Brownfields Briefs

A Stakeholder's Guide to "All Appropriate Inquiries" (AAI) U.S. EPA's new proposed rule for environmental site assessment

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On August 26, 2004, U.S. EPA proposed a new rule, "Standards and Practices for All Appropriate Inquiries."[1] Required by the January 2002 "Brownfields Amendments,"[2] when finalized this rule is expected to become the national standard for conducting "All Appropriate Inquiries," a process commonly referred to as Phase One Environmental Site Assessment. ASTM (formerly known as the American Society for Testing and Materials), which for many years has provided the industry standards for environmental site assessments, is revising its "Standard Practice for Environmental Site Assessment" (E–1527) to be compatible with the new EPA standard. EPA based its proposal on the Brownfields Amendments and the work of a Negotiated Rulemaking committee, 25 people representing diverse interests who met several times in 2003 to develop the rule's language.

The Phase One site assessment is one of the most common environmental documents in the United States. Approximately 250,000 are prepared every year. Phase One assessments are desktop surveys accompanied by a walk-through site inspection, usually conducted on behalf of persons or organizations who do not own the subject property. With the permission of the property owner, they can include intrusive sampling of water, soil, or air, but usually they do not. In most cases intrusive sampling is only included in the Phase Two assessment, if one is conducted.

But the people who live and work on or near the properties being assessed are generally unfamiliar with the assessments. This is because higher profile sites—typically the most contaminated—are usually addressed under the Superfund Law, the Corrective Action provisions of the Resource Conservation and Recovery Act, or the counterpart

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[1]*Federal Register*, August 26, 2004, pp. 52542 ff.
[2]The Small Business Liability Relief and Brownfields Revitalization Act (Public Law 107-118, 115 stat. 2356, amending the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), informally known as the Superfund Law.

statutes of states, territories, and tribes. In most cases, those cleanup programs require public notification and involvement. Unless Phase One site assessments are conducted pursuant to such cleanup programs, or other government-run activity, there is generally no requirement to inform the public.

The Purpose of AAI

Historically, the main reason parties have conducted Phase One site assessments has been to show that they have no reason to believe that the property is contaminated. Thus, the existence of a site assessment document does not mean that a property has a problem; it is the hope of the party that commissions the study to show that it doesn't. This stands in sharp contrast to Phase Two assessments and Superfund-type remedial investigations, which are designed to define the nature, source, and extent of pollution on or near the subject property.

The specter of joint, strict and several liability under CERCLA has driven prospective purchasers, lenders. and others to conduct "all appropriate inquiries" in the form of Phase One assessments. Parties traditionally conducted such assessments to qualify for the "innocent landowner defense" under CERCLA, which was the only potential defense to CERCLA liability until passage of the Brownfields Amendments of 2002.

In enacting the Brownfields Amendments, Congress sought to clarify liability relief and expand it beyond the Innocent Landowner Defense, provided the parties meet several requirements, including the preparation of a Phase One Site Assessment under the All Appropriate Inquiries Standard that Congress required EPA to promulgate.

The 2002 Brownfields Amendments specify four categories of parties who need to conduct All Appropriate Inquiries. The first three are commonly known as the Landowner Liability Protections.

1. Bona Fide Prospective Purchasers
2. Contiguous Property Owners
3. Innocent Landowners
4. Parties receiving site characterization and assessment grants from U.S. EPA. In this case, the AAI standards apply to petroleum products and controlled substances (drugs), not just hazardous substances as defined by CERCLA.

For the Bona Fide Prospective Purchaser, it's important to recognize that the completion of All Appropriate Inquiries is necessary, but not sufficient, to qualify for protection against CERCLA liability. Under the Brownfields statute, documenting potential environmental problems is not enough. Among other requirements, purchasers and property owners must take "reasonable steps" to stop continuing releases, prevent future releases, and prevent exposure. In addition, they must cooperate with persons authorized to conduct cleanup, and they must comply with land use restrictions. That last requirement affects the All Appropriate Inquiries process, because parties now must

identify all such restrictions as part of the Phase One site assessment. For those seeking Contiguous Property Owner or Innocent Landowner liability defenses, the parties must have "no reason to know" at the time of acquisition, but once the contamination is identified they are also subject to the additional requirements.

The proposed rule takes a performance-based approach, which is the way that the more competent practitioners of site assessment already use the ASTM standard. That is, instead of simply using the various information-collecting practices as a checklist, those practices are to be used to answer a series of seven questions (paraphrased from the proposed rule):

1. How was/is the property being used?

2. What substances were/are used on the property?

3. Were/are wastes managed or disposed there?

4. What cleanup has been/is being conducted?

5. Are there any engineering controls in place?

6. Are there any institutional controls—restrictions on access or use?

7. Will/has contamination from nearby properties migrate(d) onto the property?

On the one hand, if the party conducting the Inquiries is able to answer all the questions reliably without consulting all sources listed in the practices, then it isn't necessary to continue the research.

On the other hand, if information collected from one type of source doesn't answer each of the questions that the source is supposed to address, then the party conducting the Inquiries must use another source to answer that question. Under the proposed EPA All Appropriate Inquiries rule, the party can use information—such as actual environmental sampling, which is not required as part of a Phase One assessment—to answer those questions. If not enough information is available to answer all seven questions, then the parties must identify "data gaps" and comment on their significance.

The Criteria

In the Brownfields Amendments, Congress established specific research criteria, or methods. The proposed rule is largely based upon those criteria, but it makes clear that they are merely a means to an end: answering the seven questions outlined above. The criteria, as clarified in the proposed All Appropriate Inquiries Rule, are similar to the established ASTM Phase One Standard, but there are a number of small differences. The Criteria described in the proposed rule include:

A. Interviews with past and present owners, operators, and occupants. In most cases, this is an absolute requirement. Where abandoned property appears subject to unauthorized use, the proposed rule specifies interviews with at least one neighbor.

B. Reviews of historical sources, such as aerial photographs, fire insurance maps, building department records, chain of title documents, and land use records.

C. Searches for environmental cleanup liens.

D. Reviews of Federal, state, tribal, and local government records, such as environmental data bases, including registries of institutional and engineering controls, and public health records. These records are typically ordered, as a package, from private data vendors. The proposed rule specifies default search distances—that is, the distance from the subject property for which data must be reported—but like the ASTM standard, it allows the environmental professional conducting the assessment to use discretion in setting search distances, based upon the location.

E. A visual "walk-through" inspection. In one of its most heavily debated recommendations, the Negotiated Rulemaking Committee suggested, and EPA proposed, a narrow loophole that essentially allows deferral of the inspection until after purchase, if the inspection "cannot be performed …"

F. Specialized knowledge on the part of the entity having the site assessment conducted.

G. Consideration whether the property is underpriced because of contamination. Note that this does not mean that an appraisal is required.

H. Commonly known or reasonably ascertainable information about the property, from sources such as neighbors, government officials, newspapers, websites, libraries, historical societies, or community organizations.

Qualifications

Some of these requirements may be directly met by the party for whom the Phase One is being conducted, but most of the assessment must be done by a team led by a qualified environmental professional. For the first time nationally, the proposed rule establishes minimum qualifications for such environmental professionals, based upon professional licensing, education, and/or experience. This was perhaps the most hard-fought section of the negotiated rule, and definitely the recommendation receiving the most public comment—from environmental professionals.

The proposed rule is a compromise between objectives. It attempts to raise the bar on qualifications, yet it would permit people who have been conducting site assessments for ten years (with a college degree in any field) to continue their practices. EPA and the Negotiated Rulemaking committee agreed certifications from private organizations should not be accepted as proof of qualifications, because that would put EPA in the position of

accrediting such organizations. In completing an assessment, the environmental professional is required to document that he or she meets the qualifications for environmental professionals provided in the rule.. Given the large number of comments EPA received on this question, it's possible that EPA may make minor modifications to the requirements in the final rule.

The proposed rule further requires the preparation of a written report, even though that written report need not be submitted to EPA or any other government agency. However, another entity—such as a state regulatory agency—that requires the completion of AAI may also require the submission of such a report under state law. In fulfilling the statutory requirement that the party conducting the Inquiries and the environmental professional consider the "degree of obviousness" of contamination, the professional should "include an opinion regarding additional appropriate investigation."

The proposed rule says that All Appropriate Inquiries must be conducted within a year prior to property purchase, and that certain information be collected again or updated if necessary, within six months. A person may use a report prepared for another party, if he or she fulfills again the requirements imposed on the party conducting the Inquiry and if the report is updated.

Finally, the proposed rule reminds those conducting inquiries to comply with all existing requirements for public disclosure, but it creates no new reporting obligations.

CPEO's View

Until the new rule is adopted, EPA will accept ASTM's Phase One standard as the interim standard for AAI, as Congress directed. Once in place, the new rule may increase the average cost of conducting a site assessment. But in some cases it may be less expensive to complete the Inquiries if the seven questions can be answered without consulting all sources.

CPEO, as a participant in the Negotiated Rulemaking process, believes the proposed rule is a significant step forward. The performance-based approach will better identify potential environmental problems with only minimal increases in assessment costs.

Still, the Brownfields Amendments did not provide the statutory basis for some other important missed opportunities for improving the site assessment process. Unless the Phase One is being conducted in compliance with another environmental program, there is no requirement to ask for public input, or even to notify the public that a site assessment is underway. Furthermore, while the parties conducting the Inquiries may conduct sampling to meet the assessment's performance objectives, sampling is not required.

These limitations are insignificant at most sites where there is no or little contamination. But at sites where it appears that human health and the environment are at

serious risk, communities must demand that environmental regulatory agencies become actively involved.

The Brownfields concept, which uses the demand for property reuse to promote the screening and remediation of blighted properties, can promote the protection of human health and the environment. But unless affected communities participate directly in the oversight of Brownfields activities, they risk the likelihood that developers and local agencies will simply sweep environmental problems "under the rug." The proposed All Appropriate Inquiries rule can be a tool to ensure that environmental protection accompanies property redevelopment, but this is more likely to happen if the public is part of the process.