Congress of the United States
Washington, DC 20515

November 30, 2004

The Honorable Michael O. Leavitt
Administrator
Environmental Protection Agency
1200 Pennsylvania Avenue, N.W.
Washington, D.C. 20460-0001

Subject: Comments on Proposed All Appropriate Inquiries Rule-Docket ID No. SFUND-2004-0001

Dear Administrator Leavitt:

We are writing to provide comments and to express our serious concerns about the Environmental Protection Agency's (EPA) proposed "All Appropriate Inquiries" rule (AAI). This rule is required pursuant to the Small Business Liability Relief and Brownfields Revitalization Act of 2001 ("Brownfields law").

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.

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.

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. Our specific comments are set forth below:

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Proposed AAI Rule, Section 312.21 (Inquiry by an Environmental Professional)

Section 101(35)(B) of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) as amended by section 223 of the Brownfields law requires that the standards and practices established in the AAI rule shall include the results of an inquiry by an environmental professional. The law clearly requires that the inquiry be conducted by an environmental professional in accordance with generally accepted good commercial and customary standards and practices. Even under the interim standard established in the Brownfields law, the American Society for Testing and Materials Standard E-1527-97, the key elements of an inquiry, including the site inspections and critical interviews, must be conducted by an environmental professional.

Under Section 312.21 of the proposed AAI rule, an environmental professional is not required to conduct the inquiry. In fact, none of the detailed qualifications for an environmental professional established in the proposed rule are necessary for the person actually conducting the inquiry. This includes site inspections and interviews with hazardous materials experts associated with the site. An environmental professional need not participate directly in the inquiry at all, but need only supervise or have the person conducting the inquiry under his or her charge. This is inconsistent with the intent of the Brownfields law and with the generally accepted good commercial and customary standards and practices codified in the interim requirements.

The probability of missing an environmental problem becomes unacceptably high when the person conducting the inquiry on the ground does not have the experience or judgment of an environmental professional. The consequences are serious.

It is worth noting that EPA itself recognizes the importance of having an environmental professional actually conduct critical elements of the inquiry in the preamble to the proposed AAI rule. "EPA believes that the professional judgment of an individual meeting the proposed definition of environmental professional is vital to ensuring that all circumstances at the property indicative of environmental conditions and potential releases or threatened releases are properly identified and analyzed" (67 Federal Register 52565). EPA recognizes and recommends that an environmental professional conduct this portion of the inquiry, but does not require it. EPA must require it as provided in the Brownfields law.

Proposed AAI Rule Section 312.27

Section 101(35)(B) of CERCLA as amended by section 223 of the Brownfields law also requires that the standards and practices established in the AAI rule shall include visual

inspections of the facility and the adjoining properties. Under Section 312.27 of the proposed AAI rule, EPA proposes unauthorized and ill-advised exemptions to this requirement.

Actual visual inspection of a facility is central to every environmental inquiry. Interestingly, EPA acknowledges this fact in the preamble to the proposed AAI rule. "The visual on-site inspection of a property during the conduct of all appropriate inquiries may be the most important aspect of the inquiries and the primary source of information regarding the environmental conditions on the property" (69 Federal Register 52564). Despite this acknowledgment, and the express condition in the Brownfields law, EPA provides unauthorized and potentially broad exemptions to this requirement.

Exemptions include weather, the location of the property, and refusal by the seller to allow access despite good faith efforts by the purchaser. The opportunity for mischief is great. An owner's refusal to allow access is a red flag in any transaction, and without inspection, the risk that contamination will go undiscovered is unacceptably high. Anyone can still purchase a property under these circumstances, but to grant a waiver from liability or to provide other federal benefits without an inspection does not reflect the core principles of the Brownfields law -- that environmental protection and polluter pay principles not be sacrificed. EPA's proposal to limit inspections of adjoining properties is also not authorized by the law.

Again, if contamination goes undiscovered, a seller who has refused entry on the property may profit from the lack of disclosure and put the profits out of reach before the problem is discovered. The property may not be suitable for redevelopment, and it may not qualify as a Brownfields site where that is an issue, though it may be treated as one by the parties. Purchasers may also argue that they are entitled to environmental liability exemptions without taking reasonable steps required by the statute to mitigate the contamination, as long as they do not discover the contamination. In fact, in EPA Interim Guidance issued on March 6, 2003, on Limitations on CERCLA Liability, EPA finds that "[k]nowledge of contamination and the opportunity to plan prior to purchase should be factors in evaluating what are reasonable steps" (p. 11). Thus, a party that does not find contamination is potentially rewarded because it would not be reasonable to require that they take steps to address contamination when they do not know about it.

Clearly, the exemptions from site inspections provide an opportunity for parties to make it easier to satisfy the AAI standard, and if they satisfy the other statutory requirements, they escape liability. Thus, a party that never does an adequate inquiry may allow the contamination to go unaddressed indefinitely, potentially without liability. We recognize that this will not happen in every case and that multiple factors must be satisfied before liability relief is granted. Nevertheless, to allow such a minimum standard for AAI undermines an important safeguard against abuse of the liability exemption.

Conclusion

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. The focus of our comments have been the most serious flaws in the proposed rule. 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.

If you have any questions, please contact us or have your staff contact Bettina Poirier of the House Committee on Energy and Commerce Democratic staff at (202) 226-3400, or Malcolm Woolf of the Senate Committee on Environment and Public Works Democratic staff at (202) 224-8832.

Sincerely,

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