benefits will be significant.

Response:

The Environmental Protection Agency thanks the commenter for the stated support for the proposed rule. EPA agrees that the cost of complying with the final rule will not be significantly different from the cost of complying with the ASTM E1527-2000 standard.

Commenter Organization Name: Templeton, Sharon

Comment Number: 0407

Excerpt Number: 1

Other Sections: NEW - 1.1.1.3 - The proposed rule will improve quality of ESAs

Excerpt Text:

The proposed rule builds on and significantly improves the existing environmental inquiry process for property transactions. While the cost of conducting an inquiry according to the proposed AAI rule will likely be a little more than the cost associated with the current process, the cost impacts should be minor and the resulting benefits will be significant.

Response:

The Environmental Protection Agency thanks the commenter for the stated support for the proposed rule. EPA agrees that the cost of complying with the final rule will not be significantly different from the cost of complying with the ASTM E1527-2000 standard.

1.1.2 General Opposition to the Proposed Rule

Commenter Organization Name: Hullinger, Jeffrey P

Comment Number: 0057

Excerpt Number: 1

Excerpt Text:

I don't think there needs to be such a rule. In the past, ASTM Standard 1597 has served as the de facto standard by which the real estate and environmental communities evaluated whether "adequate environmental' due diligence has been exercised. The objective has been to establish the "innocent landowner defense" under CERCLA. And although ASFE has routinely objected to the ASTM standard (it wishes to elevate the level of effort, qualifications criteria, and consequently price for a typical Phase I assessment), I believe it has generally worked well in defining overall level of environmental risk posed by sites.

What does the new proposed AAI rule really do? It removes the standard from being a guide to proper conduct of an ESA to being a promulgated regulation. Based upon nearly 30 years of environmental engineering, my experience with promulgated regulations is that they are most commonly used by the agencies as bludgeons to punish the "guilty," rather than as constructive tools to support redevelopment. And brown field redevelopment needs to focus far more on providing carrots, far less on wielding sticks. I fear that future developments on brownfields will be thrown into turmoil if and when EPA decides to disqualify a property from future protections in the event the environmental professional has deviated in minor, meaningless ways from this regulation.

In closing, I will say that if there is truly a need for a promulgated regulation on how to conduct All Appropriate Inquiry, the proposed standard is a good one. But there really is no such need, and for that reason I oppose its promulgation.

Response:

CERCLA §§ 101(35)(B)(ii) and (iii), contain congressional direction requiring EPA to promulgate federal standards and practices for the conduct of all appropriate inquiries and also establishes the criteria EPA must include in the final rule. The ASTM E1527 standard was established by Congress as an interim standard, to be replaced by EPA's duly implemented rule. There was no EPA discretion exercised as to whether or not to provide this regulation, rather EPA is following the command of Congress.

The intent of the final rule is to establish clear standards for conducting all appropriate inquiries and thus allow for more certainty with regard to what a prospective property owner must do, prior to purchasing a property, to obtain protection from liability for releases and threatened releases of hazardous substances under CERCLA. The final rule (as did the proposed rule) encourages environmental professionals to use discretion and professional judgment in determining the best sources of information and the best manner in which to obtain information, given the objectives of the regulation and the specific characteristics of the property being assessed. EPA anticipates that this flexible approach

will encourage the efficient use of resources while protecting human health and the environment.

With regard to the use of the ASTM E1527-2000 standard, prior to the development of the proposed rule, EPA determined that the ASTM E1527-2000 standard was inconsistent with applicable law. Since publication of the proposed rule, ASTM International has updated its E1527 Phase I Environmental Site Assessment Process to address the inconsistencies. EPA has determined that the updated standard is compliant with the statute criteria and consistent with the final rule. Therefore, in the final rule, EPA is referencing the standards and practices developed by ASTM International and known as Standard E1527-05 and entitled “Standard Practice for Environmental Site Assessments: Phase I Environmental Site Assessment Process.” Persons conducting all appropriate inquiries may use the procedures included in the ASTM E1527-05 standard to comply with the final rule.

Commenter Organization Name: City of Jacksonville, Florida

Comment Number: 0095

Excerpt Number: 10

Excerpt Text:

The proposed rule could be the death knell for the Brownfields Program. It is overly costly and, with so many things to review, at the end of the day, the developer could still be denied protection from liability because he overlooked some small detail. This regulation does little to encourage Brownfield redevelopment, and provides little comfort for people who want to renew underused property.

Response:

In addressing the cost issue, we note that the Agency’s cost analysis indicates that the cost of complying with the final rule will not be significantly different from the cost of complying with the ASTM E1527-2000. The Agency encourages the commenter to refer to the Economic Impacts Analysis provided in the docket for the proposed rule.

The Agency disagrees with the commenter’s assertion that the all appropriate inquiries requirements published as the proposed rule would discourage redevelopment of brownfields and increase developer liability. As explained in the preamble to the proposed rule, the standards and practices proposed were not significantly different from the generally accepted good commercial and customary standards and practices in use prior to publication of the final rule. In fact, EPA believes that publication of the final rule setting federal standards and practices for the conduct of all appropriate inquiries provides a level of certainty regarding the procedures necessary for the conduct of all appropriate inquiries prior to the purchase of commercial properties, including brownfields, and therefore may have the effect of encouraging the redevelopment of contaminated properties. The Agency also points out that the final rule setting federal standards and practices for the conduct of all appropriate inquiries does not alter the liability provisions established by Congress in CERCLA (as amended by the Small Business Liability Relief and Brownfields Revitalization Act). Today’s final rule merely

establishes standards for conducting all appropriate inquiries, which is only one of the criteria established in CERCLA for obtaining protection from liability.

Commenter Organization Name: Young, Richard

Comment Number: 0243

Excerpt Number: 3

Excerpt Text:

NREP's core argument is that the any environmental regulation in their current formats that isolates other environmental professions unfairly empowers single two professions. This unfair empowerment will lead to environmental injustice, price controls, and degraded economic revival. These issues are the exact things that the United States Environmental Protection Agency (EPA) and various State environmental agencies are chartered to prevent and protect.

Response:

The final rule, as did the proposed rule, allows for individuals who are not licensed professional engineers or licensed professional geologists to qualify as environmental professionals. The final rule does not unfairly empower any particular categories of professionals. Rather, the final rule sets some minimum qualifications, including education and experience requirements, for the individual who is responsible for supervising the all appropriate inquiries activities and signing the written report of findings. EPA believes that by establishing these minimum qualifications for the individual overseeing the all appropriate inquiries activities the final rule establishes a necessary standard for ensuring that high quality investigations are performed and that prospective landowners are aware of the potential environmental conditions of a property prior to acquiring a property. The availability of a quality pre-purchase investigation may provide a prospective landowner with the information necessary to comply with all of the statutory criteria or continuing obligations required to obtain protection from CERCLA liability.

Commenter Organization Name: PIRG

Comment Number: 0258

Excerpt Number: 1

Excerpt Text:

While representatives from U.S. PIRG played an integral role during the rulemaking process, we believe it is important to emphasize that U.S. PIRG dissented from the draft document and withdrew entirely from the rulemaking process. We feel that AAI requirements that are weaker than the 1997 American Society for Testing and Materials (ASTM) standards are unacceptable, as they pose a greater risk to human health and environment quality.

Furthermore, U.S. PIRG is deeply troubled by EPA's unwillingness to publish our reasons for dissension in the appendices of the final AAI draft language. In a letter dated December 19, 2003 U.S. PIRG outlined its reasons for dissent and withdrawal from the rule making process, yet EPA continued to portray U.S. PIRG as a supporter of the final draft document. In a later correspondence, dated February, 17 2004, addressed to

Assistant Administrator Marianne Horinko, U.S. PIRG's Executive Director, Gene Karpinski once again emphasized that our organization does not support the draft regulations.

The public has the right to know if a key stakeholder in the rulemaking process has severe and justified misgivings concerning the finality of the overall group's decision. Tactics designed to mislead or obfuscate a member's final opinion on the draft document, serves no further purpose other than to prevent the public's right to unabridged and unfettered access to all sides of story. Allowing U.S. PIRG to publish its reasons for dissension in the appendices of the AAI draft document would have met the degree of transparency expected in EPA's rulemaking process. We sincerely hope that EPA strives for greater openness and candor in future instances of rulemaking.

Response:

EPA acknowledges that US PIRG withdrew from the negotiated rulemaking process after the process was over. US PIRG initially negotiated with the full committee in good faith and agreed to the consensus regulatory language. The letters from US PIRG and Mr. Karpinski were sent to the Agency after all negotiations were finished and agreed to by all members of the negotiated rulemaking committee, including US PIRG.

EPA notes that in the preamble to the proposed rule, EPA acknowledged that US PIRG had changed its position with regard to the agreed upon consensus. In addition, EPA noted that US PIRG's letters to EPA were available in the rulemaking docket. EPA did nothing to "mislead or obfuscate" any member of the negotiated rulemaking committee's position. EPA disclosed US PIRG's change in position and provided public access to the letters that US PIRG provided to EPA.

Commenter Organization Name: Rose and Westra

Comment Number: 0320

Excerpt Number: 22

Other Sections: NEW - 6.1 - EPA should adopt ASTM standard rather than develop separate regulations

Excerpt Text:

In summary, R&W believes that the NRA/FACA process has created redundant, expensive, and unworkable Proposed Rules. The EIA ignores increased requirements of the Proposed Rules and their associated costs. Therefore, R&W requests that the EPA withdraw the Proposed Rules and continue its historical cooperation with ASTM to tweak the E 1527-00 Standard Practice, if necessary, to comply with the legislative requirements.

Response:

Please see response to comment number 0057, excerpt 1.

Commenter Organization Name: Anonymous

Comment Number: 0322

Excerpt Number: 1

Excerpt Text:

I am opposed to the proposed rule, as it is currently written. I think that those who have a four year degree with five years of relevant experience should qualify as an environmental professional. Also, I think that there should be a provision for those currently working in the field who may be near the ten year experience requirement to become qualified. The proposed rule states that those who have ten years of experience on the effective date of the rule would be qualified. This does not address those who have several years of experience who would reach the ten year benchmark in the future.

Response:

Based upon input provided in public comments, EPA amended the proposed definition of an environmental professional to allow for individuals with a bachelor's degree in science or engineering and five years of full time relevant experience to qualify as an environmental professional. In addition, the definition of environmental professional in the final rule does not include the proposed grandfather clause, but allows for individuals with 10 or more years of full time relevant experience to qualify as an environmental professional, even if they do not have a college degree.

Commenter Organization Name: Greenlining Institute

Comment Number: 0354

Excerpt Number: 3

Excerpt Text:

Because we present a perspective that was not adequately represented on the rulemaking committee, and our members will be harmed if the rule goes into effect as proposed, we appreciate the opportunity to present these comments and thank you in advance for considering our views in reaching your ultimate decision [Footnote: Some of our members will be prevented from carrying out development projects, and will incur the increased costs of the rule and exposure to liability where development goes forward. Community members, who are members of Greenlining, will be harmed by the chilling effect on development and concomitant lack of services and continued blight in their neighborhoods].

And, to end where we began, the point of the new rule was to provide certain and clear liability relief to prospective developers of idle or abandoned property. The rule does exactly the opposite, exposing would-be developers to virtually open-ended liability. It simply will not be worth the risk to develop brownfields in our communities. Developers will look to the suburban edge, where there has been no industrial activity and there is no risk of contamination, exacerbating sprawl and hobbling investment in communities that need it most. We think EPA should consider the environmental impacts of increased sprawl that will be caused by the new rule.

Response:

EPA appreciates your concern regarding the representation of differing perspectives on the Negotiated Rulemaking Committee. In 1982, the Administrative Conference of the United States established criteria and recommendations for using the negotiated rulemaking process that in 1990 was established in the Negotiated Rulemaking Act (Recommendation 82-4, 1 CFR §305.82-4 and Recommendation 85-5, 1 CFR §305.85-5). Among other things, the Administrative Conference recommended that reasonable efforts be made to secure a balanced group of interests on a negotiated rulemaking committee. To this end EPA went to substantial lengths, including hiring an independent convener to identify interested stakeholders and who interviewed over 60 individuals representing potential stakeholders, to ensure that differing stakeholders were afforded an opportunity to participate meaningfully. The Negotiated Rulemaking Committee for the all appropriate inquiries rule was assembled to effectuate the diverse perspectives of stakeholders, or those parties having an interest in or who potentially would be affected by the rulemaking. After EPA went to considerable lengths to identify the spectrum of stakeholders, the Agency published a “Notice of Intent to Negotiate” in the Federal Register on March 6, 2003 (68 FR 10675) which identified the Agency’s preliminary list of interests and requested public comment on that list of potential interests or stakeholder groups to include in the negotiated rulemaking process. Following publication of this notice, EPA held a public meeting to discuss its intent to negotiate the proposed rule and to provide interested parties with another opportunity to comment on the Agency’s preliminary list of committee members. Following the public comment period, and based upon input received in the public comments, EPA added additional stakeholder members to its additional list of potential members and initiated the negotiated rulemaking process.

Once the Negotiated Rulemaking Committee on All Appropriate Inquiries was established, the Committee conducted all of its business publicly and affording members of the general public ample opportunity to participate in that regard. EPA published notices announcing the date of each Committee meeting in the Federal Register and accepted written public comment on the Committee’s negotiations throughout the Committee’s negotiations. In addition, the Committee reserved time during every day of the Committee’s negotiations for members of the general public to address the Committee. The Agency made every effort to be inclusive in this transparent negotiated rulemaking process. For further information concerning this process please see the preamble to the proposed All Appropriate Inquiries rule published in the Federal Register (40 CFR Part 312).

The Agency disagrees with the commenter’s assertion that the all appropriate inquiries requirements published as the proposed rule would discourage redevelopment of brownfields and increase developer liability. As explained in the preamble to the proposed rule, the standards and practices proposed were not significantly different from the generally accepted good commercial and customary standards and practices in use prior to publication on the final rule. In fact, EPA believes that publication of the final rule setting federal standards and practices for the conduct of all appropriate inquiries provides a level of certainty regarding the procedures necessary for the conduct of all appropriate inquiries prior to the purchase of commercial properties, including brownfields, and therefore may have the effect of encouraging the redevelopment of

contaminated properties. The Agency also points out that the final rule setting federal standards and practices for the conduct of all appropriate inquiries does not alter the liability provisions established by Congress in CERCLA (as amended by the Small Business Liability Relief and Brownfields Revitalization Act). Today's final rule merely establishes standards for conducting all appropriate inquiries, which is only one criterion established in CERCLA for obtaining protection from liability.

Commenter Organization Name: EAA

Comment Number: 0366

Excerpt Number: 1

Excerpt Text:

After a diligent review of the proposed AAI standard at the recent Las Vegas annual meeting, it is the general and very strong consensus of the members that the proposed rule lacks sufficient fairness to the industry, lack of complete study of the user market, and consideration of legal and regulatory issues with regard to other industries.

Response:

It is EPA's position that every effort was taken to create a fair rule that both increases certainty for the purposes of spurring redevelopment and is protective of human health and the environment. The Agency went to great lengths to produce a rule that is comprehensive and well thought out. To this end, a negotiated rulemaking approach was undertaken and professionals in the industries affected were consulted and unanimously supported the proposed rule.

1.1.2.1 Opposition to the Performance Standard

Commenter Organization Name: City of Jacksonville, Florida

Comment Number: 0095

Excerpt Number: 1

Excerpt Text:

Fundamental difficulties with the proposed regulation are that EPA provides not "bright line test" for how much inquiry is appropriate. As a result there is no reasonable assurance that the inquirer will get any liability relief even though he has done what to a reasonable person would appear to be an exhaustive search. Also, the regulation relies on vague terms: after conducting "appropriate inquiries" a person seeking to be treated as a "bona fide prospective purchaser" must "exercise [] appropriate care...by taking reasonable steps" to prevent releases of and limit exposures to hazardous substances. By simply parroting the obscure language of the Brownfields Amendment, EPA does nothing to clarify for the public how, with confidence, it can comply and get the benefits Congress allows.

Response:

The final does provide a finite list of activities that must be conducted to meet the requirements for "all appropriate inquiries," or the pre-purchase due diligence that a prospective landowner must undertake to ensure compliance with the statutory criteria for all appropriate inquiries. However, the final rule is structured around a set of objectives and performances standards and does not provide a "bright line test" for how extensively the inquiries must be conducted because the extent of investigation that needs to be conducted at any given property may vary depending upon the past uses and ownerships of the property.

By establishing clear objectives and setting parameters to the investigation through a set of performance factors that include gathering information that is publicly available (or otherwise obtainable), obtainable from its source within reasonable time and cost constraints, and which can practicably be reviewed, the approach taken in the final rule provides reasonable goals and endpoints to the information collection requirements. The proposed objectives provide a discrete list of the types of information that must be collected as part of the all appropriate inquiries investigation. In addition, the performance factors set boundaries around the efforts that must be taken and the cost burdens that must be incurred to obtain the required information. The fact that the rule is framed within a primary objective, to "identify conditions indicative of releases and threatened releases of hazardous substances," actually reduces the open-ended nature of the investigation and establishes an overall goal for the inquiries.

The commenter may have misunderstood the statutory requirements that must be met to obtain a defense to CERCLA liability and may be incorrectly assuming that the completion of the all appropriate inquiries investigation is all that is required to obtain liability protection under CERCLA. The conduct of all appropriate inquiries is only one requirement for obtaining relief from CERCLA liability. Prospective landowners must

conduct all appropriate inquiries prior to acquiring a property to qualify for a defense to CERCLA liability as an innocent landowner, bona fide prospective purchaser or contiguous landowner. However, once a property is acquired, the property owner must comply with all of the other statutory criteria necessary to qualify for the liability protections. In particular, landowners must undertake “reasonable steps” to “stop any continuing releases.” Therefore, the final rule’s objective of identifying conditions indicative of releases and threatened releases of hazardous substances on, at, in, or to a property to links appropriately with the statutory criteria requiring the landowner to address such releases to qualify for the liability protections.

EPA notes that the regulations established today only address the all appropriate inquiries provisions of CERCLA Sections 101(35)(B)(i)(I) and 101(35)(B)(ii) and (iii). Today’s rule does not address the requirements of CERCLA Section 101(35)(B)(i)(II) for what constitutes “reasonable steps.”

Commenter Organization Name: Rose and Westra

Comment Number: 0320

Excerpt Number: 2

Excerpt Text:

The E 1527-0 process states specific performance requirements while allowing the Environmental Professional (EP) sufficient leeway to use professional judgement. The Proposed Rules set vague performance standards without providing sufficient guidance for the EP. This will create chaos in the Phase I ESA/AAI marketplace.

Response:

The final rule is very similar to the ASTM E1527-2000 Phase I Environmental Site Assessment Process. The final rule establishes clear objectives and sets parameters to the investigation through a set of performance factors that include gathering information that is publicly available (or otherwise obtainable), obtainable from its source within reasonable time and cost constraints, and which can practicably be reviewed, the approach taken in the final rule provides reasonable goals and endpoints to the information collection requirements. The proposed objectives provide a discrete list of the types of information that must be collected as part of the all appropriate inquiries investigation. In addition, the performance factors set boundaries around the efforts that must be taken and the cost burdens that must be incurred to obtain the required information. The final rule is framed within a primary objective, to “identify conditions indicative of releases and threatened releases of hazardous substances.” Given that the final rule is very similar to the ASTM E1527-2000 standard, EPA disagrees with the commenter’s assertion that the rule will create chaos in the market place.

With regard to the use of the ASTM E1527-2000 standard, prior to the development of the proposed rule, EPA determined that the ASTM E1527-2000 standard was inconsistent with applicable law. Since publication of the proposed rule, ASTM International has updated its E1527 Phase I Environmental Site Assessment Process to address the inconsistencies. EPA has determined that the updated standard is compliant with the

statute criteria and consistent with the final rule. Therefore, in the final rule, EPA is referencing the standards and practices developed by ASTM International and known as Standard E1527-05 and entitled “Standard Practice for Environmental Site Assessments: Phase I Environmental Site Assessment Process.” Persons conducting all appropriate inquiries may use the procedures included in the ASTM E1527-05 standard to comply with the final rule.

Commenter Organization Name: Congressmen Dingell, Boxer, et al

Comment Number: 0332

Excerpt Number: 7

Excerpt Text:

We are also concerned about the vague performance standards relied on in the rule that are no substitute for the specific criteria and benchmarks that were crafted in the statute to ensure clear and consistent requirements. Significant changes must be made for this rule to meet the minimum standards required in the Brownfields law.

Response:

Please see response to comment number 0095, excerpt 1.

Commenter Organization Name: FAA

Comment Number: 0334

Excerpt Number: 4

Excerpt Text:

EPA ASSURANCE OF APPROPRIATE AAI

1) The proposed AAI regulations require a report describing AAI conducted and requires the EP to sign the report. If EPA is going to require a tougher standard to demonstrate that AAI have been conducted, then FAA, as the purchaser of many properties, would like a greater degree of EPA concurrence that the investigations carried out were appropriate.

Response:

The Small Business Liability Relief and Brownfields Revitalization Act requires EPA to promulgate federal standards and practices for the conduct of all appropriate inquiries. The statute requires that the rule include an inquiry conducted by an environmental professional. EPA does not believe that requiring an environmental professional to sign the written report of the inquiries represents “a tougher standard,” than the current ASTM E1527 Phase I Environmental Site Assessment Process. Determining if a party has adequately carried out the inquiries is for a court to decide and is outside of EPA’s purview.

Commenter Organization Name: CBPA

Comment Number: 0344

Excerpt Number: 9

Excerpt Text:

The basic approach to current Phase I site assessment (ASTM E1 527) is that of a procedural checklist. A specified list of records must be reviewed, and specified inspections and interviews conducted. Once these procedures are completed, the prospective purchaser is protected from liability for hidden pollution not discovered at the time of purchase but that may later come to light. ASTM E1 527 requires review of a long list of sources, but there is also an end to the inquiry-you know when you are done and there is reasonable protection from courtroom second guessing so long as the checklist is followed and the results properly memorialized.

The proposed new rule, on the other hand, adopts open-ended, catch-all liability provisions. Under the new rule it will be difficult to know how much inquiry is adequate and it may be impossible to achieve liability protection for contamination that is not discovered during the pre-purchase Phase I, no matter how diligently the Phase I was conducted.

Response:

The proposed rule in no way alters the liability scheme established by Congress in the CERCLA legislation. EPA recognizes that complying with the final rule alone brings no liability relief. Only when actors undertake all appropriate inquiries before purchasing property AND comply with all of the additional continuing obligations Congress has set out will they be eligible for liability relief. It is with this knowledge that EPA has attempted to specify steps that, if followed, constitute all appropriate inquiries. However, it should be noted that compliance with the final rule does not provide liability relief unless the continuing obligations established by Congress in the Small Business Liability Relief and Brownfields Revitalization Act also are met. The Agency believes this view accurately reflects the intent of Congress. The commenter's assertion that "under the new rule it will be difficult to know how much inquiry is adequate and it may be impossible to achieve liability protection..." is inaccurate. Congress established within the legislation what constitutes protection from CERCLA liability. All appropriate inquiries is merely one criteria established by Congress for obtaining certain protections from liability.

See also the response to comment number 0095, excerpt 1.

Commenter Organization Name: Greenlining Institute

Comment Number: 0354

Excerpt Number: 5

Excerpt Text:

-A. EPA Improperly Rejected the Clear and Definite Industry Standard Checklist Approach of ASTM E1527 and Adopted a New "Performance Based" Approach with Vague and Broadly Worded Objectives and Performance Factors Inconsistent with Congressional Intent

The current industry standard for conducting AAI is ASTM E1527. ASTM E1527's basic

approach to site assessment is that of a procedural checklist. A specified list of records must be reviewed, and specified inspections and interviews conducted. Once these procedures are completed, the prospective purchaser is protected from liability for hidden pollution not discovered at the time of purchase but that may later come to light. ASTM E1527 requires review of a long list of sources, but there is also an end to the inquiry—you know when you are done. Although some judgment calls on the part of the environmental professional conducting the inquiry are inherent in the process, there is reasonable protection from courtroom second guessing so long as the checklist is followed and the results properly memorialized.

The committee has abandoned the checklist approach in favor of what it has described in public meetings as the "performance based" approach of the proposed rule. Although the words "performance based" have a ring of reasonableness about them, they cloak an attempt to saddle developers who wish to put brownfields back into productive use with unreasonable liability exposure. The performance based approach is embodied in the "objectives," "performance factors," and "data gaps," sections of the proposed rule. These sections are so broadly worded that they may reasonably be construed as requiring prospective purchasers to prove a negative: that there is no undisclosed contamination present on the subject site. At best, they are vague and leave the courtroom door wide open to second guessing should contamination not discovered by the AAI subsequently come to light p[Footnote: Negotiated rulemaking committee members were aware that the "checklist approach" represents industry standard and that they were abandoning it in favor of a new "performance based approach" that would require proving a negative, i.e., that there are no indications of contamination, or, as one committee member understood it, "leaving no rock unturned" until it is proved that "the property is indeed clean." In a series of memos documenting the committee's work, one participant noted the following: "Existing methodologies, such as ASTM Phase I, provide reliable checklists for collecting information on property ownership and use, the presence and release of hazardous substances, and past efforts to address such releases. But they aren't as helpful if information sources are incomplete or the goal is to show that the property is indeed 'clean'." Lenny Siegel, Center for Public Environmental Oversight, All Appropriate Inquiry Committee Update, July 1, 2003, available at <http://www.cpeo.org/lists/brownfields> ("Committee Update"). "[T]hose who emphasize the need to leave no rock unturned in the search for contamination are glad that the environmental professional conducting the inquiry will be required to keep looking until those answers are found." Committee Update, September 12, 2003.].

Proposed § 312.20(d) "Objectives" requires that purchasers "seek to identify" a list of conditions indicative of contamination. Standards and Practices for All Appropriate Inquiries, 69 Fed. Reg. 52542, 52577 (proposed August 26, 2004) (to be codified at 40 C.F.R. pt 312). Proposed § 312.20(e) "Performance factors" in turn requires that purchasers must seek to gather information that will meet the objectives set out in section d, and must "evaluate the thoroughness and reliability of the information" gathered. If there is "a lack of or inability to obtain information required," 65 Fed. Reg. at 52576, to meet the objectives then the environmental professional must "comment upon the significance of such data gaps with regard to the ability to identify conditions indicative

of releases or threatened releases of hazardous substances." Proposed § 312.20 (f), 69 Fed. Reg. at 52578. Further, if there are data gaps "such that the environmental professional cannot reach an opinion regarding the identification of conditions indicative of releases and threatened releases, such data gaps must be noted in the environmental professional's opinion." Proposed § 312.21, 65 Fed. Reg. at 52578.

Taken together, the practical result of these provisions is to give the environmental professional a Hobson's choice: he must either say that he has enough information to conclude that all conditions indicative of contamination have been identified (i.e., in the environmental professional's opinion a negative has been proven: there is no undiscovered indication of contamination) or must state that there are "data gaps" that prevent reaching a definitive conclusion. The committee intentionally left ambiguous the status of "data gap qualified" reports in order to reach final agreement [Footnote: Mr. Siegel's running commentary reveals that "This issue emerged as a potential dealbreaker when one environmental group participant indicated plans to dissent unless the rule included language disqualifying a party from liability relief if the environmental professional found that he/she had insufficient data to determine whether an environmental release might have occurred. At the last minute, this difference was overcome by the insertion, into the draft rule, of language saying (this might not be the final wording), 'If there are data gaps such that the environmental professional cannot reach an opinion regarding the identification of conditions indicative of releases and threatened releases, such data gaps must be noted in the report.'" Committee Update, November 14, 2003. The language cited by Mr. Siegel was incorporated verbatim into the proposed rule. However, it leaves unanswered the question of whether data gap qualified reports do or don't provide liability protection.]. EPA concluded that "data gap qualified" reports should provide definitive liability protection but bowed to the wishes of committee members and agreed to vague consensus language in order to reach unanimous agreement [Footnote: "EPA and several of the other committee members argued that the Inquiry still may be complete, even if there are major data gaps." Committee Update, November 14, 2003.]. It is one thing to strike "a balance of certainty for prospective purchasers, developers and others while ensuring protection of public health" by making balanced policy determinations and embodying them in clearly worded regulations. S. Rep. 102-2 at 4. It is quite another to adopt intentionally vague regulations that leave policy disputes unresolved and leave it to the parties to fight it out in court another day.

In the real world, although pre-purchase site assessments are an invaluable tool, no matter how thorough a phase one (or even phase two, for that matter) it is possible that sources of contamination on the subject property will remain undiscovered. Even if the site investigation identifies contamination, it may not identify all of it. It is common to discover additional materials not disclosed in the best site investigation reports once excavation for a construction project begins. Environmental professionals know this and are unlikely to go out on a liability limb by stating that their report has disclosed all indications of contamination. The result will be highly "data gap qualified" reports that make liability protection uncertain at best.

This is not what Congress intended. There is no indication that Congress intended a shift to a "performance based" approach. There is no indication that Congress intended to hold developers liable for finding all contamination that might be present. Indeed, such a requirement would defeat the entire purpose of the legislation. The negotiated rulemaking committee created these previously unknown catch-all liability provisions from whole cloth. We suggest that the "performance based" approach is unworkable in the context of Congressional directive to "clarify the obligations of any party who seeks to use the [innocent purchaser] defense," S. Rep. 102-2 at 13, and to "provide protection to persons who wish to purchase contaminated property." Id. at 11.

Response:

The language used by Congress in describing the action to be taken under this rule is "all appropriate inquiries." Because each property for which AAI is undertaken is unique, "appropriate" inquiries for one property may not be "appropriate" for another. This uniqueness requires differing approaches. Therefore, the final rule has been promulgated in a manner that allows the flexibility needed to engage in all appropriate inquiries for any property. The purpose behind establishing a performance standard for the conduct of all appropriate inquiries is to allow for a comprehensive assessment of available information about the potential environmental conditions at a property, while avoiding duplicative requirements. Sections 312.20(d) and (e) of the final rule set forth objectives for the all appropriate inquiries and performance factors for obtaining the information established within the objectives. As explained in the preamble to the proposed rule, the advantage of a performance-based approach over a checklist approach to conducting the inquiries is that multiple sources of information need not be consulted for the same information.

The final rule (as did the proposed rule) encourages environmental professionals to use discretion and professional judgment in determining the best sources of information and the best manner in which to obtain information, given the objectives of the regulations and the specific characteristics of the property being assessed. EPA anticipates that this flexible approach will prevent a waste of resources in the case of properties that may not require as rigorous of an investigation due to available information about a property or particular knowledge about a property that may not be available in the case of other properties, while at the same time maintaining adequate standards to ensure environmental protection in the case of all properties. Inherent in this approach is less specificity than otherwise could be developed. However, the types of information that must be collected as part of the all appropriate inquiries and as listed in §312.20(d) of the final rule, are essentially the same types of information included in the "checklist" referred to by the commenter. EPA believes that good faith compliance with the standards set forth in final rule will provide the same level of knowledge and information about a property as was previously available under the interim standard established by Congress.

Commenter Organization Name: NPCA

Comment Number: 0403

Excerpt Number: 2

Excerpt Text:

Fundamental difficulties with the Proposed Rule's AAI content and performance requirements exist. As outlined in more detail below, the content requirements are extremely burdensome and costly and the performance requirements are in some cases infeasible. Furthermore, even undertaken in good faith to the best of one's ability, fulfilling the AAI standards does not guarantee the supposed benefits of the rule. In short, there is no conclusive test to determine how much inquiry and post acquisition action is appropriate. Consequently, there is no reasonable assurance that the inquirer/purchaser will get any liability relief even after exercising what as drafted will be an exhaustive and costly analysis. Because the standards and practices for AAIs under the Proposed Rule will increase the cost and burden of Phase I ESAs, without providing an equitable guarantee that the purchaser will in fact get liability protection, the Proposed Rule actually discourages development of brownfield properties.

Response:

Please see responses to comment numbers 0344 (excerpt 9) and 0354 (excerpt 3).

Commenter Organization Name: NPCA

Comment Number: 0403

Excerpt Number: 10

Excerpt Text:

What are reasonable efforts? What about "No Further Action" determinations? As discussed below, the Proposed Rule's performance requirements also leave a potential purchaser with little to no clarification on how and when the liability protection proffered by the new standards will actually be afforded.

Response:

Please see response to comment number 0354 (excerpt 5).

Commenter Organization Name: NPCA

Comment Number: 0403

Excerpt Number: 11

Excerpt Text:

As stated above, even if the content requirements under the Proposed Rule's AAI standards are met, purchasers have continuing obligations, which can lead to the loss of liability protection. As drafted, a lack of information or an inability to obtain information, including the information outlined above, for identified and unidentified data gaps under the Proposed Rule, will threaten a potential owner's ability to claim liability protection under the new standard. CERCLA mandates post-acquisition obligations, including requirements to take reasonable steps to stop or prevent releases and threatened releases. Consequently, if a potential owner does not identify a release or threatened release, even though they fulfilled the requirements of AAIs, they will not be entitled to liability protection should that release or threatened release materialize after acquisition.

Similarly, if an existing institutional control was not identified during AAI, a landowner would not be exempt from complying with the control after acquisition and failure to do so would bar a claim for liability protection. In addition, because of the requirement to identify controls on and within one-half mile of the subject property, even if a control is identified, under the continuing performance requirements, what recourse does the subject property owner have in assuring that controls on other properties are in conformance? If an owner identifies a release or a potential release on an adjacent property, do they have the continuing obligation to stop or prevent it from coming on to the subject property? It would appear then, that despite best efforts and compliance with, as drafted, extremely burdensome and costly AAI standards, the primary goal of this effort - liability protection under CERCLA - would still not be realized in many cases. Thus, the protection envisioned by the Act and the incentive for redevelopment of unused and abandoned property will not be realized.

Response:

The final rule does not include a requirement to search for institutional controls within ½ mile from the subject property. However, the requirement to search for institutional controls affecting the property in question is retained. Further, the final rule establishes standards for one requirement established under CERCLA for obtaining protection from CERCLA liability. The need for a property owner to comply with the continuing obligations set forth in CERCLA do not result from a discretionary decision by the EPA, rather they exist because of Congressional mandate. The continuing obligations do not include stopping releases from adjoining or nearby properties. However, if such releases are discovered, it may be prudent to report them.

Commenter Organization Name: CCLR

Comment Number: 0415

Excerpt Number: 1

Excerpt Text:

Our conclusion, and the conclusion of all we have consulted, is that the proposed rule takes a big step backwards in providing clarity and certainty for the brownfield redeveloper. The obligations of prospective purchasers seeking CERCLA liability protection are significantly less clear under the proposed rule. The proposed rule appears to make it much more difficult to determine what must be done in the conduct of a pre-purchaser inquiry in order to achieve liability protection. We also note that the cost of implementing the new rule will be significantly greater than the \$47 estimate provided by the Economic Impacts Analysis (EIA).

CCLR has carefully reviewed the familiar ASTM E1527-00 standard with an eye to the requirements of the Brownfields Amendments. It is our position that ASTM E1527-00 actually meets the criteria required by the Brownfield Amendments. While adopting the proposed "performance based" approach to site assessment would likely result in a reduction of brownfield conversion, we urge EPA to adopt the well understood and time proven checklist approach of ASTM E1527-00 as the standard for all appropriate inquiry, an approach that will meet the Congressional goal of simplification, clarity, and increased

brownfield reuse.

Response:

Please see Responses to comment numbers 0320 (excerpt 2) and 0354 (excerpt 5).

Commenter Organization Name: CCLR

Comment Number: 0415

Excerpt Number: 2

Excerpt Text:

The proposed rule abandons the generally accepted practice of ASTM E1527-00, and instead adopts an open-ended and expanded scope of inquiry that diminishes the certainty of liability protection.

ASTM E1527's basic approach to site assessment is that of a procedural checklist. A specified list of records must be reviewed, and specified inspections and interviews conducted. Once these procedures are completed, the prospective purchaser is protected from liability for hidden pollution not discovered at the time of purchase but that may later come to light. ASTM E1527 requires review of a long list of sources, but there is also a definite and readily identifiable end to the inquiry. Although some judgment calls on the part of the environmental professional conducting the inquiry are inherent in the process, there is reasonable protection from courtroom second guessing so long as the checklist is followed and the results properly memorialized.

In this proposed rule, the checklist approach has been eliminated and shifted to a "performance based" approach. The performance based approach is instituted by the "objectives," "performance factors," and "data gaps," sections of the proposed rule. These sections may be construed to require prospective purchasers to prove a negative: that there is no undisclosed contamination present on the subject site. It is our opinion that these requirements introduce a high level of ambiguity, and with this lack of clarity, leave brownfield redevelopers exposed to CERCLA litigation.

Response:

Please see response to comment number 0057, excerpt 1.

Commenter Organization Name: CCLR

Comment Number: 0415

Excerpt Number: 3

Excerpt Text:

The status of "data gap qualified" reports is ambiguous. Liability protection is not clearly articulated here.

No matter how thorough a phase I (or even phase II, for that matter) it is possible that sources of contamination on the subject property will remain undiscovered. Even if the site investigation identifies contamination, it may not identify all of it. Additional

contamination not disclosed in the best site investigation reports are often unearthed once excavation for a construction project begins. Environmental professionals know this and are unlikely to go out on a liability limb by stating that their report has disclosed all indications of contamination. The result will be highly "data gap qualified" reports. This would make liability protection uncertain at best, even where sampling and analysis is conducted.

This all represents a sweeping increase in the scope of work required by a phase I site investigation and without language that provides a guarantee, a commensurate decrease in the potential for liability protection. This is not the "balance of certainty for prospective purchasers, developers and others" intended by Congress. S. Rep. 107-2 at 4. This rule does not appear to reduce the likelihood of CERCLA liability risk. Congress did not intend to hold brownfield redevelopers liable for finding all contamination that might be present. If the proposed changes are implemented, such a requirement would defeat the intended purpose of the legislation. We suggest that the novel "performance based" approach is antithetical to the intent, in the context of Congressional directive to "clarify the obligations of any party who seeks to use the [innocent purchaser] defense," S. Rep. 102-2 at 13, and to "provide protection to persons who wish to purchase contaminated property." Id. at 11.

Response:

Please see response to comment number 0057, excerpt 1.

Commenter Organization Name: Small, Arthur

Comment Number: 0424

Excerpt Number: 1

Excerpt Text:

My comments focus on the open-ended nature of the proposed AAI standards. I believe that the open-ended nature of the new standard may create negative consequences both for economic development and for public health.

Response:

Please see response to comment number 0057, excerpt 1.

Commenter Organization Name: Small, Arthur

Comment Number: 0424

Excerpt Number: 3

Excerpt Text:

Potential effects of the open-ended search requirements on public health.

Do the open-ended search requirements nonetheless create important benefits for public health? Might these benefits be large enough to outweigh the costs?

There is reason to be skeptical. If the open-ended rules inhibit transactions and development, they will inhibit the subsequent development of the real estate. The process

of development - the sending in of bulldozers and backhoes - will often itself provide the best opportunity to discover contamination. By discouraging development, the rules simultaneously discourage the information discovery that development brings. Contamination problems that might have been discovered will then instead fester. On-going threats to public health may then continue undetected, untreated.

In sum: The open-ended search requirements look, in economic terms, like a bad idea. They do not appear justified, either on economic or health grounds. I urge you to drop these, and replace them with closed-ended, specifically enumerated requirements.

Response:

Please see response to comment number 0057, excerpt 1.

In addressing the cost issue, we note that the Agency's cost analysis indicates that the cost of complying with the final rule will not be significantly different from the cost of complying with the ASTM E1527-2000 standard. We encourage you to refer to the economic impacts analysis included in the docket for the proposed rule.

Commenter Organization Name: Anonymous

Comment Number: 0427

Excerpt Number: 3

Excerpt Text:

It seems to me that the agency is opening a Pandora's box of possible information that is simply going to confuse the industry, make property inquiry's so expensive that Banks and Lenders will simply forego the process and assume or insure the risk, which will increase the damage done to the environment _ with after the fact research, instead of catching problems before they occur.

I don't like the All Appropriate Inquiries proposal as I've seen so far.

Response:

Please see response to comment number 0057, excerpt 1.

In addressing the cost issue, we note that the Agency's cost analysis indicates that the cost of complying with the final rule will not be significantly different from the cost of complying with the ASTM E1527-2000 standard. We encourage you to refer to the economic impacts analysis included in the docket for the proposed rule.

Commenter Organization Name: Dannatt, Georgina

Comment Number: PM-0359-0004

Excerpt Number: 1

Excerpt Text:

One thing that is often lacking is common sense. Unfortunately, I do not believe the performance-based standards approach will remedy many of the current problems. In some cases, it may be necessary for the proposed rule to be prescriptive, rather than

leaving it up to the judgement of the provider.

Frequently, the consultant meets only the minimum requirements due to time and pricing pressures, failing to answer some of the obvious questions. There is too much focus on what the current site is, and past uses may be completely overlooked. Additionally, there is no proper investigation of current uses, such as the basic regulatory compliance status. When data failure is encountered, no effort is made to obtain data from an alternate source.

Response:

Please see response to comment number 0057, excerpt 1.

1.1.2.2 The Proposed Rule Is Not Protective of Human Health and Environment

Commenter Organization Name: PIRG

Comment Number: 0258

Excerpt Number: 2

Excerpt Text:

I. Historical Context for Objections and Withdrawal

After years of debate, analysis, and deliberation, Congress passed H.R. 2869, the Small Business Liability Relief and Brownfields Revitalization Act in 2001 ("Brownfields Law"). While U.S. PIRG neither supported nor opposed enactment of the Brownfields law, we consistently worked with members of Congress and the Administration to maintain protections for public health and environmental quality under the law. The minimally adequate criteria for AAI were a central topic during these negotiations.

U.S. PIRG's position -then, as now-is that the criteria of the Brownfields Law and the "Standard Practice for Environmental Site Assessments: Phase I Environmental Site Assessment Process, E 1527-97" (97 ASTM standards) provide the minimum level of protection for AAI. Congress also determined in Section 223 of the Brownfields Law that the 97 ASTM standards should be utilized to satisfy the AAI requirement for properties purchased after May 1997, until the new regulations are promulgated. AAI requirements that are weaker than the 97 ASTM standards increase the potential that people and the environment will continue to be exposed to unsafe levels of contamination without notice of such dangers.

Without such notice, contamination can spread-endangering the community and driving up clean up costs. Weaker standards can also allow sellers of contaminated property to profit without consideration of the condition of the property. In addition, holding sellers responsible for contaminated property may become more difficult after transfer because profits may be put out of reach after the sale. Finally, purchasers may be unaware that they do not have the resources to manage the contaminated property, if they do not have adequate notice of the property's condition.

Response:

The Agency disagrees with the commenter's notion that the All Appropriate Inquiries rule is less stringent than the ASTM guidance. We believe that the final rule is more comprehensive in protecting human health and the environment because it is based upon clear objectives and establishes a performance-based approach to conducting all appropriate inquiries. The advantage of this approach is that a party cannot simply perform each action independently and gain liability protection; rather they must complete the investigation in good faith, in compliance with clear objectives, and by using the performance standards as guidelines. In addition, the final rule establishes a far more stringent definition of environmental professional and requires that an individual meeting this definition oversee the conduct of all activities and review and sign the written report of findings.

EPA notes that the statute does not provide liability protection for sellers of contaminated property, or any party that is a potentially responsible party.

Commenter Organization Name: PIRG

Comment Number: 0258

Excerpt Number: 7

Excerpt Text:

It is for the aforementioned reasons that U.S. PIRG withdrew from the negotiated rule making and opposes the AAI final language. It is of great concern to our organization that public health and environmental quality have been sacrificed for substandard regulations that will likely do more harm than good.

Response:

EPA notes that the commenter did participate in the Negotiated Rulemaking Process, did agree to the consensus regulatory standards developed by the Negotiated Rulemaking Committee, and then several weeks following its agreement to the consensus notified EPA by mail that the organization wished to withdraw from its agreement.

Commenter Organization Name: Congressmen Dingell, Boxer, et al

Comment Number: 0332

Excerpt Number: 2

Excerpt Text:

A weak standard for the environmental inquiry provided in the AAI rule in connection with the sale or transfer of property will result in more contaminated sites going undiscovered, allowing the contamination to go unaddressed and allowing a continuing threat to public health and the environment. Sellers of contaminated property may take excess profits from the sale of the property and put those profits out of reach before the need for cleanup is known. Taxpayers are then more likely to bear the cost of cleanup.

In addition, purchasers may find after acquiring a property that it is contaminated and not suitable for the planned redevelopment. Moreover, purchasers who would otherwise be required to take reasonable steps to mitigate the environmental harm on the property to obtain a liability exemption may argue that it is not reasonable to expect such steps when the contamination is not known and the AAI standard has nevertheless been met.

Response:

Sellers of contaminated property and other potentially responsible parties are not provided with protection from CERCLA liability. The final rule provides absolutely no protection for any party who is potentially responsible for releases or threatened releases of hazardous substances. Further, purchasers also must take reasonable steps when contamination is found. The fact that a property owner missed a release during all appropriate inquiries does not provide them with immunity from complying with all the other "continuing obligations" once a release is discovered. In addition, an inadequately

performed all appropriate inquiries investigation will not be sufficient defense to violating the continuing obligations.

Commenter Organization Name: NPCA

Comment Number: 0403

Excerpt Number: 17

Excerpt Text:

NPCA strongly recommends EPA review and revise the AAIs content in order to more appropriately commensurate the cost and burdens associated with the standards to the environmental benefit and actual liability protection afforded potential property owners,

Response:

The Agency believes that the balance between protecting human health and the environment and promoting development by keeping costs reasonable has been found. The final rule has incorporated several suggestions made by commenters and has better effectuated this balance. For example, the definition of environmental professional has been broadened to allow qualified individuals who would have otherwise been shut out of the profession to participate in AAI investigations. Also, the requirement to search for institutional controls on neighboring properties has been removed as the Agency views this as an unnecessary burden without sufficient benefits.

Commenter Organization Name: Wilson, Shawn

Comment Number: 0440

Excerpt Number: 1

Excerpt Text:

Please scrap the Proposed Rule on Standards and Practices for All Appropriate Inquiries.

FIRREA created appraisal certification and appraisal standards for a very good reason: to protect the public.

Response:

Please see response to comment number 0212. EPA agrees with the commenter that there is an opportunity to coordinate appraisal activities in a better organized fashion. It is the Agency's hope that the appraisal industry will be recognized by environmental professionals and owners/grantees of property as valuable partners in many instances. However, we reiterate that the use an appraisal is within the discretion of the owner of the property (or the grantee).

1.1.2.3 *The Proposed Rule Is Inconsistent with the Brownfields Amendments and/or the ASTM Standard*

Commenter Organization Name: PIRG

Comment Number: 0258

Excerpt Number: 4

Other Sections: NEW - 2.1.6 - Revise educational requirements to allow individuals with substantial relevant work experience to qualify as EPs

Excerpt Text:

II. Examples of Weaknesses in the Draft Proposed AAI Rule

The examples set forth below demonstrate just a few of the ways the draft proposed AAI rule weakens current protections for public health and environmental quality. The draft proposed AAI rule contains numerous inconsistencies with the Brownfields Law and provides a less effective process for assessing the condition of a site than the 97 ASTM standard. A comprehensive description of the inconsistencies between the Brownfields Law and the draft AAI proposed rule, and all of the ways in which the proposed rule is weaker than the 97 ASTM standard are outside the scope of this letter. The examples are provided as an illustration of the problem with the draft proposed rule.

Response:

Please see response to comment number 0258, excerpt 2.

Commenter Organization Name: Congressmen Dingell, Boxer, et al

Comment Number: 0332

Excerpt Number: 1, 3 and 6

Excerpt Text:

A central purpose of the Brownfields law is to encourage the redevelopment of contaminated sites, without sacrificing public health, the environment, or the principle that polluters, not taxpayers, should pay for the cleanup. These are the core principles of the law. As members of the Committee[s] with jurisdiction over Superfund and Brownfields programs, we are commenting on this rule because of our concern that portions of it are inconsistent with the intent of Congress and are unauthorized by the Brownfields law. Portions of the rule are weaker than what was required by statute and do not reflect the careful balance struck in the law.

Specific criteria were required in the Brownfields law to ensure clear and consistent standards in the AAI rule. These criteria were required to ensure that a strong environmental inquiry would be conducted before the sale or transfer of a property and before the AAI condition of the liability exemptions provided for in the Brownfields law would be satisfied. Key elements have not been included in the proposed rule as required. The Brownfields law contains specific criteria to be included in the standards and practices required in the AAI rule. The failure to incorporate these criteria in the rule is contrary to the intent of Congress and is not authorized by the statute.

Response:

The final rule addresses each of the criteria included in the statute. In fact, the final rule is organized around the ten criteria provided by Congress in CERCLA.

Commenter Organization Name: CBPA

Comment Number: 0344

Excerpt Number: 1

Excerpt Text:

CBPA members are involved in the redevelopment of environmentally distressed properties. After reviewing the new proposed standard, we have come to the conclusion that the proposed rule obscures the obligations of prospective purchasers and increases uncertainty, rather than clarifying the obligations of purchasers and providing certainty as was intended by the Brownfields Act of 2002. We believe that the net effect of the new standard would be to discourage development of brownfields, rather than encouraging their development as Congress intended in the Brownfields Act.

Response:

Please see response to comment number 0057, excerpt 1.

Commenter Organization Name: CBPA

Comment Number: 0344

Excerpt Number: 7

Excerpt Text:

We believe the proposed rule obscures the obligations of prospective purchasers and greatly increases uncertainty, rather than clarifying the obligations of purchasers and providing certainty as was intended by the Brownfields Act.

Response:

Please see response to comment number 0057, excerpt 1.

Commenter Organization Name: Greenlining Institute

Comment Number: 0354

Excerpt Number: 2

Excerpt Text:

When we apply the proposed rule to sites that we are familiar with, small idle or underutilized parcels in economically depressed communities, we see the new rule to be problematic. We believe it will discourage redevelopment of brownfields in economically depressed neighborhoods by increasing developer liability, rather than encouraging development by decreasing liability exposure as Congress intended. This will undermine the reforms of SB 32 that we worked so hard to achieve.

Response:

Please see responses to comment numbers 0057 (excerpt 1) and 0354 (excerpt 3).

Commenter Organization Name: Greenlining Institute

Comment Number: 0354

Excerpt Number: 7

Excerpt Text:

C. EPA'S Task is Largely to Describe Industry Customary Practice and the Criteria Included in the AAI Rule Must be Applied in a Manner Consistent with Customary Practice

The negotiated rulemaking committee applied their charge in a largely prescriptive manner: that the government should dictate to the real estate market what the content of an appropriate pre-purchase inquiry shall be. This is not the task Congress assigned to the agency. Rather EPA's role in promulgating standards and practices for All Appropriate Inquiry is largely descriptive. Congress intended EPA to clarify and codify what the real estate industry considers to be good commercial practice with respect to All Appropriate Inquiry. The statutory definition of All Appropriate Inquiry is an investigation "into the previous ownership and uses of the facility in accordance with generally accepted good commercial and customary standards and practices." 42 U.S.C. § 9601 (35)(B)(i)(I) (emphasis added). The criteria provided by Congress for inclusion in the regulation at section 9601(35)(B)(iii) are provided in the context of describing their role in generally accepted practice.

If EPA discards customary standards and practices in favor of new procedures that committee has devised, it will render a significant provision of the statute surplusage. The Supreme Court has often advised that it is "reluctant to treat statutory terms as surplusage in any setting." *Duncan v. Walker*, 533 U.S. 167, 174 (2001). This is especially so "when the term occupies so pivotal a place in the statutory scheme." *Id.* "Generally accepted good commercial and customary standards and practices" have been the polestar of All Appropriate Inquiry since 1986. Moreover, the statute commands EPA to promulgate regulations "to carry out all appropriate inquiries under clause (i)" and clause (i) describes all appropriate inquiries as being "in accordance with generally accepted good commercial and customary standards and practices." 42 U.S.C. § 9601(B).

In the following sections we analyze provisions of the proposed rule in which we believe that the committee applied the statutory criteria of 42 U.S.C. § 9601 (35)(B)(iii) in a manner inconsistent with Congressional intent because inter alia the committee failed to properly consider factors Congress deemed relevant, including generally accepted industry standards. See *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 42-43 (1983).

Response:

EPA disagrees with the commenter. The Agency points out that the final rule is not significantly different than the procedures included in the interim standard, which the commenter contends is "generally accepted good commercial practice." EPA points out that in addition to establishing that all appropriate inquiries would be conducted in "accordance with generally accepted good commercial and customary standards and

practices, Congress established ten criteria in that statute that EPA must include in the federal regulations for all appropriate inquiries. As EPA pointed out in the preamble to the proposed rule, the current interim standard, the ASTM E1527 Phase I Environmental Site Assessment Process, does not fully address each of the statutory criteria. Congress did not intend for EPA to merely clarify and codify current industry practice. By including environmental professionals with first hand experience in conducting environmental site assessments on the Negotiated Rulemaking Committee, EPA ensured that generally accepted good commercial practices were considered during the development of the proposed rule. The Agency points out that these stakeholders' expertise and knowledge of industry practices and standards and the technical know how possessed by them was a very positive force in guiding the development of the proposed rule. Further, the current interim standard, implemented by Congress, was meant to be temporary. Arguably, by definition, the standards and practices contained in the Agency's proposed rule is an industry standard based upon generally accepted good commercial and customary standards and practices due to the fact that it was developed in large part by industry leaders and other users who were members of the Negotiated Rulemaking Committee, including the National Association of Homebuilders, The Real Estate Roundtable, National Association of Industrial and Office Properties, International Council of Shopping Centers, National Brownfields Association, the National Ground Water Association, American Society of Civil Engineers, and Wasatch Environmental, Inc., to name a few. (40 CFR Part 312, p. 52550).

Commenter Organization Name: Eden Housing

Comment Number: 0380

Excerpt Number: 1

Excerpt Text:

After reviewing the new proposed standard, we have come to the conclusion that the proposed rule obscures the obligations of prospective purchasers and increases uncertainty, rather than clarifying the obligations of purchasers and providing certainty as was intended by the Brownfields Act of 2002. We believe that the net effect of the new standard would be to discourage development of brownfields, rather than encouraging their development as Congress intended in the Brownfields Act.

Response:

Please see response to comment number 0057, excerpt 1.

Commenter Organization Name: Eden Housing

Comment Number: 0380

Excerpt Number: 8

Excerpt Text:

We believe the proposed rule obscures the obligations of prospective purchasers and greatly increases uncertainty, rather than clarifying the obligations of purchasers and providing certainty as was intended by the Brownfields Act.

Response:

Please see response to comment number 0057, excerpt 1.

Commenter Organization Name: NPCA

Comment Number: 0403

Excerpt Number: 16

Excerpt Text:

The Proposed Rule's standards, particularly those standards outlined herein, are costly, burdensome and in some cases may be unachievable. Thus, the primary purpose of the Act, to exempt from liability under CERCLA certain owners of real property and contiguous property on which there has been a hazardous substance release or threatened release has been thwarted. While clarification on requirements for the innocent landowner defense as well as standards for contiguous property and bona fide purchaser defenses would have provided much needed incentive and assurance to potential purchasers and lessees of industrial properties, particularly brownfield properties, as currently drafted, the Proposed Rule does not serve that purpose.

Response:

Please see response to comment number 0057, excerpt 1.

Commenter Organization Name: Sierra Club & NET

Comment Number: 0419

Excerpt Number: 1

Excerpt Text:

The Brownfields Law carefully strikes a balance between the need to encourage the redevelopment of contaminated sites while at the same time ensuring that public health and the environment are protected and that those responsible for the harm, not the taxpayer, are held responsible for the cleanup. Unfortunately, the proposed AAI rule fails to meet even the minimum criteria specifically required by the Brownfields Law.

The proposed AAI rule is also weaker than the interim standards established in the Brownfields law-the "Standard Practice for Environmental Site Assessments: Phase I Environmental Site Assessment Process, E 1527-97" (the "97 ASTM Standard"). The general performance standards contained in the proposed AAI rule are no substitute for the specific criteria contained in the Brownfields Law and the specific procedures and rigorous documentation requirements contained in the interim 97 ASTM Standard.

The net effect of these deficiencies is that the proposed AAI rule makes it more likely contamination will not be identified before the sale or transfer of property. This endangers public health and may allow sellers to profit from a sale while placing those profits out of reach before the need for cleanup is even known - making it more likely that taxpayers will end up paying the cleanup costs. Purchasers may also purchase properties without adequate investigation only to find out later that those sites may not be suitable for the planned future use.

In addition, the low threshold established in the proposed AAI rule could allow the purchaser to argue that they followed CERCLA, including the AAI rule, and failed to find contamination. Then, they could claim entitlement to liability relief under CERCLA while arguing that they are not responsible for taking the steps necessary to mitigate the harm as required in the statute because it would not be reasonable for them to have to address contamination that was not discovered during the AAI investigation.

Response:

Please see responses to comment numbers 0258 (excerpt 2) and 0332 (excerpt 2).

Commenter Organization Name: Sierra Club & NET

Comment Number: 0419

Excerpt Number: 6

Excerpt Text:

--Landowners and Environmental Professionals Must Achieve Compliance with All Statutory and Valid Regulatory Requirements

Establishing protocols in document review is an essential aspect of many professional activities that deal with property transactions. EPA's vague statements in the proposed rule's preamble appear to undermine the need for such vitally needed-and legally required-protocols to establish AAI. In particular, EPA's statements that "the landowner and the environmental professional must 'seek to achieve' the proposed objectives and performance factors..." (emphasis added) undermine the importance that Congress placed on certain key activities in the Brownfields Law and on the commonsense need to investigate, access and utilize key sources of information that can inform that determination of whether a site is contaminated.

The EPA should strive to increase protections by promoting precision in decision making, rather than reducing clarity in the regulatory process. Ambiguous objectives and standards are an inadequate surrogate for establishing minimum requirements for the review of documents and investigation of property. Such requirements increase certainty for businesses, expedite the safe development of properties and facilitate business and judicial review of decisions. EPA should hold parties who are interested in receiving a liability exemption responsible for investigating all potentially conditions at a site. However, the final rule must-at a minimum-also require the investigation of all documents and undertaking of all activities described in section 223 of the Brownfields Law.

-Conclusion

Establishing weak standards in the AAI rule provides an incentive for the seller and purchaser alike to "speak no evil, hear no evil" about these sites, so that the sale can proceed which benefits the seller, while the purchaser gets liability relief. It is quite clear that the Brownfields Law establishes specific criteria to prevent just this result. The failure of the proposed AAI rule to meet these criteria and otherwise protect human

2.3.10 The Agency Should Define the Term "Full-Time"

Commenter Organization Name: Lind, Peter

Comment Number: 0107

Excerpt Number: 2

Excerpt Text:

Which brings me to the definition for "relevant experience". The proposed regulations consistently state the equivalent of "full-time" relevant experience. What is meant by "full-time". As a licensed architect, or engineer, or geologist, or any other professional the term full-time must be defined.

In Illinois, I currently hold ten professional licenses. Seven of the Illinois professional licenses are in the environmental field: asbestos, lead, air monitoring, project management, design professional, etc. Illinois does not currently license individuals as an "Environmental Professional", nor firms as "Environmental Consultants". For the most part, I have held current and continuously all seven licenses since 1988... or a total of 16 years.

My design firm also serves public and institutional clients offering licensed architectural and engineering for facility needs. If my design firm spends 50% of the time on architecture and 50% on AAI related projects, then my total relevant experience may be viewed by the opposing lawyer as only 8 years (16 years times 50% relevant experience), even though I held, maintained, and offered the AAI service to clients and holding all relevant state environmental licenses for the entire duration. In Illinois, each environmental license requires relevant EPA refresher training to maintain the annual license.

Response:

The use of the phrase "full-time" within the definition of environmental professional and the definition of relevant experience is meant to require that an individual has accumulated the equivalent of 3, 5, or 10 years of experience. An individual may accumulate such experience over a longer length of time than the 3, 5, or 10 years, as long as the total time of accumulated experience would be the equivalent of 3, 5, or 10 years of full-time experience. Even after an individual accumulates the required number of years of full-time experience, that individual does not have to conduct environmental site assessments, or all appropriate inquiries investigations, on a full-time basis to qualify as an environmental professional.

Commenter Organization Name: Lind, Peter

Comment Number: 0107

Excerpt Number: 4

Excerpt Text:

3. Define the term "full-time" as an individual holding current an annual state license in an equivalent environmental consultant role.

Response:

The use of the phrase “full-time” within the definition of environmental professional and the definition of relevant experience is meant to require that an individual has accumulated the equivalent of 3, 5, or 10 years of experience. An individual may accumulate such experience over a longer length of time than the 3, 5, or 10 years, as long as the total time of accumulated experience would be the equivalent of 3, 5, or 10 years of full-time experience. Even after an individual accumulates the required number of years of full-time experience, that individual does not have to conduct environmental site assessments, or all appropriate inquiries investigations, on a full-time basis to qualify as an environmental professional.