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Part II

Environmental Protection Agency

40 CFR Part 312

Standards and Practices for All Appropriate Inquiries and Notice of Public Meeting To Discuss Standards and Practices for All Appropriate Inquiries; Proposed Rules

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 312

[SFUND–2004–0001; FRL–7806–2]

RIN 2050–AF04

Standards and Practices for All Appropriate Inquiries

AGENCY: Environmental Protection Agency.

ACTION: Proposed rule.

SUMMARY: The Environmental Protection Agency (EPA) today is proposing federal standards and practices for conducting all appropriate inquiries as required under Sections 101(35)(B)(ii) and (iii) of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA). 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).

DATES: Comments on today's proposed rule must be submitted on or before October 25, 2004. Comments postmarked after this date will be marked ''late'' and may not be considered. Any person may request a public hearing on this proposal by filing a request by September 10, 2004.

ADDRESSES: Submit your comments, identified by Docket ID No. SFUND–2004–0001, by one of the following methods:

1. Federal eRulemaking Portal: *http://www.regulations.gov.* Follow the on-line instructions for submitting comments.

2. Agency Web site: *http://www.epa.gov/edocket.* EDOCKET, EPA's electronic public docket and comment system, is EPA's preferred method for receiving comments. Follow the on-line instructions for submitting comments.

3. E-mail: Comments may be sent by electronic mail to *superfund.docket@epa.gov,* /Attention Docket ID No. SFUND–2004–0001.

4. Mail: Send comments to: OSWER Docket, Environmental Protection Agency, Mailcode: 5305T, 1200 Pennsylvania Ave., NW., Washington, DC 20460, Attention Docket ID No. SFUND–2004–0001. In addition, please mail a copy of your comments on the information collection provisions to the Office of Information and Regulatory Affairs, Office of Management and Budget (OMB), Attn: Desk Officer for EPA, 725 17th St. NW., Washington, DC 20503.

5. Hand Delivery: Deliver your comments to: EPA Docket Center, EPA West Building, Room B102, 1301 Constitution Ave., NW., Washington, DC, Attention Docket ID No. SFUND–2004–0001. Such deliveries are only accepted during the Docket's normal hours of operation, and special arrangements should be made for deliveries of boxed information.

Instructions: Direct your comments to Docket ID No. SFUND–2004–0001. EPA's policy is that all comments received will be included in the public docket without change and may be made available online at *http://www.epa.gov/edocket,* including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through EDOCKET, regulations.gov, or e-mail. The EPA EDOCKET and the Federal regulations.gov Web sites are ''anonymous access'' systems, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an e-mail comment directly to EPA without going through EDOCKET or regulations.gov, your e-mail address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD–ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses. For additional information about EPA's public docket visit EDOCKET on-line or see the **Federal Register** of May 31, 2002 (67 FR 38102). For additional instructions on submitting comments, go to Unit I.C. of the **SUPPLEMENTARY INFORMATION** section of this document.

Docket: All documents in the docket are listed in the EDOCKET index at http://www.epa.gov/edocket. Although listed in the index, some information is not publicly available, *i.e.,* CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available either electronically in EDOCKET or in hard copy at the EPA Docket Center, EPA West Building, Room B102, 1301 Constitution Avenue, NW., Washington, DC. 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.

If you would like to file a request for a public hearing on this proposed rule, please submit your request to Ms. Linda Garczynski at: Office of Brownfields Cleanup and Redevelopment (5105T), U.S. Environmental Protection Agency, 1200 Pennsylvania Avenue, NW., Washington, DC 20460, or via e-mail at *garczynski.linda@epa.gov.*

FOR FURTHER INFORMATION CONTACT: For general information contact the RCRA/Superfund/EPCRA/UST Call Center at (800) 424–9346 (toll free) or TDD (800) 553–7672 (hearing impaired). In the Washington, DC Metropolitan area, call (703) 412–3323 or TDD (703) 412–9810. For detailed information on specific aspects of the proposed rule, contact Patricia Overmeyer of EPA's Office of Brownfields Cleanup and Redevelopment at (202) 566–2774 or at *overmeyer.patricia@epa.gov.*

SUPPLEMENTARY INFORMATION:

I. General Information

A. Who Potentially May Be Affected by Today's Proposed Rule?

If promulgated as proposed, this regulation may affect most directly those persons and businesses purchasing commercial property or any property that will be used for commercial purposes and who may, after purchasing the property, seek to claim protection from CERCLA liability for releases or threatened releases of hazardous substances. Under section 101(35)(B) of CERCLA, as amended by the Small Business Liability Relief and Brownfields Redevelopment Act (Pub. L. 107–118, 115 stat. 2356, ''the Brownfields Amendments'') such persons and businesses are required to conduct all appropriate inquiries prior to or on the date in which the property is acquired. Prospective property owners who do not conduct all

appropriate inquiries prior to obtaining ownership of the property may lose their ability to claim protection from CERCLA liability as an innocent landowner, bona fide prospective purchaser, or contiguous property owner.

In addition, today's proposal will affect any party who receives a brownfields grant awarded under CERCLA Section 104(k)(2)(B) and uses the grant money to conduct site characterization or assessment activities. This includes state, local and tribal governments that receive brownfields site assessment grants for the purpose of conducting site characterization and assessment activities. Such parties are required under CERCLA Section 104(k)(2)(B)(ii) to conduct such activities in compliance with the standards and practices established by EPA for the conduct of all appropriate inquiries. EPA notes that today's rule also may affect other parties who apply for brownfields grants under the provisions of Section 104(k), since such parties may have to qualify as a bona fide prospective purchaser to ensure compliance with the statutory prohibitions on the use of grant funds under Section 104(k)(4)(B)(i). Any party seeking liability protection as a bona fide prospective purchaser, including eligible brownfields grantees, must conduct all appropriate inquiries prior to acquiring a property.

The background document, ''Economic Impacts Analysis for the All Appropriate Inquiries Proposed Regulation,'' presents a comprehensive analysis of all potentially impacted entities. This document is available in the docket established for today's proposed rule. A summary of potentially affected businesses is provided in the table below.

Our aim in the table below is to provide a guide for readers regarding entities likely to be directly regulated or indirectly affected by this action. This action, however, may affect other entities not listed in the table. To determine whether you or your business is regulated or affected by this action, you should examine the proposed regulatory language amending CERCLA. This language is found at the end of this **Federal Register** notice. If you have questions regarding the applicability of this action to a particular entity, consult the person listed in the preceding section entitled **FOR FURTHER INFORMATION CONTACT.**

Industry category	NAICS code
Manufacturing	31–33
Wholesale Trade	42
Retail Trade	44–45
Finance and Insurance	52
Real Estate	531
Professional, Scientific and Technical Services	541
Accommodation and Food Services	72
Repair and Maintenance	811
Personal and Laundry Services	812
State, Local and Tribal Government	N/A

B. How Can I Get Copies of This Document and Other Related Information?

1. *Docket.* EPA has established an official public docket for this action under Docket ID No. SFUND–2004–0001. The official public docket consists of the documents specifically referenced in this action, any public comments received, and other information related to today's action. Although a part of the official docket, the public docket does not include Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Documents in the official public docket are listed in the index list in EPA's electronic public docket and comment system, EDOCKET. Documents may be available either electronically or in hard copy. Electronic documents may be viewed through EDOCKET. Hard copy documents may be viewed at the EPA Docket Center, EPA West, Room B102, 1301 Constitution Avenue NW., Washington, DC. The EPA Docket Center Public Reading Room 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.

2. *Electronic Access.* You may access the **Federal Register** document electronically through the EPA Internet under the ''**Federal Register**'' listings at *http://www.epa.gov/fedrgstr.* Comments on the proposed rule can be submitted through the federal e-rulemaking portal, *http://www.regulations.gov.*

An electronic version of the public docket also is available through EPA's electronic public docket and comment system, EDOCKET. You may use EDOCKET at *http://www.epa.gov/edocket/* to submit or view public comments, access the index listing of the contents of the public docket, and access those documents in the public docket that are available electronically. Once in the system, select ''search,'' then key in the appropriate docket identification number.

Certain types of information will not be placed in EDOCKET. Information claimed as CBI and other information whose disclosure is restricted by statute, which is not included in the official public docket, will not be available for public viewing in EPA's electronic public docket. EPA's policy is that copyrighted material will not be placed in EPA's electronic public docket but will be available only in printed, paper form in the official public docket. Docket materials that are not available electronically may be viewed at the docket facility identified in Section I.B. EPA intends to work toward providing electronic access to all of the publicly available docket materials through EPA's electronic public docket.

For public commenters, it is important to note that EPA's policy is that public comments, whether submitted electronically or in paper, will be made available for public viewing in EPA's electronic public docket as EPA receives them and without change, unless the comment contains copyrighted material, CBI, or other information whose disclosure is restricted by statute. When EPA identifies a comment containing copyrighted material, EPA will provide a reference to that material in the version of the comment that is placed in EPA's electronic public docket. The entire printed comment, including copyrighted material, will be available in the public docket.

Public comments submitted on computer disks that are mailed or delivered to the docket will be transferred to EPA's electronic public docket. Public comments that are mailed or delivered to the docket will be scanned and placed in EPA's electronic public docket. Where practical, physical objects will be photographed, and the photograph will be placed in EPA's electronic public docket along with a brief description written by the docket staff.

C. What Should I Consider as I Prepare My Comments for EPA?

a. *Submitting Public Comments.* You may submit comments electronically, by mail, or through hand delivery/courier, as explained in the **ADDRESSES** section of this document. To ensure proper receipt by EPA, identify the appropriate docket identification number in the subject line on the first page of your comment. Please ensure that your comments are submitted within the specified comment period. Comments received after the close of the comment period will be marked ''late.'' EPA is not required to consider late comments.

b. *Submitting CBI.* Do not submit information that you consider to be confidential business information (CBI) electronically through EPA's electronic public docket or by e-mail. Send or deliver information identified as CBI only to the following address: CERCLA CBI Document Control Officer, Office of Solid Waste and Emergency Response (5101T), U.S. EPA, 1200 Pennsylvania Avenue, NW., Washington, DC 20460, Attention: Docket ID No. SFUND–2004–0001. You may claim information that you submit to EPA as CBI by marking any part or all of that information as CBI (if you submit CBI on disk or CD ROM, mark the outside of the disk or CD ROM as CBI and then identify electronically within the disk or CD ROM the specific information that is CBI). Information so marked will not be disclosed except in accordance with procedures set forth in 40 CFR, Part 2.

In addition to one complete version of the comment that includes any information claimed as CBI, a copy of the comment that does not contain the information claimed as CBI must be submitted for inclusion in the public docket and EPA's electronic public docket. If you submit the copy that does not contain CBI on disk or CD ROM, mark the outside of the disk or CD ROM clearly that it does not contain CBI. Information not marked as CBI will be included in the public docket and EPA's electronic public docket without prior notice. If you have any questions about CBI or the procedures for claiming CBI, please consult the person identified in the **FOR FURTHER INFORMATION CONTACT** section.

c. *Tips for Preparing Your Comments.* You may find the following suggestions helpful for preparing your comments:

i. Identify the rulemaking by docket number and other identifying information (*e.g.*, subject heading, **Federal Register** date and page number).

ii. Explain your views as clearly as possible.

iii. Explain why you agree or disagree; suggest alternatives and substitute language for your requested changes.

iv. Describe any assumptions and provide any technical information and/or data that you used to support your views.

v. If you estimate potential burden or costs, explain how you arrived at your estimate in sufficient detail to allow for it to be reproduced.

vi. Provide specific examples to illustrate your concerns and suggest alternative.

vii. Make sure to submit your comments by the comment period deadline identified.

Contents of This Proposed Rule

I. Statutory Authority

These regulations are proposed under the authority of Section 101(35)(B) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (42 U.S.C. 9601), as amended, most importantly by the Small Business Liability Relief and Brownfields Redevelopment Act.

II. Background

A. What Is the Intent of Today's Proposed Rule?

The intent of today's proposed rule is to propose regulations setting federal standards and practices for the conduct of ''all appropriate inquiries.'' This regulatory action was initiated in response to legislative amendments to the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA). On January 11, 2002, President Bush signed the Small Business Liability Relief and Brownfields Revitalization Act (Pub. L. 107–118, 115 stat. 2356, ''the Brownfields Amendments''). The Brownfields Amendments amend CERCLA by providing funds to assess and clean up brownfields sites, clarifying CERCLA liability provisions for certain landowners, and providing funding to enhance state and tribal clean up programs. Today's regulatory action proposes standards and practices for the conduct of ''all appropriate inquiries,'' a key provision of the Brownfields Amendments. Subtitle B of Title II of the Brownfields Amendments revises CERCLA Section 101(35), clarifying the requirements necessary to establish the innocent landowner defense. In addition, the Brownfields Amendments add protections from CERCLA liability for bona fide prospective purchasers and contiguous property owners who meet certain statutory requirements.

Each of the CERCLA liability provisions for innocent landowners, bona fide prospective purchasers, and contiguous property owners, requires that, among other requirements, persons

claiming the liability protections conduct all appropriate inquiries into prior ownership and use of a property prior to or at the time at which a person acquires a property. The law requires EPA to develop regulations establishing standards and practices for how to conduct all appropriate inquiries and promulgate the standards within two years of enactment of the Amendments. Congress included in the Brownfields Amendments a list of criteria that the Agency must address in the regulations establishing standards and practices for conducting all appropriate inquiries § 101(35)(2)(B)(ii) and (iii). The Brownfields Amendments also require that parties receiving a federal brownfields grant awarded under CERCLA Section 104(k)(2)(B) conduct site characterizations and assessments and must conduct these activities in accordance with the standards and practices for all appropriate inquiries.

The regulations proposed 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 proposed rule does not address the requirements of CERCLA Section 101(35)(B)(i)(I) for what constitutes ''reasonable steps.''

B. What Is ''All Appropriate Inquiries?''

An essential step in real property transactions is evaluating a property for potential environmental contamination and assessing potential liability for contamination present at the property. The process for assessing properties for the presence of environmental contamination often is referred to as ''environmental due diligence,'' or ''environmental site assessment.'' The Comprehensive Environmental Response Compensation and Liability Act (CERCLA) or Superfund, provides for a similar, but legally distinct, process referred to as ''all appropriate inquiries.''

Under CERCLA, persons may be held strictly liable for cleaning up hazardous substances at properties that they either currently own or operate or owned or operated in the past. Strict liability under CERCLA means that liability for environmental contamination could be assigned based solely on property ownership.

In 1986, the Superfund Amendments and Reauthorization Act (Pub. L. No. 99–499, 100 stat. 1613, ''SARA'') amended CERCLA by creating an ''innocent landowner'' defense to CERCLA liability. The new Section 101(35)(B) of CERCLA provided a defense to CERCLA liability, for those persons who could demonstrate, among other requirements, that they ''did not know and had no reason to know'' prior to purchasing a property that any hazardous substance that is the subject of a release or threatened release was disposed of on, in, or at the property. Such persons, to demonstrate that they had ''no reason to know'' must have undertaken, prior to, or at the time of acquisition of the property, ''all appropriate inquiries'' into the previous ownership and uses of the property consistent with good commercial or customary practice. The 2002 Brownfields Amendments added potential liability protections for ''contiguous property owners'' and ''bona fide prospective purchasers'' who also must demonstrate they conducted all appropriate inquiries, among other requirements, to benefit from the liability protection.

C. What Are the Current Standards for All Appropriate Inquiries?

As part of the Brownfields Amendments to CERCLA, Congress established interim standards for the conduct of all appropriate inquiries. The federal interim standards established by Congress became effective on January 11, 2002. In the case of properties purchased after May 31, 1997, the interim standards include the procedures of the American Society for Testing and Materials (ASTM) Standard E1527–97 (entitled ''Standard Practice for Environmental Site Assessment: Phase 1 Environmental Site Assessment Process''). In the case of persons who purchased property prior to May 31, 1997 and who are seeking to establish an innocent landowner defense or qualify as a contiguous property owner, the interim standards require that such persons must establish, among other statutory requirements, that they did not know and had no reason to know of releases or threatened releases to the property before the date they acquired the property. To establish they did not know and had no reason to know of releases or threatened releases, persons who purchased property prior to May 31, 1997 must demonstrate that they carried out all appropriate inquiries into the previous ownership and uses of the property in accordance with generally accepted good commercial and customary standards and practices.

In the case of property acquired by a non-governmental entity or non-commercial entity for residential or other similar uses, the current interim standards for all appropriate inquiries may not be applicable. For those cases, the Brownfields Amendments to CERCLA establish that a ''facility inspection and title search that reveal no basis for further investigation shall be considered to satisfy the requirements'' for all appropriate inquiries. In addition, such properties are not within the scope of today's proposed rule.

The interim standards remain in effect until EPA promulgates federal regulations establishing standards and practices for conducting all appropriate inquiries.

On May 9, 2003, EPA published a final rule (68 FR 24888) clarifying that for the purposes of achieving the all appropriate inquiries standards of CERCLA Section 101(35)(B), and until the Agency promulgates regulations implementing standards for all appropriate inquiries, the procedures for persons who purchase property on or after May 31, 1997 may include either the procedures provided in ASTM E1527–2000, entitled ''Standard Practice for Environmental Site Assessment: Phase I Environmental Site Assessment Process,'' or the earlier standard cited by Congress in the Brownfields amendments, ASTM E1527–97.

Today's notice is a proposed rule and as such has no effect upon the current interim standards for all appropriate inquiries established by Congress in the Brownfields Amendments and clarified by EPA in the May 9, 2003 final rule. However, once the Agency promulgates a final rule establishing federal regulations containing the standards and practices for conducting all appropriate inquiries, the interim standard will no longer be the operative standard for conducting all appropriate inquiries. Following the effective date of a new final regulation, the standards and practices included as the final regulation will replace the current interim standards for all appropriate inquiries.

The National Technology Transfer and Advancement Act (NTTAA), directs agencies to use technical standards that are developed or adopted by voluntary consensus standards bodies (unless their use would be inconsistent with applicable law or otherwise impractical). We considered ASTM E1527–2000, for use in this rule and determined that the standard is inconsistent with applicable law because it does not meet the statutory criteria necessary to achieve the purpose of the rule. Section V.I of today's proposed rule provides additional detail on the basis for our interpretation with respect to this alternative. We invite public comment on our determination that the ASTM E1527–2000 Phase I Environmental Site Assessment Standard is inconsistent with applicable law.

D. What Are the Liability Protections Established Under the Brownfields Amendments?

The Brownfields Amendments provide important liability protections for landowners who qualify as contiguous property owners, bona fide prospective purchasers, or innocent landowners. To meet the statutory requirements for any of these landowner liability protections, a landowner must meet certain threshold requirements and satisfy certain continuing obligations. To qualify as a bona fide prospective purchaser, contiguous property owner, or innocent landowner, a person must perform ''all appropriate inquiries'' before acquiring the property. Bona fide prospective purchasers and contiguous property owners also must demonstrate that they are not potentially liable or affiliated with any other person that is potentially liable for response costs at the property. In the case of contiguous property owners, the landowner claiming to be a contiguous property owner also must demonstrate that he did not cause, contribute, or consent to any release or threatened release of hazardous substances. To meet the statutory requirements for a bona fide prospective purchaser, a property owner must have acquired a property subsequent to any disposal activities involving hazardous substances at the property.

Continuing obligations required under the statute include complying with land use restrictions and not impeding the effectiveness or integrity of institutional controls; taking ''reasonable steps'' with respect to hazardous substances affecting a landowner's property to prevent releases; providing cooperation, assistance and access to EPA, a state, or other party conducting response actions or natural resource restoration at the property; complying with CERCLA information requests and administrative subpoenas; and providing legally required notices. For a more detailed discussion of these threshold and continuing requirements please see EPA, *Interim Guidance Regarding Criteria Landowners Must Meet in Order To Qualify for Bona Fide Prospective Purchaser, Contiguous Property Owner, or Innocent Landowner Limitations on CERCLA Liability* (Common Elements, 2003). A copy of this document is available in the docket for today's proposed rule.

1. Bona Fide Prospective Purchaser

The Brownfields Amendments added the bona fide prospective purchaser provision at CERCLA Section 107(r). The provision provides protection from CERCLA liability, and limits EPA's recourse for unrecovered response costs to a lien on property for the increase in fair market value attributable to EPA's response action. To meet the statutory requirements for a bona fide prospective purchaser, a person must meet the requirements set forth in CERCLA Section 101(40). A bona fide prospective purchaser must have bought property after January 11, 2002 (the date of enactment of the Brownfields Amendments). A bona fide prospective purchaser may purchase property with knowledge of contamination after performing all appropriate inquiries, provided the property owner meets or complies with all of the other statutory requirements set forth in CERCLA Section 101(40). Conducting all appropriate inquiries *alone* does not provide a landowner with protection against CERCLA liability. Landowners who want to qualify as bona fide prospective purchasers must comply with *all* of the statutory requirements. The statutory requirements include, without limitation, that the landowner must:

- Have acquired a property after all disposal activities involving hazardous substances at the property;
- Provide all legally required notices with respect to the discovery or release of any hazardous substances at the property;
- Exercise appropriate care by taking reasonable steps to stop continuing releases, prevent any threatened future release, and prevent or limit human, environmental, or natural resources exposure to any previously released hazardous substance;
- Provide full cooperation, assistance, and access to persons that are authorized to conduct response actions or natural resource restorations;
- Comply with land use restrictions established or relied on in connection with a response action;
- Not impede the effectiveness or integrity of any institutional controls;
- Comply with any CERCLA request for information or administrative subpoena; and
- Not be potentially liable, or affiliated with any other person who is potentially liable for response costs for addressing releases at the property.

Persons claiming to be bona fide prospective purchasers should keep in mind that failure to identify an environmental condition or identify a release or threatened release of a hazardous substance on, at, in or to a property during the conduct of all appropriate inquiries does *not* relieve a landowner from complying with the other post-acquisition statutory requirements for obtaining the liability protections. Landowners must comply with all the statutory requirements to obtain the liability protection. For example, an inability to identify a release or threatened release during the conduct of all appropriate inquiries does not negate the landowner's responsibilities under the statute to take reasonable steps to stop a release, prevent a threatened release, and prevent exposure to a release or threatened release. None of the other statutory requirements for the bona fide prospective purchaser liability protection is contingent upon the results of the conduct of all appropriate inquiries.

2. Contiguous Property Owner

The Brownfields Amendments added a new contiguous property owner provision at CERCLA Section 107(q). This provision excludes from the definition of ''owner'' or ''operator'' under CERCLA Section 107(a)(1) and (2) a person who owns property that is ''contiguous to, or otherwise similarly situated with respect to, and that is or may be contaminated by a release or threatened release of hazardous substances from'' property owned by someone else. To qualify as a contiguous property owner, a landowner must have no knowledge of contamination prior to acquisition and meet all of the criteria set forth in CERCLA Section 107(q)(1)(A), which include, without limitation:

- Not causing, contributing, or consenting to the release or threatened release;
- Not being potentially liable nor affiliated with any other person who is potentially liable for response costs at the property;
- Taking reasonable steps to stop continuing releases, prevent any threatened release, and prevent or limit human, environmental, or natural resource exposure to any hazardous substances released on or from the landowner's property;
- Providing full cooperation, assistance, and access to persons that are authorized to conduct response actions or natural resource restorations;
- Complying with land use restrictions established or relied on in connection with a response action;
- Not impeding the effectiveness or integrity of any institutional controls;
- Complying with any CERCLA request for information or administrative subpoena;
- Providing all legally required notices with respect to discovery or release of any hazardous substances at the property.

The contiguous property owner liability protection ''protects parties that are essentially victims of pollution incidents caused by their neighbor's actions.'' S. Rep. No. 107–2, at 10 (2001). Contiguous property owners must perform all appropriate inquiries prior to purchasing property. However, performing all appropriate inquiries in accordance with the regulatory requirements alone is not sufficient to assert the liability protections afforded under CERCLA. Property owners must fully comply with all of the statutory requirements to be afforded the contiguous property owner liability protection. Persons who know, or have reason to know, that the property is or could be contaminated prior to purchasing a property cannot qualify for the liability protection as a contiguous property owner, but may be entitled to bona fide prospective purchaser status.

Persons claiming to be contiguous property owners should keep in mind that failure to identify an environmental condition or identify a release or threatened release of a hazardous substance on, at, in or to a property during the conduct of all appropriate inquiries, does not relieve a landowner from complying with the other statutory requirements for obtaining the contiguous landowner liability limitation. Landowners must comply with all the statutory requirements to qualify for the liability protections. For example, an inability to identify a release or threatened release during the conduct of all appropriate inquiries does not negate the landowner's responsibilities under the statute to take reasonable steps to stop the release, prevent a threatened release, and prevent exposure to the release or threatened release. None of the other statutory requirements for the contiguous property owner liability protection is contingent upon the results of the conduct of all appropriate inquiries.

3. Innocent Landowner

The Brownfields Amendments also clarify the innocent landowner affirmative defense. To qualify as an innocent landowner, a person must conduct all appropriate inquiries and meet all of the statutory requirements. The requirements include, without limitation:

- Having no reason to know that any hazardous substance which is the subject of a release or threatened release was disposed of on, in, or at the facility;
- Providing full cooperation, assistance and access to persons authorized to conduct response actions at the property;
- Complying with any land use restrictions and not impeding the effectiveness or integrity of any institutional controls;
- Taking reasonable steps to stop continuing releases, prevent any threatened release, and prevent or limit human, environmental, or natural resource exposure to any hazardous substances released on or from the landowner's property;

To succeed in an innocent landowner liability defense, a property owner must demonstrate compliance with CERCLA Section 107(b)(3) as well. Such persons must establish, by a preponderance of the evidence:

- That the act or omission that caused the release or threat of release of hazardous substances and the resulting damages were caused by a third party with whom the person does not have employment, agency, or a contractual relationship;
- The person exercised due care with respect to the hazardous substance concerned, taking into consideration the characteristics of such hazardous substance, in light of all relevant facts and circumstances;
- Took precautions against foreseeable acts or omissions of any such third party and the consequences that could foreseeable result from such acts or omissions.

Like contiguous property owners, innocent landowners must perform all appropriate inquiries prior to acquiring a property and cannot know, or have reason to know, of contamination to qualify for this landowner liability protection. Persons claiming to be innocent landowners also should keep in mind that failure to identify an environmental condition or identify a release or threatened release of a hazardous substance on, at, in or to a property during the conduct of all appropriate inquiries, does not relieve or exempt a landowner from complying with the other statutory requirements for making the innocent landowner defense. Landowners must comply with all the statutory requirements to obtain the defense. For example, an inability to identify a release or threatened release during the conduct of all appropriate inquiries does not negate the landowner's responsibilities under the statute to take reasonable steps to stop the release, prevent a threatened release, and prevent exposure to the release or threatened release. None of the other statutory requirements for the innocent landowner defense is contingent upon the results of the conduct of all appropriate inquiries.

E. What Criteria Did Congress Establish for the All Appropriate Inquiries Standard?

Congress included in the Brownfields Amendments a list of criteria that the Agency must include in the regulations establishing standards and practices for conducting all appropriate inquiries. These criteria are set forth in CERCLA Section 101(35)(2)(B)(ii) and include:

- The results of an inquiry by an environmental professional.
- Interviews with past and present owners, operators, and occupants of the facility for the purpose of gathering information regarding the potential for contamination at the facility.
- Reviews of historical sources, such as chain of title documents, aerial photographs, building department records, and land use records, to determine previous uses and occupancies of the real property since the property was first developed.
- Searches for recorded environmental cleanup liens against the facility that are filed under federal, state, or local law.
- Reviews of federal, state, and local government records, waste disposal records, underground storage tank records, and hazardous waste handling, generation, treatment, disposal, and spill records, concerning contamination at or near the facility.
- Visual inspections of the facility and of adjoining properties.
- Specialized knowledge or experience on the part of the defendant.
- The relationship of the purchase price to the value of the property, if the property was not contaminated.
- Commonly known or reasonably ascertainable information about the property.
- The degree of obviousness of the presence or likely presence of contamination at the property, and the ability to detect the contamination by appropriate investigation.

In addition, Congress instructed EPA, in the Brownfields Amendments to develop regulations establishing standards and practices for conducting all appropriate inquiries in accordance with generally accepted good commercial and customary standards and practices.

F. How Did EPA Go About Developing the Proposed Rule?

Consistent with the Negotiated Rulemaking Act of 1996, 5 U.S.C. 561 *et seq.* (The Negotiated Rulemaking Act), EPA decided to use the negotiated rulemaking process to develop the proposed federal standards for conducting all appropriate inquiries.

The most important reason for using the regulatory negotiation process for developing the proposed federal standards is that all stakeholders, when consulted, strongly supported a consensus-based negotiated rulemaking effort. In addition, the Agency determined that a negotiated rulemaking committee composed of stakeholders familiar with good commercial and customary standards and practices, as well as the technical, scientific, and environmental policy issues relevant to environmental due diligence, would provide great benefit to the Agency in its attempt to fulfill the Congressional mandate. EPA also believed that a regulatory negotiation process would be less adversarial than if the Agency were to develop a proposed rule using its internal regulatory development process and that a regulatory negotiation could result in a proposed rule that would effectively reflect Congressional intent.

G. What Is Negotiated Rulemaking?

Using negotiated rulemaking to develop the proposed rule is fundamentally different than the Agency's internal rulemaking development process. Negotiated rulemaking is a process in which a proposed rule is developed by a committee composed of representatives of those interests that will be significantly affected by the rule. The process is started by the Agency's careful identification of the interests potentially affected by the rulemaking under consideration. To help in this identification process, the Agency publishes a notice in the **Federal Register**, that identifies a preliminary list of potentially affected interests and requests public comment on that list. Following receipt of the comments, the Agency establishes a formal advisory committee under the Federal Advisory Committee Act (FACA). A balanced membership representing these various interests is invited by the Agency to participate in the advisory committee. Representation on the committee may be direct, that is, each member represents a specific interest, or may be indirect, through coalitions of parties formed for this purpose. The Agency is a member of the committee representing the interests of all of the federal government.

Meetings of the committee are announced in the **Federal Register** and are open to observation by members of the public. Decisions of the committee are made by consensus, which generally means an agreement of all committee members that they can accept the provisions of the proposed rule when taken as a whole package. A neutral professional, or facilitator, impartially assists the negotiated rulemaking committee by applying proven consensus building techniques to the committee's activities. This professional facilitator serves several roles, including convening the process, facilitating meetings and mediating committee negotiations.

The negotiated rulemaking process involves a mutual education of the negotiating parties by each other on the practical concerns about the impact of each approach considered by the committee. All committee members participate in seeking to reach a consensus that resolves the concerns of the other members, rather than leaving it up to EPA to bridge different points of view. A key principle of negotiated rulemaking is that agreement is by consensus of all the members. Thus, no one interest or group of interests is able to control the process. The Negotiated Rulemaking Act defines consensus as ''the unanimous concurrence among interests represented on a negotiated rulemaking committee, unless the committee itself unanimously agrees to use a different definition.'' 5 U.S.C. 562(2).

When a regulatory negotiation advisory committee reaches consensus on the provisions of a proposed rule, the Agency generally uses such consensus language as the basis of its proposed rule, which is published in the **Federal Register**. This provides the required public notice and allows for a public comment period. Committee members agree to support the proposed rule as published if there are no substantive changes from the consensus provisions. Other interested parties retain their rights to comment, participate in an informal hearing (if requested) and judicial review. EPA anticipates, however, that the pre-proposal consensus agreed upon by a negotiated rulemaking committee will effectively address most major issues prior to publication of a proposed rule.

H. What Was the Process that EPA Followed in Establishing and Conducting the Negotiated Rulemaking Committee?

During the fall of 2002, EPA initiated the negotiated rulemaking process by identifying appropriate stakeholder groups and soliciting advice and input from experienced public and private sector users of similar standards. EPA retained an expert facilitator to contact parties potentially affected by the all appropriate inquiries rule to determine whether or not stakeholders were interested in participating in a negotiated rulemaking process and determine the potential for stakeholder issues to be successfully addressed through a regulatory negotiation. Following an evaluation of stakeholder interest and input, the facilitator found that there was sufficient enthusiasm among stakeholders for a negotiated rulemaking process and almost all stakeholders that EPA identified and the facilitator interviewed expressed a belief that potential issues and differences between interested parties could be successfully addressed and negotiated through the regulatory negotiation process. A description of the issues raised by identified stakeholders and a list of interested stakeholders, as well as the findings of the facilitator are contained in the final report entitled *Convening Assessment Report on the Feasibility of a Negotiated Rulemaking Process to Develop the All Appropriate Inquiry Standard Required under the Small Business Liability Relief and Brownfields Revitalization Act.* A copy of this final report is included in the regulatory docket for today's notice.

Following the convening process, the Agency determined that the use of a regulatory negotiation process in this matter was appropriate. The Agency then identified stakeholders and interest groups who potentially would be affected by the rulemaking under consideration. After identifying an initial list of potential interests, 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 receipt of public comments in response to that notice and the conduct of a public hearing to obtain public input, the Agency established a negotiated rulemaking advisory committee under the provisions of the Federal Advisory Committee Act (FACA). The advisory committee included a balanced membership representing the various interests identified either by EPA or by public commenters as having a significant stake in the outcome of the rulemaking. The Agency then published in the **Federal Register** a notice announcing the establishment of the Negotiated Rulemaking Committee on All Appropriate Inquiries (the Negotiated Rulemaking Committee) on April 7, 2003 (68 FR 16747).

The Agency developed a charter for the Negotiated Rulemaking Committee defining the purpose, scope and duration of the committee in accordance with the provisions of the FACA. The

primary purpose of the committee was to negotiate a consensus on the terms of a proposed rule setting standards and practices for the conduct of all appropriate inquiries. The committee was composed of 25 members and each member of the committee represented a specific stakeholder interest. EPA had one seat on the committee. The Agency member on the committee represented the Federal government's own set of interests. A neutral facilitator assisted the Negotiated Rulemaking Committee by applying proven consensus building techniques to the Committee's activities. This facilitator served several roles including convening the process, facilitating meeting discussions, and mediating Committee negotiations.

The Agency's negotiated rulemaking committee for this proposed rule was formed and operated in full compliance with the requirements of the Federal Advisory Committee Act (FACA) and in a manner consistent with the requirements for the Negotiated Rulemaking Act of 1990. Committee members established formal ground rules for the conduct of their negotiations. Among other things, the ground rules provide that Committee decisions would be made by consensus, Committee agreements would be tentative until the Committee reached final consensus on regulatory language, and Committee members could not withdraw their consensus once a final consensus was reached by the Committee. All meetings of the Negotiated Rulemaking Committee were open public meetings. Members of the public, including representatives from organizations not represented on the Committee were welcomed to observe Committee discussions during each meeting. All written products developed by the Committee were made available to the public on EPA's Web site and in the Agency's rulemaking docket. Time was set aside during each meeting of the Committee to hear comments from the public. Members of the public also had the opportunity to provide written comments to the negotiated rulemaking committee on the topics considered and discussed by the Committee. The openness of the negotiated rulemaking process allowed for continued review of the Committee proceedings by the public and allowed the Committee to give full consideration to input offered by the public during its deliberations.

The Negotiated Rulemaking Committee for All Appropriate Inquiries conducted six multiple-day meetings over the course of an eight-month period, beginning in April 2003. The Committee reached consensus on the provisions of a proposed rule during its meeting in November 2003. The consensus of all Committee members was confirmed in December 2003 through approval of the facilitator's summary of that meeting, including the text of the proposed rule. The Agency, consistent with the intent of the Negotiated Rulemaking Act of 1990 and in compliance with the Committee's ground rules, is using the Committee's consensus regulatory language as the basis of today's proposed rule.

I. What Are the Benefits of Negotiated Rulemaking?

The regulatory negotiation process allowed EPA to solicit direct input from informed, interested, and affected parties while drafting the regulation, rather than delay public input until the public comment period provided after publishing a proposed rule; therefore, ensuring that the rule is sensitive to the needs and limitations of both the parties and the Agency. A rule drafted by negotiation with informed and affected parties is expected to be grounded in the practical experiences of the experts on the committee and more easily implemented, thereby providing the public with the benefits of the rule while minimizing the negative impact of a regulation conceived or drafted without the direct input of outside knowledgeable parties. Since a negotiating committee includes representatives from the major stakeholder groups affected by or interested in the rule, the number of public comments on the proposed rule may be reduced and those comments that are received may be more moderate.

Under a traditional rulemaking process, EPA develops a proposed rulemaking using Agency staff and consultant resources. The concerns of affected parties are made known through various informal contacts and through publication of advance notices of proposed rulemaking in the **Federal Register**. After the notice of proposed rulemaking is published for comment, affected parties may submit arguments and data defining and supporting their positions with regard to the issues raised in the proposed rule. All communications from affected parties are directed to the Agency. In general, there is not much communication among parties representing different interests. Many times, effective regulations have resulted from such a process. However, as Congress noted in the Negotiated Rulemaking Act of 1990, such regulatory development procedures ''may discourage the affected parties from meeting and communicating with each other, and may cause parties with different interests to assume conflicting and antagonistic positions and to engage in expensive and time-consuming litigation * * * '' (5 U.S.C. 581(2), Pub. L. 101–648). Congress also stated that ''adversarial rulemaking deprives the affected parties and the public of the benefits of face-to-face negotiations and cooperation in developing and reaching agreement on a rule. It also deprives them of the benefits of shared information, knowledge, expertise, and technical abilities possessed by the affected parties.'' (*Id* at 5 U.S.C. 581(3)). In the case of today's proposed rule, EPA believes that the willingness of the stakeholders to participate in the negotiated rulemaking greatly benefitted the development of the proposed rule.

J. Who Was Represented on the Negotiated Rulemaking Committee?

The Agency initiated the negotiated rulemaking process giving particular attention to ensuring full and adequate representation of those interests that may be significantly affected by the proposed rule setting standards for conducting all appropriate inquiries. The Negotiated Rulemaking Act defines the term ''interest'' as ''with respect to an issue or matter, multiple parties which have a similar point of view or which are likely to be affected in a similar manner'' (5 U.S.C. 562(5)). Listed below are parties that the Agency identified as being ''significantly affected'' by the matters that may be included in the proposed rule. The Negotiated Rulemaking Committee consisted of representatives from each of these stakeholder groups.

The Negotiated Rulemaking Committee was composed of 25 members representing parties of interest to the rulemaking. EPA monitored the membership of the Committee carefully to ensure that there was a balanced representation from affected and interested stakeholder groups. The Negotiated Rulemaking Committee included representatives from the following stakeholder groups:

- Environmental Interest Groups
- Environment Justice Community
- Federal Government
- Tribal Governments
- State Governments
- Local Governments
- Real Estate Developers
- Bankers and Lenders
- Environmental Professionals

After establishing the above list of stakeholders as the stakeholders representing significant interests in the rulemaking, EPA identified specific organizations that the Agency believed could speak for and represent these

interests. After identifying a preliminary list of organizations to invite to participate in the negotiated rulemaking process, publishing the preliminary list in the **Federal Register** in a *Notice of Intent To Negotiate* (68 FR 10675), and considering public comment on the list of organizations invited to represent each stakeholder group, including considering self-nominations received from commenters, the Negotiated Rulemaking Committee was formed. The Committee included individuals from the following organizations:

- U.S. Environmental Protection Agency
- Environmental Defense
- Center for Public Environmental Oversight
- Partnership for Sustainable Brownfields Redevelopment
- West Harlem Environmental Action
- U.S. Public Interest Research Group (U.S. PIRG) [1]
- Association of State and Territorial Solid Waste Management Officials
- Gila River Indian Tribe
- Cherokee Nation
- U.S. Conference of Mayors
- National Association of Local Government Environmental Professionals
- International Municipal Lawyers Association
- National Association of Development Organizations
- National Association of Homebuilders
- The Real Estate Roundtable
- National Association of Industrial and Office Properties
- International Council of Shopping Centers
- Trust for Public Land
- National Brownfields Association
- Mortgage Bankers Association
- Environmental Bankers Association
- National Ground Water Association
- American Society of Civil Engineers
- ASFE
- Wasatch Environmental, Inc.

The docket for today's rulemaking includes a list of the individuals that represented each of these organizations on the Negotiated Rulemaking Committee. Also included in the docket are the meeting summaries for each meeting of the Committee and the Committee's final report.

[1] EPA notes that after all members of the Negotiated Rulemaking Committee reached consensus on November 14, 2003 and such consensus was confirmed by all Committee members through approval of the final meeting summary, U.S. PIRG submitted a letter, dated December 19, 2003, seeking to withdraw from the Committee. EPA included the letter and its reply in the public docket for the negotiated rulemaking process, SFUND–2003–0006.

III. Detailed Description of Today's Proposed Rule

A. What Is the Purpose and Scope of the Proposed Rule?

As outlined in the Brownfields Amendments to CERCLA, the purpose of today's rule is to establish federal standards and practices for the conduct of all appropriate inquiries. Such inquiries must be conducted by persons seeking any of the landowner liability protections under CERCLA prior to acquiring a property (as outlined in Section II.B. of this preamble). In addition, persons receiving Federal brownfields grants under the authorities of CERCLA Section 104(k)(2)(B) to conduct site characterizations and assessments must conduct such activities in compliance with the all appropriate inquiries regulations.

In the case of persons claiming one of the CERCLA landowner liability protections, the scope of today's proposed rule includes the conduct of all appropriate inquiries for the purpose of identifying releases and threatened releases of hazardous substances on, at, in or to the property that would be the subject of a response action for which a liability protection would be needed and such a property is owned by the person asserting protection from liability. CERCLA liability is limited to releases and threatened releases of hazardous substances which cause the incurrence of response costs. Therefore, in the case of all appropriate inquiries conducted for the purpose of qualifying for protection from CERCLA liability (CERCLA Section 107), the scope of the inquiries is to identify releases and threatened releases of hazardous substances which cause or threaten to cause the incurrence of response costs.

In the case of persons receiving Federal brownfields grants to conduct site characterizations and assessments, the scope of the proposed all appropriate inquiries standards and practices may be broader. The Brownfields Amendments include a definition of a ''brownfield site'' that includes properties contaminated or potentially contaminated with pollutants and contaminants not included in the definition of ''hazardous substance'' in CERCLA Section 101(14). Brownfields sites include properties contaminated with (or potentially contaminated with) hazardous substances, as well as petroleum and petroleum substances, controlled substances, and pollutants and contaminants (as defined in CERCLA Section 101(33)). Therefore, in the case of persons receiving federal brownfields grant monies to conduct site assessment and characterization activities at brownfields sites, the scope of the all appropriate inquiries may include these other pollutants and contaminants, as outlined in proposed § 312.1(c)(2), to ensure that persons receiving brownfields grants can appropriately and fully assess the properties that are owned by grant recipients to the full extent provided by the law. It is not the case that every recipient of a brownfields assessment grant has to include within the scope of the all appropriate inquiries petroleum and petroleum products, controlled substances and CERCLA pollutants and contaminants (as defined in CERCLA Section 101(33)). However, in those cases where the terms and conditions of the grant or the cooperative agreement with the grantee designate a broader scope to the investigation (beyond CERCLA hazardous substances), then the scope of the all appropriate inquiries should include the additional substances or contaminants.

The scope of today's proposed rule does not include property purchased by a non-governmental entity or non-commercial entity for ''residential or other similar uses where a facility inspection and title search reveal no basis for further investigation.'' (Pub. Law 107–118 at Sec. 223). CERCLA Section 101(35)(B)(v) states that in those cases, the title search and facility inspection shall be considered to satisfy the requirements for all appropriate inquiries.

EPA notes that today's proposed rule also does not affect the existing CERCLA liability protections for state and local governments that acquire ownership to properties involuntarily in their functions as sovereigns, pursuant to CERCLA Sections 101(20)(D) and 101(35)(A)(ii). Involuntary acquisition of properties by state and local governments fall under those CERCLA provisions and EPA's policy guidance on those provisions, not under the all appropriate inquiry provisions of CERCLA Section 101(35)(B).

B. To Whom Is the Rule Applicable?

Today's proposed rule applies to any person who may seek the landowner liability protections of CERCLA as an innocent landowner, contiguous property owner, or bona fide prospective purchaser. The statutory requirements to obtain each of these landowner liability protections include the conduct of all appropriate inquiries. In addition, the proposed rule will apply to individuals receiving Federal grant monies under CERCLA Section 104(k)(2) to conduct site characterization and assessment

activities. Persons receiving such grant monies must conduct the site characterization and assessment in compliance with the all appropriate inquiries regulatory requirements.

C. Does the Proposed Rule Include Any New Reporting or Disclosure Obligations?

The proposed rule does not include any new reporting or disclosure obligations. The proposed rule only would apply to those property owners who may seek the landowner liability protections provided under CERCLA for innocent landowners, contiguous property owners or bona fide prospective purchasers. The documentation requirements included in this proposed rule are primarily intended to enhance the inquiries by requiring the environmental professional to record the results of the inquiries and his or her conclusions regarding conditions indicative of releases and threatened releases on, at, in, or to the property and to provide a record of the environmental professional's inquiry. There are no proposed requirements to notify or submit information to EPA or any other government entity.

The proposed rule does require, in proposed § 312.21(c), that the environmental professional on behalf of the property owner document the results of the all appropriate inquiries in a written report. The property owner may use this report to document the results of the inquiries. The Agency believes that such a report can be similar in nature to the type of report currently provided under generally accepted commercial practices. Today's proposed rule contains no requirements regarding the length, structure, or specific format of the written report. In addition, the proposed rule does not require that a written report of any kind be submitted to EPA or any other government agency, or that a written report be maintained on-site at the subject property for any length of time. The purpose of the written report is merely to ensure that any person claiming one of the CERCLA landowner liability protections be able to show documentation that all appropriate inquiries were conducted in compliance with the federal regulations, should such documentation be required.[2] The Agency notes, that while this proposed regulation would not require parties conducting all appropriate inquiries to retain the written report or any other documentation discovered, consulted, or created in the course of conducting the inquiries, the retention of such documentation and records may be helpful should the property owner need to assert protection from CERCLA liability after purchasing a property.

The proposed rule would require that a written report documenting the results of the all appropriate inquiries include an opinion of an environmental professional as to whether the all appropriate inquiries conducted identified conditions indicative of releases or threatened releases of hazardous substances on, at, in or to the subject property. The proposed rule also would require that the report identify data gaps in the information collected that affect the ability of the environmental professional to render such an opinion or determine the significance of data gaps.

The proposed rule, at proposed § 312.21(d), would require that the environmental professional who conducts or oversees the all appropriate inquiries sign the written report. There are two purposes for the proposed requirement to include a signature in the report. First, the individual signing the report would declare, on the signature page, that he or she meets the definition of an environmental professional, as provided in proposed § 312.10. In addition, the proposed rule would require the environmental professional to declare that: [I, We] have developed and performed the all appropriate inquiries in conformance with the standards and practices set forth in 40 CFR Part 312.

The Negotiated Rulemaking Committee considered requiring an environmental professional to ''certify'' the results of the all appropriate inquiries when signing the report. However, several members of the Committee, members of the public representing organizations of environmental insurance companies, and professional engineers and environmental scientists, pointed out that requiring the report to include a certification statement could imply a warranty or guarantee of the report results on the part of the environment professional. This in turn could have implications regarding the availability and costs of professional insurance for environmental professionals. Requiring a certification as part of the all appropriate inquiries report also could cause a conflict with current requirements governing the use of professional stamps held by individuals with professional licenses, such as those for professional engineers, issued by states, tribes, and the federal government. To avoid such implications, the proposed rule does not include a certification requirement. However, the proposed rule would require that each all appropriate inquiries report include a signature of the environmental professional as well as two statements above the signature. One statement would read ''[I, We] declare that, to the best of [my, our] professional knowledge and belief, [I, we] meet the definition of Environmental Professional as defined in § 312.21 of 40 CFR part 312.'' The proposal also includes a second statement to be included above the signature, stating: ''[I, We] have the specific qualifications based on education, training, and experience to assess a property of the nature, history, and setting of the subject property. [I, We] developed and performed the all appropriate inquiries in conformance with the standards and practices set forth in 40 CFR part 312.'' These statements are meant to document that an individual meeting the proposed qualifications of an environmental professional was involved in the conduct of the all appropriate inquiries and that the activities performed by, or under the supervision or responsible charge of, the environmental professional were performed in conformance with the proposed regulations.

The proposed rule allows for the property owner and any environmental professional engaged in the conduct of all appropriate inquiries for a specific property to design and develop the format and content of a written report that will meet the prospective purchaser's objectives and information needs in addition to providing documentation that all appropriate inquiries were completed prior to the acquisition of the property, should the landowner need to assert protection from liability after purchasing a property.

The Agency requests comment on the proposed requirements for an all appropriate inquiries report. The Agency also requests comments on the signature requirements for the all appropriate inquiries report.

Although today's proposed rule does not include any additional disclosure requirements, CERCLA Section 103 does require persons in charge of facilities, including on-shore and off-shore facilities, and persons in charge of vessels to notify the National Response Center of any release of a hazardous substance of a quantity equal to or greater than a ''reportable quantity,'' as

[2] Nothing in this proposed regulation or preamble is intended to suggest that any documentation prepared in conducting all appropriate inquiries will be admissible in court in any litigation where a party raises one of the liability protections, or will in any way alter the judicial rules of evidence.

defined in CERCLA Section 102(b) from the facility or vessel. Today's proposed rule proposes no changes to this reporting requirement and proposes no changes to any other reporting or disclosure requirements under federal, tribal, or state law.

D. What Are the Proposed Qualifications for an Environmental Professional?

1. What Is the Intent of the Proposed Definition of an Environmental Professional?

In the Brownfields Amendments, Congress required that all appropriate inquiries include ''the results of an inquiry by an environmental professional'' (CERCLA Section 101(35)(B)(iii)(I)). The members of the Negotiated Rulemaking Committee determined that it is necessary to establish minimum qualifications for persons managing or overseeing all appropriate inquiries. The Committee's intent, in setting minimum professional qualifications, is to ensure that all inquiries are conducted at a high level of professional ability and ensure the overall quality of both the inquiries conducted and the conclusions or opinions rendered with regard to conditions indicative of the presence of a release or threatened release on, at, in, or to a property, based upon the results of all inquiries. The Committee agreed that an environmental professional conducting or overseeing all appropriate inquiries must possess sufficient specific education, training, and experience necessary to exercise professional judgment to develop opinions and conclusions regarding the presence of releases or threatened releases of hazardous substances to the surface or subsurface of a property. The Committee agreed that an environmental professional must hold a degree in an engineering or scientific field of study and that such individuals also must have a number of years of relevant experience in conducting all appropriate inquiries, or environmental site assessments. The Committee determined that any individual overseeing the conduct of all appropriate inquiries must provide significant information about the environmental conditions at a property to support a purchaser's or property owner's claim with regard to liability protection under CERCLA. Therefore, any individual overseeing the conduct of the all appropriate inquiries must have a significant level of education and experience. In addition, the Committee determined that it is essential for environmental professionals to remain current in their field of practice.

2. What Are the Minimum Qualifications for Meeting the Definition of an Environmental Professional?

Today's proposed rule includes a definition of an environmental professional that reflects the Negotiated Rulemaking Committee's extensive efforts to identify a set of minimum qualifications, including minimum levels of education and experience, that characterize the type of professional who is best qualified to oversee and direct the development of comprehensive inquiries and provide the landowner with sound conclusions and opinions regarding the potential for releases or threatened releases to be present at the property. The proposed rule allows for individuals not meeting the proposed definition of an environmental professional to contribute to and participate in the all appropriate inquiries on the condition that such individuals are conducting inquiries activities under the supervision or responsible charge of an individual that meets the regulatory definition of an environmental professional.

The proposed rule would require that the final review of the all appropriate inquiries and the conclusions that follow from the inquiries rest with an individual who qualifies as an environmental professional, as defined in proposed section § 312.10 of the proposed rule. The Negotiated Rulemaking Committee concluded, as reflected in its final consensus document, that it is essential that a person meeting the regulatory definition of an environmental professional sign a report documenting the results and conclusions of the all appropriate inquiries to attest to his or her opinion that the inquiries were conducted in compliance with the regulations. The proposed rule also provides that in signing the report, the environmental professional must document that he or she meets the definition of an ''environmental professional'' included in the regulations.

The proposed definition of an environmental professional includes minimum educational qualifications and a number of years of full-time relevant experience in the conduct of all appropriate inquiries or environmental site assessments. The proposed definition first and foremost requires that to qualify as an environmental professional a person must ''possess sufficient specific education, training, and experience necessary to exercise professional judgment to develop opinions and conclusions regarding the presence of releases or threatened releases * * * to the surface or subsurface of a property, sufficient to meet the objectives and performance factors'' that are provided in the proposed regulation. The proposed definition of an environmental professional includes individuals who possess the following combinations of education and experience.

- Hold a current Professional Engineer's or Professional Geologist's license or registration from a state, tribe, or U.S. territory and have the equivalent of three (3) years of full-time relevant experience; or
- Be licensed or certified by the federal government, a state, tribe, or U.S. territory to perform environmental inquiries as defined in § 312.21 and have the equivalent of three (3) years of full-time relevant experience; or
- Have a Baccalaureate or higher degree from an accredited institution of higher education in a relevant discipline of engineering, environmental science, or earth science and the equivalent of five (5) years of full-time relevant experience; or
- As of the date of the promulgation of the final rule, have a Baccalaureate or higher degree from an accredited institution of higher education and the equivalent of ten (10) years of full-time relevant experience.

Based upon the recommendations of the Negotiated Rulemaking Committee, EPA is proposing to recognize as environmental professionals those individuals who are licensed by any tribal or state government as a professional engineer (P.E.) or a professional geologist (P.G.), and have three years of full-time relevant experience in conducting all appropriate inquiries. The Agency believes that such individuals have ''sufficient specific education, training, and experience necessary to exercise professional judgment to develop opinions and conclusions regarding the presence of releases or threatened releases * * * to the surface or subsurface of a property, sufficient to meet the objectives and performance factors'' provided in the proposed regulation. EPA and the Committee concluded that the rigor of the tribal- and state-licensed P.E. and P.G. certification processes, including the educational and training requirements, as well as the examination requirements, paired with the requirement to have three years of relevant professional experience conducting all appropriate inquiries will ensure that all appropriate inquiries

are conducted under the supervision or responsible charge of an individual well qualified to oversee the collection and interpretation of site-specific information and render informed opinions and conclusions regarding the environmental conditions at a property, including opinions and conclusions regarding the presence of releases or threatened releases of hazardous substances and other contaminants on, at, in, or to the property. The Agency's decision to recognize tribal and state-licensed P.E.s and P.G.s reflects the fact that tribal governments and state legislatures hold such professionals responsible (legally and ethically) for safeguarding public safety, public health, and the environment. To become a P.E. or P.G. requires that an applicant have a combination of accredited college education followed by approved professional training and experience. Once a publicly-appointed review board approves a candidate's credentials, the candidate is permitted to take a rigorous exam. The candidate must pass the examination to earn a license, and perform ethically to maintain it. After a state or tribe grants a license to an individual, and as a condition of maintaining the license, many states require P.E.s and P.G.s to maintain proficiency by participating in approved continuing education and professional development programs. In addition, members of the Negotiated Rulemaking Committee, including state representatives on the Committee, pointed out that tribal and state licensing boards can investigate complaints of negligence or incompetence on the part of licensed professionals, and may impose fines and other disciplinary actions such as cease and desist orders or license revocation.

The Negotiated Rulemaking Committee also recommended, and EPA is proposing, to include within the proposed definition of an environmental professional individuals who are environmental professionals, or otherwise licensed to perform environmental site assessments or all appropriate inquiries by the Federal government (*e.g.*, the Bureau of Indian Affairs) or under a state or tribal certification program, provided that these individuals also have three years of relevant experience. It is the Committee's and EPA's opinion that such qualifications define individuals who ''possess sufficient specific education, training, and experience necessary to exercise professional judgment to develop opinions and conclusions regarding the presence of releases or threatened releases * * * to the surface or subsurface of a property, sufficient to meet the [proposed rule's] objectives and performance factors.''

Although the proposed rule recognizes tribal and state-licensed P.E. and P.G.s and other such government licensed environmental professionals with three years of experience to be environmental professionals, the proposed rule does not restrict the definition of an environmental professional to these licensed individuals. The proposed definition of an environmental professional also would include individuals who hold a Baccalaureate or higher degree from an accredited institution of higher education in a relevant discipline of engineering, environmental science, or earth science and have the equivalent of five (5) years of full-time relevant experience in conducting environmental site assessments, or all appropriate inquiries. Again, such individuals most likely will possess sufficient specific education, training, and experience necessary to exercise professional judgment to develop opinions and conclusions regarding the presence of releases or threatened releases to the surface or subsurface of a property, sufficient to meet the proposed objectives and performance factors included in proposed § 312.20(d) and (e).

A goal of the Negotiated Rulemaking Committee was to establish qualifications for the environmental professional that will ensure that all appropriate inquiries are conducted at a high standard of technical and scientific quality, while not significantly disrupting the current market for professional site assessment services. The Committee debated whether or not to recommend that the definition of an environmental professional be restricted to individuals holding a Professional Engineer or Professional Geologist license, or holding another similar license from a state, tribe, or U.S. territory. Establishing such a requirement could assure that all appropriate inquiries conducted for the purposes of supporting a claim to a CERCLA liability protection would be conducted by highly qualified individuals. However, Committee members recognized that many individuals with appropriate education and training and many years of relevant experience in conducting environmental site assessments (including non-licensed environmental engineers and geologists) may be qualified to conduct all appropriate inquiries, although they do not have a Professional Engineer or Professional Geologist license. The Committee therefore discussed what qualifications are necessary to ensure that an individual is qualified to oversee the conduct of all appropriate inquiries, review the results of all inquiries for a particular property and be capable of assessing this information in light of all other relevant site-specific information about a property (*e.g.*, hydrogeologic setting), and develop sound opinions and conclusions regarding the environmental conditions at a property and the potential presence of a release or threatened release on, at, in or to the property. The Committee determined that the individuals best qualified to review all available and relevant information about a property and render a professional opinion regarding the environmental conditions at a property at a standard of quality necessary that may ensure a valid interpretation of the findings and accurate opinion of the property's environmental conditions, are those with a degree in a relevant field of engineering, environmental science, or earth science and five years of full-time relevant experience. The Committee considered many other variants of educational and experience qualifications. Some Committee members preferred proposing qualifications centered more closely around specific education or training criteria. Other Committee members pointed out that the qualifications should be based primarily on years of relevant experience. After much deliberation and after receiving and considering public comments on the subject, the Committee recommended that the proposed definition of an environmental professional include both educational and experience qualifications. The Committee recommended that the definition of an environmental professional include a requirement that such individuals hold a Baccalaureate or higher degree in a relevant field of science or engineering. Committee members believed that individuals trained in science and engineering are best qualified to understand how to interpret information collected about a property in light of the environmental conditions and site-specific situations at the property. In addition, the Committee determined that individuals with such degrees also should have five years of relevant full-time experience in conducting all appropriate inquiries prior to meeting the qualifications for an environmental professional. The proposed rule also would require all environmental professionals to remain current in the field of all appropriate inquiries, or environmental site assessments.

During the Committee's deliberations on the definition of an environmental professional, public commenters raised particular concerns with regard to individuals who currently are employed in the business of conducting all appropriate inquiries or environmental site assessments, but who do not meet the Committee's proposed qualifications of an environmental professional. The Committee gave careful consideration of public comments that pointed out the potential impacts that the proposed definition of an environmental professional may have on the current market for environmental site assessment services and the fact that many practicing professionals without science degrees have substantial investigative and writing skills. Members of the public pointed out in written comments to EPA and the Committee that some practicing professionals have many years of experience in conducting all appropriate inquiries, but do not have the specific educational requirements recommended by the Committee. EPA and the Committee, in considering these comments, wanted to ensure that professionals with extensive experience in conducting all appropriate inquiries and who have built their careers in such a business practice not be put out of business or bear a hardship of having to obtain a degree mid-career. However, EPA and the Committee had to balance this concern with the additional concerns of ensuring that all appropriate inquiries are conducted by experienced and well-qualified professionals.

The Committee deliberated the merits of setting a high standard of excellence for the conduct of all appropriate inquiries through the establishment of stringent qualifications for environmental professionals against the need to ensure that competent individuals currently conducting all appropriate inquiries are not displaced. After carefully considering these issues, the Committee recommended and EPA is proposing, as part of the proposed definition of an environmental professional, a provision allowing many currently practicing professionals to continue to conduct business in the field of environmental site assessments or all appropriate inquiries, while ensuring a high qualifications standard for future professionals. The Negotiated Rulemaking Committee recommended that the proposed definition of an environmental professional allow for persons that at the time of promulgation of the final rule do not meet the proposed educational or professional licensing qualifications for an environmental professional but have more than ten years of experience in conducting environmental site assessments to be included as environmental professionals. This provision is proposed as a ''grandfather'' clause and would only apply to those individuals with ten or more years of experience in the field of all appropriate inquiries investigations on the date of promulgation of the final rule. The Committee made this recommendation after careful consideration of public comments and of the potential impacts that the proposed definition of an environmental professional may have on the current market for environmental site assessment services and the fact that many practicing professionals without science degrees have substantial investigative and writing skills.

The proposed definition provides that ''as of the date of promulgation of the final rule, individuals who have a baccalaureate or higher degree from an accredited institution of higher education and the equivalent of ten (10) years of full-time relevant experience'' will meet the proposed definition of an environmental professional. Again, this provision of the proposed definition is a grandfather clause and would apply only to those individuals meeting these qualifications on the date of promulgation of the final rule. Persons not meeting these qualifications on the effective date of the final rule will have to meet the other minimum qualifications included in the proposed definition to qualify as an environmental professional for the purpose of conducting all appropriate inquiries under the federal standards established under the final rule.

EPA is requesting comment on the proposed definition of an environmental professional and the specific minimal qualifications included in the proposed definition.

3. If I Am Certified as an Environmental Professional by a Private Certification Association, Do I Qualify as an Environmental Professional Under the Proposed Rule?

During the Negotiated Rulemaking Committee's deliberations, the general public had many opportunities to comment on the Committee's draft regulatory language including the opportunity to provide written comment to the Committee and make oral presentations to the Committee during each of the Committee's meetings. Many individuals took advantage of the openness of the negotiated rulemaking process to provide input and comment to the Committee, particularly with regard to the Committee's deliberations on the definition of an environmental professional. The Committee considered restricting the definition of an environmental professional to state-licensed certification programs. However, based upon many comments received from the public, as well as the concerns of some members of the Committee, the Committee members concluded that there is a need to recognize individuals who have similar qualifications to P.E.s and P.G.s but do not hold a state-issued license or certificate. Therefore, the Committee recommended, and EPA is proposing, to include within the definition of an environmental professional those individuals who have a baccalaureate or higher degree from an accredited institution of higher education in a relevant discipline of engineering, environmental science, or earth science and the equivalent of five (5) years of full-time relevant experience in conducting environmental site assessments or all appropriate inquiries. The proposed definition of ''relevant experience'' is ''participation in the performance of environmental site assessments that may include environmental analyses, investigations, and remediation which involve the understanding of surface and subsurface environmental conditions and the processes used to evaluate these conditions and for which professional judgment was used to develop opinions regarding conditions indicative of releases or threatened releases * * * to the subject property.''

The Committee received comments from independent professional certification organizations, including the Certified Hazardous Materials Managers' organization, requesting that their organizations' certification programs be named in the proposed regulatory definition of an environmental professional. The Committee concluded that such an approach would require that EPA review the certification requirements of each organization to determine whether or not each organization's certification requirements meet or exceed the regulatory qualifications proposed for an environmental professional. Given that there may be many such organizations and given that each organization may review and change its certification qualifications on a frequent or periodic basis, EPA concluded that such a undertaking was not practicable. The Agency does not have the necessary resources to review the legitimacy of each private certification organization and review and approve each organization's certification

qualifications. Therefore, the Committee recommended, and EPA is proposing, to include within the regulatory definition of an environmental professional, a generic performance-based qualifications standard that includes education and experience qualifications, but does not recognize any private organization's certification program. However, the Agency notes that any individual with a certification from a private certification organization where the organization's certification qualifications include the same or more stringent education and experience requirements as those included in the federal regulation will meet the definition of an environmental professional for the purposes of this regulation. As stated above, the proposed definition of an environmental professional includes individuals who hold a Baccalaureate or higher degree from an accredited institution of higher education in a relevant discipline of engineering, environmental science, or earth science and the equivalent of five (5) years of full-time relevant experience.

4. Can Persons Not Meeting the Proposed Definition of an Environmental Professional Contribute to the Conduct of All Appropriate Inquiries?

During the Committee's deliberations on the definition of an environmental professional, members of the public also raised concerns about restricting the conduct of all appropriate inquiries to only those individuals meeting the definition of an environmental professional. The Negotiated Rulemaking Committee considered requiring that all the activities necessary to complete the all appropriate inquiries investigation be conducted by persons meeting the proposed definition of an environmental professional. Such a requirement could ensure that all of the required activities are conducted at a high standard of quality. In addition, requiring that all activities be conducted by an environmental professional could ensure, to a high level of confidence, the accuracy and reliability of the environmental professional's interpretation of the inquiries results. However, after careful review of specific activities required to complete the all appropriate inquiries, consideration of public comments offered during the Committee's deliberations, and consideration of the costs and impacts to the market for environmental site assessment services, the Committee decided that it is not necessary for an environmental professional to perform all aspects of the all appropriate inquiries.

Therefore, the proposed definition of an environmental professional would allow for many of the individual inquiry activities to be conducted by individuals that may not qualify as an environmental professional per the proposed definition. The proposed rule would allow individuals not meeting the definition of an environmental professional to contribute to the conduct of the all appropriate inquiries, as long as such individuals are working under the supervision or responsible charge of an individual who meets the proposed definition of an environmental professional. This provision would allow for a team of individuals working for the same firm or organization (*e.g.*, individuals working for the same government agency) to share the workload for conducting all appropriate inquiries for a single property, provided that one member of the team meets the proposed definition of an environmental professional and reviews the results and conclusions of the inquiries and signs the final report.

The Agency requests comments on all of the proposed qualifications included in the definition of an environmental professional and the provisions allowing for individuals who do not qualify as environmental professionals to contribute to inquiry activities.

E. References

Today's proposed rule includes no references. However, the Agency is reserving a reference section and may include references in the final rule. As explained later in this preamble, EPA is inviting the public to identify potentially applicable standards developed by standards developing organizations that may be applicable and compliant with the regulations proposed today. Prior to promulgating a final regulation setting federal standards and practices for all appropriate inquiries, the Agency may consider citing or referencing applicable and compliant voluntary consensus standards in the final regulation. This may facilitate implementation of the final regulations and avoid disruption to parties using voluntary consensus standards that are found to be fully compliant with the federal regulations.

F. What Is Included in ''All Appropriate Inquiries?''

The proposed Federal regulations for conducting all appropriate inquiries include standards and practices for conducting the activities included in each of the statutory criterion established by Congress in the Brownfields Amendments. These criteria are set forth in CERCLA Section 101(35)(2)(B)(iii) and are:

- The results of an inquiry by an environmental professional (proposed § 312.21).
- Interviews with past and present owners, operators, and occupants of the facility for the purpose of gathering information regarding the potential for contamination at the facility (proposed § 312.23).
- Reviews of historical sources, such as chain of title documents, aerial photographs, building department records, and land use records, to determine previous uses and occupancies of the real property since the property was first developed (proposed § 312.24).
- Searches for recorded environmental cleanup liens against the facility that are filed under Federal, State, or local law (proposed § 312.25).
- Reviews of Federal, State, and local government records, waste disposal records, underground storage tank records, and hazardous waste handling, generation, treatment, disposal, and spill records, concerning contamination at or near the facility (proposed § 312.26).
- Visual inspections of the facility and of adjoining properties (proposed § 312.27).
- Specialized knowledge or experience on the part of the defendant (proposed § 312.28).
- The relationship of the purchase price to the value of the property, if the property was not contaminated (proposed § 312.29).
- Commonly known or reasonably ascertainable information about the property (proposed § 312.30).
- The degree of obviousness of the presence or likely presence of contamination at the property, and the ability to detect the contamination by appropriate investigation (proposed § 312.31).

1. Who Is Responsible for Conducting the All Appropriate Inquiries?

The Brownfields Amendments to CERCLA require persons claiming any of the landowner liability protections to conduct all appropriate inquiries into the past uses and ownership of subject property. The criteria included in the Brownfields Amendments for the regulatory standards for all appropriate inquiries require that the inquiries include an inquiry by an environmental professional. The statute does not require that all criteria or inquiries be conducted by an environmental professional. After careful review and consideration of each statutory criterion,

the Negotiated Rulemaking Committee determined that many, but not all, of the inquiries activities must be conducted by, or under the supervision or responsible charge of, an individual meeting the qualifications within the proposed definition of an environmental professional.

The Committee recommended, and EPA is proposing, that several of the activities included in the inquiries may be conducted either by the purchaser, or the landowner, and do not have to be conducted under the supervision or responsible charge of the environmental professional. The proposed rule would require that the results of all activities not conducted by or under the supervision or responsible charge of the environmental professional be provided to the environmental professional to ensure that such information may be fully considered when the environmental professional draws conclusions based on the inquiry activities or renders an opinion as to whether conditions at the property are indicative of a release or threatened release of a hazardous substance (or other contaminant) on, at, in, or to the property which causes the incurrence of response costs.

The proposed rule allows for the following activities to be the responsibility of, or conducted by, the purchaser or landowner and not necessarily by the environmental professional, provided the results of such inquiries or activities are provided to an environmental professional overseeing the all appropriate inquiries:

- Searches for environmental cleanup liens against the subject property that are filed or recorded under federal, tribal, state, or local law, as required by proposed § 312.25.
- Assessments of any specialized knowledge or experience on the part of the purchaser or landowner, as required by § 312.28.
- An assessment of the relationship of the purchase price to the fair market value of the subject property, if the property was not contaminated, as required by § 312.29.
- An assessment of commonly known or reasonably ascertainable information about the subject property, as required by § 312.30.

The proposed rule would require that all other required inquiries and activities, beyond those listed above to be conducted by, or under the supervision or responsible charge of, an environmental professional. The Agency requests comment on the proposed division of responsibilities.

2. When Must All Appropriate Inquiries Be Conducted?

CERCLA, as amended, requires innocent landowners, bona fide prospective purchasers, and contiguous property owners to conduct all appropriate inquiries prior to acquiring a property for the purposes of either establishing that the purchaser ''did not know and had no reason to know'' of releases or threatened releases of hazardous substances on, at, in, or to the property, or in the case of the bona fide prospective purchaser, to identify environmental conditions indicative of releases or threatened releases at the property prior to taking ownership of the property. In the case of contiguous property owners, CERCLA Section 107(q)(1)(A)(viii) requires that a person claiming to be a contiguous property owner conduct all appropriate inquiries ''at the time at which the person acquired the property.'' In the case of innocent landowners, Section 101(35)(B) of CERCLA requires that the property owner conduct all appropriate inquiries ''on or before the date on which the defendant acquired the facility.''

Other than to specify that all appropriate inquiries must be conducted at or prior to the time a person acquires a property, the statute is silent regarding how close to the actual purchase date the inquiries must be completed. The proposed rule requires that all appropriate inquiries be conducted within one year prior to taking title to a property. As explained below, purchasers may use information collected as part of previous inquiries for the same property, if the inquiries were completed or updated within one year prior to the date the property is acquired. The proposed rule would require that certain information collected as part of the all appropriate inquiries be updated if it was collected more than 180 days prior to the date a purchaser acquires the property. In addition, the Agency is proposing to define the date of acquisition of a property as the date on which the purchaser acquires title to the property.

The Agency believes that the event that most closely reflects the Congressional intent of the date on which the defendant acquired the property is the date on which a purchaser received title to the property. The Agency considered other dates, such as the date a prospective purchaser signs a purchase or sale agreement. However, EPA believes that it could be burdensome to require a prospective purchaser to have completed the all appropriate inquiries prior to having an agreement with a seller to complete a sales transaction. In fact, the time period between the date on which a sales agreement is signed and the date on which the title to the property is actually transferred to the purchaser may be the most convenient time for the prospective purchaser to obtain access to the property and undertake the all appropriate inquiries. In addition, requiring that all appropriate inquiries be completed on some date prior to the date of title transfer could result in requiring prospective purchasers to undertake all appropriate inquiries so early in the property acquisition process as to require the inquiries to be completed prior to the purchaser making a final decision on whether to actually acquire the property. EPA requests comment on the proposal to establish the date on which title is transferred as the date on which the property is acquired.

To increase the potential that the information collected for the all appropriate inquiries accurately reflects the proposed objectives and performance factors, as well as to increase the potential that opinions and judgments regarding the environmental conditions at a property that are included in an all appropriate inquiries report are based on current and relevant information, the Agency is proposing that all appropriate inquiries be conducted within one year prior to the purchaser acquiring the property. Such inquiries may include information collected for previous all appropriate inquiries that were conducted or updated within one year prior to the acquisition date of the property. In addition, as explained in more detail below, the proposed rule would require that several of the components of the inquiries be updated within 180 days prior to the date the property is acquired (*i.e.*, the date the landowner obtains title to the property).

3. Can a Purchaser Use Information Collected for Previous Inquiries Completed for the Same Property?

The proposed rule, at § 312.20(b), would allow parties conducting all appropriate inquiries to use previous inquiries completed for the same property, under certain conditions. First, the previous inquiries must have been conducted in compliance with the regulations applicable at the time the previous all appropriate inquiries investigation was completed. In addition, the previous inquiries must have been completed with information that was collected or updated no longer than a year prior to the current acquisition date for the property.

Certain types of information collected more than 180 days prior to the current date of acquisition must be updated for the current all appropriate inquiries. Also, the information required under some specific criterion (*e.g.*, relationship of purchase price to property value, specialized knowledge on part of defendant) must be collected specifically for the current transaction.

When discussing the issue of whether or not to provide for the use of all appropriate inquiries conducted by a previous owner, or the seller, of a particular property, the Negotiated Rulemaking Committee recognized that there is value in using previously collected information when such information was collected in accordance with the regulatory standards, particularly when the use of such previously-collected information will reduce the need to undertake duplicative efforts. In its deliberations, the Committee discussed the potential impacts that allowing the use of all appropriate inquiries conducted by third parties could have upon the legality and legitimacy of the all appropriate inquiries required to be conducted by a purchaser not involved in the collection of the information. The Committee also discussed how often certain information required to be collected as part of the all appropriate inquiries should be updated to ensure its accuracy. A particular focus of the Committee's discussions was the need for information collected and used by an environmental professional to be accurate and current, therefore allowing the environmental professional to make informed judgments regarding the environmental conditions of the property and provide informed opinions as to the likelihood that conditions are indicative of a release or threatened release of a hazardous substance on, at, in, or to the property.

The Committee recommended, and EPA is proposing, to allow all appropriate inquiries to include information contained in previous inquiries, including inquiries conducted by third parties, for the same property. However, such information must have been updated or collected within one year prior to the date the current purchaser acquires the property (the date on which the owner takes title to the property) and collected in compliance with the regulatory requirements that were in effect at the time the previous all appropriate inquiries were conducted. Note that if the previous all appropriate inquiries were conducted prior to the effective date of the final federal standards for all appropriate inquiries, the inquiries must have been conducted in compliance with either the interim standard established by Congress in the Brownfields Amendments and clarified by EPA on May 9, 2003 (68 FR 24888), or in the case of properties purchased prior to May 31, 1997, in compliance with practices consistent with good commercial or customary business practices.

The Committee recognized that it is not sufficient to wholly adopt previously conducted all appropriate inquiries for the same property without any review. Certain aspects of the all appropriate inquiries investigation are specific to the current purchaser and the current purchase transaction. Therefore, the proposed rule would require that each all appropriate inquiries investigation include current information related to:

- Any relevant specialized knowledge held by the current purchaser and the environmental professional responsible for overseeing and signing the all appropriate inquiries report (*i.e.*, requirements of proposed § 312.28); and
- The relationship of the current purchase price to the value of the property, if the property were not contaminated (*i.e.*, requirements of proposed § 312.29).

In addition, the Committee recommended that certain information be updated if it was not collected within 180 days prior to the date of acquisition of the property (or the date on which the purchaser takes title to the property) to ensure that an all appropriate inquiries investigation accurately reflects the environmental conditions at a property. To increase the potential that information collected is accurate, as well as increase the potential that opinions and judgments regarding the environmental conditions at a property that are included in an all appropriate inquiries report are based on current and relevant information, the proposed rule would require that many of the components of the inquiries be updated within 180 days prior to the date of acquisition of the property. The components of the all appropriate inquiries that must be updated within 180 days prior to the date of acquisition of the property are:

- Interviews with past and present owners, operators, and occupants (proposed § 312.23);
- Searches for recorded environmental cleanup liens (proposed § 312.25);
- Reviews of federal, tribal, state, and local government records (proposed § 312.26);
- Visual inspections of the facility and of adjoining properties (proposed § 312.27); and
- The declaration by the environmental professional (proposed § 312.21(d)).

An all appropriate inquiries investigation may include the information listed above when previously collected by the purchaser or a third party for the same property, provided that the information was collected no longer than one year prior to the current purchaser's date of acquisition of the property and provided that it is updated for the current all appropriate inquiries investigation, if it was collected more than 180 days prior to the acquisition date. Also, in all cases where a purchaser is using previously collected information, the all appropriate inquiries for the current purchase must include a summary of any changes to the conditions of the property that occurred since the previous inquiries were conducted.

The Agency requests comment on the proposed provisions for using previously conducted all appropriate inquiries.

4. Can All Appropriate Inquiries Be Conducted by One Party and Transferred to Another Party?

The proposed rule, at proposed § 312.20(c), allows for all appropriate inquiries to be conducted by one party and transferred to another party, provided that certain conditions are met. It was brought to the attention of the Negotiated Rulemaking Committee that under certain circumstances, the person purchasing a property may obtain a report of all appropriate inquiries conducted for the property from another party, either the seller of the property or another independent party. In particular, the Committee discussed situations where the federal government or a state government agency may conduct the all appropriate inquiries on behalf of the local government on a property being purchased by a local government. For example, the EPA Brownfields program conducts ''targeted brownfields assessments'' on behalf of local governments. This situation also may occur when a state government is covering the cost of the all appropriate inquiries for a property owned by a local government or in a situation where the local government does not have access to appropriate staff or capital resources to conduct the all appropriate inquiries and it therefore is conducted by a state government agency. Another example is when a local government conducts all appropriate inquiries for a

third party in its community, such as a private prospective purchaser. In addition, local brownfields redevelopment agencies that are connected to local government may seek out contaminated property, make all appropriate inquiries about it, acquire it, and then sell the property to a developer.

The proposed rule allows for a person acquiring a property to use the results of inquiries and the inquiries report conducted by another party, if the inquiries and the report meet the proposed objectives and performance factors for the all appropriate inquiries regulations and the purchaser of the property who is seeking to use the previously-collected information or report, reviews all information collected and updates the contents of the report as necessary to accurately reflect current conditions at the property. In addition, the proposed rule would require that the purchaser update the inquiries and the report to include any relevant specialized knowledge held by the current purchaser and the environmental professional. The Agency requests comments on the proposed requirements for using all appropriate inquiries conducted by third parties.

5. What Are the Objectives and Performance Factors for the Proposed All Appropriate Inquiries Requirements?

The Committee developed its recommendation for proposed regulatory language around the criteria established by Congress in Section 101(35)(B)(iii) of CERCLA. As the Committee progressed in its efforts to address each criterion, it became apparent that the purposes and objectives for performing many of the inquiries and the types of information that must be collected to meet the objectives of the individual regulatory criterion often overlapped. For example, in developing standards addressing the criterion requiring a review of historical information, a search for recorded environmental cleanup liens, and a review of government records, the Committee concluded that the objectives of each criterion or activity was similar, and in some cases, the same information could be collected independently to satisfy each criterion when conducting activities required to fulfill each of the criterion's objectives. A chain of title document is historic information that may include information on environmental cleanup liens and may include information on past owners of the property that indicates that previous owners managed hazardous substances at the property.

To avoid requiring duplicative efforts, but to ensure that the proposed regulations include standards and practices that result in a comprehensive assessment of the environmental conditions at a property, the Negotiated Rulemaking Committee recommended, and EPA is proposing, that the all appropriate inquiries standards be structured around a concise set of objectives and performance factors. The proposed objectives and performance factors apply to the inquiries comprehensively. In conducting the inquiries collectively, the landowner and the environmental professional must seek to achieve the proposed objectives and performance factors and use these proposed objectives and standards as guidelines in implementing, in total, all of the other proposed regulatory standards and practices.

An all appropriate inquiries investigation need not address each of the regulatory criterion in any particular sequence. In addition, information relevant to more than one criterion need not be collected twice, and a single source of information may satisfy the requirements of more than one criterion and more than one objective. Under the provisions of the proposed rule, the information required to achieve each of the objectives and performance factors must be met for the all appropriate inquiries investigation to be complete. Although compliance with the all appropriate inquiries requirements ultimately will be determined in a court, the proposed rule allows the purchaser and environmental professional to determine the best process and sequence for collecting and analyzing all required information. For example, it may be appropriate in many situations for the historic records search required by proposed § 312.24 and the search of government records required under proposed § 312.26 be conducted prior to conducting interviews of past and present owners, operators, and occupants, as required under proposed § 312.23. This may allow the purchaser or environmental professional to develop a general understanding of past uses and ownership of a property prior to interviewing owners and occupants and therefore make better use of the interviews to obtain information necessary to meet the performance factors or objectives of the overall investigation when conducting interviews of past and present owners or occupants. In addition, it often may be beneficial to conduct the required interviews of owners, operators and occupants prior to conducting an on-site visual inspection. Information obtained during the interviews may be useful for locating and inspecting potential sources of environmental concerns during the visual inspection.

As stated in proposed § 312.20(d), the all appropriate inquiries standards, as applicable to landowners seeking CERCLA liability protections as innocent landowners, bona fide prospective purchasers, and contiguous landowners, are intended to result in the identification of conditions indicative of releases and threatened releases of hazardous substances on, at, in, or to the subject property prior to the acquisition of the property. As established in proposed § 312(d)(2), in the case of persons receiving federal brownfields grant monies under CERCLA Section 104(k) to conduct site characterizations and assessments, the all appropriate inquiries standards are intended to result in the identification of conditions indicative of releases and threatened releases of hazardous substances, as well as pollutants, contaminants, petroleum and petroleum products, and controlled substances (as defined in 21 U.S.C. 802) on, at, in, or to the subject property when conducting the assessment or characterization with the use of the grant funds and when the terms and conditions of the grant include such pollutants and contaminants within the scope of the grant. This expanded objective for brownfields grant recipients reflects the broad statutory definition of a ''brownfield site'' that allows EPA to provide grant monies to eligible entities (see CERCLA Section 104(k)(1)) for the assessment and cleanup of real property that is complicated by the presence or potential presences of hazardous substances, pollutants, contaminants, petroleum and petroleum products, and controlled substances (*see* CERCLA Section 101(39)).

In performing the inquiries, including conducting interviews, collecting historical data and government records, inspecting the subject property and adjoining properties, and carrying out all other inquiries, all parties undertaking all appropriate inquiries must be attentive to the fact that the primary objectives of the proposed regulation are to identify the following types of information about the subject property prior to acquiring the property:

- Current and past property uses and occupancies;
- Current and past uses of hazardous substances;
- Waste management and disposal activities that could have caused releases or threatened releases of hazardous substances;

- Current and past corrective actions and response activities undertaken to address past and on-going releases of hazardous substances;
- Engineering controls;
- Institutional controls; and
- Properties adjoining or located nearby the subject property that have environmental conditions that could have resulted in conditions indicative of releases or threatened releases of hazardous substances on, at, in, or to the subject property.

The Negotiated Rulemaking Committee also developed a set of performance factors for the conduct and performance of each of the individual proposed standards and practices that make up the proposed rule. These performance factors, which are included in proposed § 312.20(e), include: (1) Gather the information that is required for each standard and practice that is publicly available (or otherwise obtainable), obtainable from its source within reasonable time and cost constraints, and which can practicably be reviewed, and (2) review and evaluate the thoroughness and reliability of the information gathered in complying with each standard and practice, taking into account information gathered in the course of complying with the other standards and practices of this subpart. The proposed performance factors are provided as guidelines to be followed in conjunction with the proposed objectives for the all appropriate inquiries. EPA and the Negotiated Rulemaking Committee are not suggesting that the goal of the conduct of the all appropriate inquiries is to identify every available document and piece of information regarding a property and the environmental conditions on the property. Instead, the objective of the conduct of all appropriate inquiries is to develop an understanding of the conditions of the property and determine whether or not there are conditions indicative of releases and threatened releases of hazardous substances (and pollutants, contaminants, controlled substances, and petroleum and petroleum products, if applicable) on, at, in or to the subject property.

The Agency requests comments on the proposed objectives and performance factors for the all appropriate inquiries requirements.

Persons seeking to establish a basis for one of the CERCLA landowner liability protections also should keep in mind that an objective of the all appropriate inquiries standards and practices is to characterize the environmental conditions at a property that are indicative of releases or threatened releases, prior to acquiring the property. This information may facilitate compliance with the additional statutory requirements applicable for claiming the liability protections after acquiring the property.

Failure to identify an environmental condition or identify a release or threatened release of a hazardous substance on, at, in or to a property during the conduct of all appropriate inquiries, does not relieve a landowner from complying with the other post-acquisition statutory requirements for obtaining the landowner liability protections. Landowners must comply with all the statutory requirements to obtain protection from liability. For example, an inability to identify a release or threatened release during the conduct of all appropriate inquiries does not negate the landowner's post-acquisition responsibilities under the statute to take reasonable steps to stop the release, prevent a threatened release, and prevent exposure to the release or threatened release.

6. What Are Institutional Controls?

Under the proposed rule, those performing all appropriate inquiries must seek to identify institutional controls. As defined in proposed § 312.10, institutional controls are non-engineered instruments, such as administrative and legal controls, that among other things, can help to minimize the potential for human exposure to contamination, protect the integrity of a remedy by limiting land or resource use, and provide information to modify behavior. For example, an institutional control might prohibit the drilling of a drinking water well in a contaminated aquifer or disturbing contaminated soils. Institutional controls may also be referred to as land use controls, activity and use limitations, *etc.,* depending on the program under which a response action is conducted.

Institutional controls are typically used whenever contamination precludes unlimited use and unrestricted exposure at the property. Thus, institutional controls may be needed both before and after completion of the remedial action. Institutional controls often must remain in place for an indefinite duration and, therefore, generally need to survive changes in property ownership (*i.e.*, run with the land) to be legally and practically effective. Some common examples of institutional controls include zoning restrictions, building or excavation permits, well drilling prohibitions, easements and covenants.

The importance of identifying institutional controls during all appropriate inquiries is twofold. First, institutional controls are usually necessary and important components of a remedy. Failure to abide by an institutional control may put people at risk of harmful exposure to hazardous substances. Second, an owner wishing to maintain protections from CERCLA liability as an innocent landowner, contiguous property owner, or bona fide prospective purchaser must fulfill ongoing obligations to comply with any land use restrictions established or relied on in connection with a response action and to not impede the effectiveness or integrity of any institutional control employed in connection with a response action. For a more detailed discussion of these requirements please see EPA, *Interim Guidance Regarding Criteria Landowners Must Meet in Order to Quality for Bona Fide Prospective Purchaser, Contiguous Property Owner, or Innocent Landowner Limitations on CERCLA Liability* (Common Elements, 2003).

Those persons conducting all appropriate inquiries may identify institutional controls through several of the standards and practices set forth in this rule. As noted, implementation of institutional controls may be accomplished through the use of several administrative and legal mechanisms, such as zoning, building permit requirements, easements, covenants, *etc.* Thus, for example, an easement implementing an institutional control might be identified through the review of chain of title documents under § 312.24(a). Furthermore, interviews with past and present owners, operators, or occupants pursuant to § 312.23; and reviews of federal, tribal, state, and local government records under § 312.26, may identify an institutional control or refer a person to the appropriate source to find an institutional control. For example, a review of federal Superfund records, including Records of Decision and Action Memoranda, as well as other information contained in the CERCLIS data base, may indicate that zoning was selected as an institutional control or an interview with a current operator may reveal an institutional control as part of an operating permit.

7. How Must Data Gaps Be Addressed in the Conduct of All Appropriate Inquiries?

As defined in proposed § 312.10, data gaps are a lack of or inability to obtain information required by the standards and practices listed in the proposed regulation, despite good faith efforts by the environmental professional or the prospective landowner (or grant

recipient) to gather such information pursuant to the proposed objectives for all appropriate inquiries. Proposed § 312.20(f) requires environmental professionals, prospective landowners and grant recipients to identify data gaps that affect their ability to identify conditions indicative of releases or threatened releases of hazardous substances (and in the case of grant recipients pollutants, contaminants, petroleum, and controlled substances). In addition, the proposal would require such persons to identify the sources of information consulted to address, or fill, the data gaps, and require such persons to comment upon the significance of the data gaps with regard to the ability to identify conditions indicative of releases or threatened releases in the all appropriate inquiries report. In addition, proposed § 312.21(c)(2) would require that environmental professionals include in the inquiries report an identification of data gaps that affect the ability of the environmental professional to identify conditions indicative of releases or threatened releases on, at, in, or to the subject property. Proposed § 312.21(c)(2) also would require that the inquiries report include comments regarding the significance of any data gaps on the environmental professional's ability to provide an opinion as to whether the inquiries have identified conditions indicative of releases or threatened releases.

A lack of information or an inability to obtain information that may affect the ability of an environmental professional to determine whether or not there are conditions indicative of a release or threatened release of a hazardous substance (or other contaminant) on, at, in or to a property can have significant consequences regarding a prospective landowner's ultimate ability to claim protection from CERCLA liability. A person's inability to obtain information regarding a property's ownership or use prior to acquiring a property can affect the landowner's ability to claim a protection from CERCLA liability after acquiring the property, if a lack of information results in the landowner's inability to comply with any other post-acquisition statutory obligations that are necessary to assert protection from CERCLA liability. For example, if a person does not identify, during the all appropriate inquiries prior to acquiring a property, a leaking underground storage tank that exists on the property, the landowner may not have sufficient information to comply with the statutory requirement to take reasonable steps to stop on-going releases after acquiring the property. This may result in an inability to claim protection against CERCLA liability for any on-going release. The proposed rule states the need to identify data gaps, address them when possible, and document their significance. Prospective landowners must consider the potential significance of any data gaps that may exist after conducting the pre-acquisition all appropriate inquiries on the landowner's ability to fulfill the additional statutory requirements after purchasing a property.

If a person properly conducts all appropriate inquiries pursuant to this rule, including the requirements concerning data gaps at proposed §§ 312.10, 312.20(f) and 312.21(c)(2), the person can fulfill the all appropriate inquiries requirements of CERCLA Sections 107(q), 107(r), and 101(35), even when there are data gaps in the inquiries. However, as explained further in this preamble, a fulfillment of the all appropriate inquiries requirements does *not,* by itself, provide a person with a protection from or defense to CERCLA liability. An inability to identify a release or threatened release during the conduct of all appropriate inquiries does not negate the landowner's ongoing or continuing responsibilities under the statute, including the requirements to take reasonable steps to stop the release, prevent a threatened release, and prevent exposure to the release or threatened release once the landowner has acquired a property. Also, if an existing institutional control or land use restriction is not identified during the conduct of all appropriate inquiries prior to the acquisition of a property, a landowner is not exempt from complying with the institutional control or land use restriction after acquiring the property. None of the other statutory requirements for the liability protections is satisfied by the results of the all appropriate inquiries.

The Agency notes that the mere fact that a purchaser conducted all appropriate inquiries does not provide any individual with a limitation from CERCLA liability. To qualify as a bona fide prospective purchaser, innocent landowner or a contiguous property owner, a person must, in addition to conducting all appropriate inquiries prior to acquiring a property, comply with all of the other statutory requirements. These criteria are summarized in section II.D. of this preamble. The all appropriate inquiries investigation may provide a purchaser with necessary information to comply with the other post-acquisition statutory requirements for obtaining liability protections. The failure to detect a release during the conduct of all appropriate inquiries does not exempt a landowner from his or her post-acquisition continuing obligations under other provisions of the statute.

Proposed § 312.20(f) points out that one way to address data gaps may be to conduct sampling and analysis. The Agency notes that the proposed regulation does *not* require that sampling and analysis be conducted to comply with the all appropriate inquiries requirements. The proposal only notes that sampling and analysis may be conducted, where appropriate, to obtain information to address data gaps.

The Agency requests comments on the proposed provisions addressing data gaps. The Agency also explicitly requests comments on the decision not to require sampling as part of the proposed all appropriate inquiries standards.

8. Do Small Quantities of Hazardous Substances That Do Not Pose Threats to Human Health and the Environment Have To Be Identified in the Inquiries?

The environmental professional should identify and evaluate all evidence of releases or threatened releases on, at, in or to the subject property, in accordance with generally accepted good commercial and customary standards and practices. However, as provided in proposed § 312.20(g), the environmental professional need not specifically identify, in the written report prepared pursuant to proposed § 312.21(c), extremely small quantities or amounts of contamination, except as needed to fairly describe the evidence identified by the environmental professional of releases and threatened releases that could pose a threat to human health or the environment.

G. What Are the Proposed Requirements for Interviewing Past and Present Owners, Operators, and Occupants?

CERCLA Section 101(35)(B)(iii)(II) requires EPA to include in the standards and practices for all appropriate inquiries ''interviews with past and present owners, operators, and occupants of the facility for the purpose of gathering information regarding the potential for contamination at the facility.'' The proposed requirements for conducting interviews of past and present owners, operators, and occupants of the subject property are included in proposed § 312.23. The proposal identifies these interviews as being within the scope of the inquiry of the environmental professional. Therefore, all interviews would either

have to be conducted by the environmental professional or within the supervision or responsible charge of the environmental professional. The intent is that an individual meeting the definition of an environmental professional (§ 312.10) must oversee the conduct of, or review and approve the results of, the interviews to ensure the interviews are conducted in compliance with the proposed objectives and performance factors (§ 312.20). EPA also intends this proposed provision be used to help ensure that the information obtained from the interviews provides sufficient information, in conjunction with the results of all other inquiries, to allow the environmental professional to render an opinion with regard to conditions at the property that may be indicative of releases or threatened releases of hazardous substances (and pollutants, contaminants, petroleum and controlled substances, if applicable).

The proposed rule would require the environmental professional's inquiry to include interviewing the current owner and occupant of the subject property. In addition, the proposal provides that the inquiry of the environmental professional include interviews of additional individuals, including current and past facility managers with relevant knowledge of the property, past owners, occupants, or operators of the subject property, or employees of current and past occupants of the subject property as necessary to meet the proposed objectives and in accordance with the proposed performance factors. A primary objective of the interviews portion of the all appropriate inquiries is to obtain information regarding the current and past ownership and uses of the property, and obtain information regarding the conditions of the property. The proposed rule does not prescribe particular questions that must be asked during the interview. The Negotiated Rulemaking Committee and EPA concluded that the type and content of any questions asked during interviews will depend upon the site-specific conditions and circumstances and the extent of the environmental professional's (or other individual's under the supervision or responsible charge of the environmental professional) knowledge of the property prior to conducting the interviews. Therefore, the proposed rule does not include specific questions for the interviews, but requires that the interviews be conducted in a manner that achieves the proposed objectives and performance factors. EPA recommends that the environmental professional, or an individual under the supervision or responsible charge of the environmental professional, develop the interview questions prior to conducting the interview, and tailor the questions to the rule's objectives and performance factors. Interviews with current and past owners and occupants may provide opportunities to collect information about a property that is not previously recorded nor well documented or may provide valuable perspectives on how to find or interpret information required to complete other aspects of the all appropriate inquiries. Information gathered during the interview portion of the all appropriate inquiries may in turn provide valuable information for the on-site visual inspection. Persons conducting the interviews of current and past owners and occupants may want to spend some time during the interviews requesting information on the locations of operations or units used to store or manage hazardous substances on the property.

In the case of properties where there may be more than one owner or occupant, or many owners or occupants, the proposed rule would require the inquiry to include interviews of major occupants and those occupants that are using, storing, treating, handling or disposing (or are likely to have used, stored, treated, handled or disposed) of hazardous substances (or pollutants, contaminants, petroleum, and controlled substances, as applicable) on the property. The proposed rule does not specify the number of owners and occupants to be interviewed. The environmental professional must perform this function in the manner that best fulfills the proposed objectives and performance factors for the inquiries in proposed § 312.20(d) and (e). Environmental professionals may use their professional judgment to determine the specific occupants to be interviewed and the total number of occupants to be interviewed in seeking to comply with the proposed objectives and performance factors for the inquiries. Interviews must be conducted with individuals most likely to be knowledgeable about the current and past uses of the property, particularly with regard to current and past uses of hazardous substances on the property.

In the case of abandoned properties, the proposed rule would require the inquiry of the environmental professional to include interviews with one or more owners or occupants of neighboring or nearby properties. The Committee recognized that in the case of abandoned properties, it most likely will be difficult to identify or interview current or past owners and occupants of the property. Therefore, the Committee recommended that the conduct of all appropriate inquiries include interviewing at least one owner or occupant of a neighboring property to obtain information regarding past owners or uses of property in cases where the subject property is abandoned. The proposed rule defines an abandoned property as a ''property that can be presumed to be deserted, or an intent to relinquish possession or control can be inferred from the general disrepair or lack of activity thereon such that a reasonable person could believe that there was an intent on the part of the current owner to surrender rights to the property.'' As is the case with interviews conducted with current and past owners and occupants of the property, interview questions should be developed prior to the conduct of the interviews, and tailored to gather information to achieve the rule's objectives and performance factors.

The Agency requests comments on the proposed standards for conducting interviews of past and present owners and occupants of a property. EPA also requests comments on the proposed requirements to interview owners or occupants of neighboring properties in the case of abandoned properties.

H. What Are the Proposed Requirements for Reviews of Historical Sources of Information?

Historical documents and records may contain essential information regarding past ownership and uses of a property that may provide information regarding the potential for environmental conditions indicative of releases or threatened releases of hazardous substances to be present at the property. Historical documents and records, among others, may include chain of title documents, land use records, aerial photographs of the property, fire insurance maps, and records held at local historical societies. The proposed rule, as proposed § 312.24, would require the inquiry of the environmental professional to include a review of historical documents and records for the subject property that document the ownership and use of the property for a period of time as far back in the history of the property as it can be shown that the property contained structures, or from the time the property was first used for residential, agricultural, commercial, industrial, or government purposes.

The statutory criteria in the Brownfields Amendments require that reviews of historical sources of information be conducted to ''determine

previous uses and occupancies of the real property since the property was first developed.'' The Committee recommended, and EPA is proposing, that records be searched for information on the property covering a time period as far back in history as there is documentation that the property contained structures or was placed into use of some form. The Committee believed, and EPA agrees, that this provision follows Congressional intent. Historical documents and information must be reviewed to obtain information relevant to the proposed objectives and performance factors of proposed § 312.20(d) and (e). If a search of historical sources of information results in an inability of the inquiry to document previous uses and occupancies of the property as far back in history as there is documentation that the property contained structures or was placed into use of some form and such information cannot be addressed through the implementation of other inquiries or regulatory criteria, then the unavailable information must be documented as a data gap to the inquiries. The proposed requirements of §§ 312.20(f) and 312.21(c)(2) are applicable to all instances in the all appropriate inquiries that result in data gaps.

The proposed rule would not require that any specific type of historic information be collected. In particular, the proposed rule does not require that persons obtain a chain of title document for the property. The proposed rule provides that the purchaser or environmental professional use professional judgment when determining what types of historical documentation may provide the most useful information about a property's ownership, uses, and potential environmental conditions when seeking to comply with the proposed objectives and performance factors for the inquiries. The Negotiated Rulemaking Committee considered developing a specific list of historical documents that must be reviewed for each property. However, given the wide variety of property types and locations to which this proposed rule could apply, the Committee determined that any list of specific documents could result in undue burdens on many property owners due to difficulties in collecting any specific document for any particular property or property location. Therefore, the Committee recommended, and EPA is proposing, that the review of historical documents requirement allow the purchaser and environmental professional to use their judgment, in accordance with generally accepted good commercial and customary standards and practices, in locating the best available sources of historical information and reviewing such sources for information necessary to comply with the rule's objectives and performance factors.

As explained in section III.E.2 of this preamble, the purchaser or environmental professional may make use of previously collected information about a property when conducting all appropriate inquiries. The collection of historical information about a property may be a particular case where previously collected information may be valuable, as well as easily accessible. In addition, nothing in the proposed rule prohibits a person from using secondary sources (*e.g.*, a previously conducted title search) when gathering information about historical ownership and usage of a property. As explained in section III.E.2, information must be updated if it was last collected more than 180 days prior to the date of acquisition of the property.

The Agency requests comments on the proposed standards for reviews of historical sources of information.

I. What Are the Proposed Requirements for Searching for Recorded Environmental Cleanup Liens?

For purposes of this rule, recorded environmental cleanup liens are encumbrances on property for the recovery of incurred cleanup costs on the part of a state, tribal or federal government agency or other third party. Recorded environmental cleanup liens often provide an indication that environmental conditions currently or previously existed on a property that may have included the release or threatened release of a hazardous substance. The existence of an environmental cleanup lien should be used as an indicator of potential environmental concerns and as a basis for further investigation into the potential existence of on-going or continued releases or threatened releases of hazardous substances on, at, in, or to the subject property.

The Committee recommended, and EPA is proposing at proposed § 312.25, that the search for recorded environmental cleanup liens be performed either by the purchaser or through the inquiry of the environmental professional. The search for such liens may not necessarily require the expertise of an environmental professional and therefore may be more efficiently or more cost-effectively performed by the purchaser or an agent of the purchaser. Such liens may be included as part of the chain of title documents or may be recorded in some other format by state or local government agencies. If such information is collected by the purchaser, or other agent of the purchaser who is not under the supervision or responsible charge of the environmental professional, the proposed rule would require that any information on environmental cleanup liens that is collected on the part of the purchaser be provided to the environmental professional. The environmental professional can then make use of such information during the conduct of the all appropriate inquiries and when rendering conclusions or opinions regarding the environmental conditions of the property.

The Committee recommended that the all appropriate inquiries regulation require that purchasers and environmental professionals search for those environmental cleanup liens that are recorded under federal, tribal, state, or local law. Liens that are not recorded by government programs or agencies are not addressed by the language of the statute on the criteria for all appropriate inquiries (the statute speaks only of recorded liens). One caution about the conclusion one can draw from not finding a recorded environmental cleanup lien is that if EPA is in the process of cleaning up a site at the time of acquisition there is nothing to prevent EPA from recording such a lien post acquisition. This type of lien, a so-called windfall lien, has no statute of limitations on it and arises at the time EPA first spends Superfund money. States and localities may have similar mechanisms.

The Agency requests comments on the proposed standards for searching for recorded environmental cleanup liens.

J. What Are the Proposed Requirements for Reviewing Federal, State, Tribal, and Local Government Records?

The proposed rule, at proposed § 312.26, would require that federal, state, tribal and local government records be searched for information necessary to achieve the proposed objectives and performance factors, including information regarding the use and occupancy of and the environmental conditions at the subject property and conditions of nearby or adjoining properties that could have a impact upon the environmental conditions of the subject property. Federal, tribal, state and local government records may contain information regarding environmental conditions at a property. In particular, government records, or data bases of

such information, may include information on previously reported releases of hazardous substances, pollutants, contaminants, petroleum products and controlled substances. Government records may include information on institutional controls related to a particular property. For example, in the case of NPL sites, EPA Superfund records, including Action Memoranda and Records of Decision, may have information on institutional controls in place at such properties. Government records also may include information on activities or property uses that could cause releases or threatened releases to be present at a property. The proposed rule, at § 312.26(b), requires that federal, tribal, state, and local government records be searched for information indicative of environmental conditions at the subject property. The types of government records or data bases of records searched should include:

1. Government records of reported releases or threatened releases at the subject property, including previously conducted site investigation reports.

2. Government records of activities, conditions, or incidents likely to cause or contribute to releases or threatened releases, including records documenting regulatory permits that were issued to current or previous owners or operators at the property for waste management activities and government records that identify the subject property as the location of landfills, storage tanks, or as the location for generating and handling activities for hazardous substances, pollutants, contaminants, petroleum or controlled substances.

3. CERCLIS records—EPA's Comprehensive Environmental Response, Compensation, and Liability Information System (CERCLIS) database contains general information on sites across the nation and in the U.S. territories that have been assessed by EPA, including sites listed on the National Priorities List (NPL). CERCLIS includes information on facility location, status, contaminants, institutional controls, and actions taken at particular sites. CERCLIS also contains information on sites being assessed under the Superfund Program, hazardous waste sites and potential hazardous waste sites.

4. Government-maintained records of public risks (if available)—the all appropriate inquiries government records search should include a search for available records documenting public health threats or concerns caused by, or related to, activities currently or previously conducted at the site.

5. Emergency Response Notification System (ERNS) records—ERNS is EPA's data base of oil and hazardous substance spill reports. The data base can be searched for information on reported spills of oil and hazardous substances by state.

6. Government registries, or publicly available lists of engineering controls, institutional controls, and land use restrictions. The all appropriate inquiries government records search must include a search for registries or publicly available lists of recorded engineering and institutional controls and recorded land use restrictions. Such records may be useful in identifying past releases on, at, in, or to the subject property or identifying continuing environmental conditions at the property.

In the case of all the government records listed above, the requirements of this criterion may be met by searching data bases containing the same government records mentioned in the list above that are accessible and available through government entities or private sources. The review of actual records is not necessary, provided that the same information contained in the government records and required to meet the requirements of this criterion and achieve the proposed objectives and performance factors for these regulations is attainable by searching available data bases.

In addition to reviewing government records, or data bases of information contained in government records, for information about the subject property, the proposed rule would require that government records for nearby and adjoining properties be reviewed to assess the potential impact to the subject property from hazardous substances and petroleum contamination migrating from contiguous or nearby properties. The proposed rule would require all appropriate inquiries to include a search of government records or data bases for information about nearby or adjoining properties to assess potential impacts to the environmental conditions of the subject property from off-site sources of contamination. The proposed rule would require that government records be searched to identify information relative to the proposed objectives and in accordance with the performance factors on: (1) Adjoining and nearby properties for which there are governmental records of reported releases or threatened releases (*e.g.*, properties currently listed on the National Priorities List (NPL), properties subject to corrective action orders under the Resource Conservation and Recovery Act (RCRA), properties with reported releases from leaking underground storage tanks); (2) adjoining and nearby properties previously identified or regulated by a government entity due to environmental conditions at a site (*e.g.*, properties previously listed on the NPL, former CERCLIS sites with notices of no further response actions planned); and (3) adjoining and nearby properties that have government-issued permits to conduct waste management activities (*e.g.*, facilities permitted to manage RCRA hazardous wastes).

In the case of government records searches for nearby properties, the proposed rule (at § 312.26(c)) includes minimum search distances for obtaining and reviewing records or data bases concerning activities and facilities located on nearby properties. The minimum search distances proposed are based on the Negotiated Rulemaking Committee's professional judgment regarding the value of obtaining information on potential releases or threatened releases from properties and activities within a given distance from the subject property that could have an impact on the subject property. For example, government records identifying properties listed on the NPL should be searched to obtain information on NPL sites located within one-half mile of the subject property. The Committee generally believed that NPL sites located beyond one-half mile of a property most likely would have little or no impact on the environmental conditions at the subject property. For nearby properties, the proposed rule includes proposed minimum search distances (*e.g.*, properties located either within one mile or one-half mile of the subject property) for each type of record to be searched to facilitate defining the scope of the records searches. In the case of two types of records, records of RCRA small quantity and large quantity generators and records of registered storage tanks, the all appropriate inquiries search need only identify RCRA generators and storage tanks located on adjoining properties (the proposal contains no requirement to search for these two types government records for other nearby properties).

EPA and the Negotiated Rulemaking Committee realize that property-specific and regional conditions may influence the appropriateness of the proposed search distances for any given type of record and property. Appropriate search distances for properties located in rural settings may differ from appropriate search distances for urban settings. In addition, ground water flow direction, depth to ground water, arid weather

conditions, the types of facilities located on nearby properties, as well as other factors may influence the degree of impact to a property from off-site sources. Therefore, the proposed rule would allow for the environmental professional to adjust any or all of the proposed minimum search distances for any of the record types, based upon professional judgment and the consideration of site-specific conditions or circumstances when seeking to achieve the proposed objectives and performance factors for the required inquiries. The proposed rule provides that the environmental professional may consider one or more of the following factors when determining an alternative appropriate search distance:

- The nature and extent of a release;
- Geologic, hydrogeologic, or topographic conditions of the subject property and surrounding environment;
- Land use or development densities;
- The property type;
- Existing or past uses of surrounding properties;
- Potential migration pathways (*e.g.*, groundwater flow direction, prevalent wind direction); or
- Other relevant factors.

The proposed rule would require environmental professionals to document the rationale for making any modifications to the required minimum search distances included in the proposed regulation.

The Agency requests comments on the proposed standards for reviewing federal, state, tribal and local government records.

K. What Are the Proposed Requirements for Visual Inspections of the Subject Property and Adjoining Properties?

1. Visual Inspections of the Subject Property

The proposed rule, at § 312.27, would require that a visual on-site inspection be conducted of the subject property. The proposed visual on-site inspection requirements include inspecting the facilities and any improvements on the property, as well as visually inspecting areas on the property where hazardous substances may currently be or in the past may have been used, stored, treated, handled, or disposed of. During their deliberations, members of the Negotiated Rulemaking Committee overwhelmingly stressed the need for every all appropriate inquiries investigation to include an on-site inspection. Many Committee members pointed out that on-site inspections of a property can provide the best source of information regarding indications of environmental conditions on a property. The Committee recommended, and EPA included in today's proposed rule, a requirement that a visual on-site inspection of the subject property be conducted in all but a few very limited cases and that physical limitations to the visual on-site inspection (*e.g.*, weather conditions, physical obstructions) be documented.

We note that persons conducting all appropriate inquiries with monies provided in a grant awarded under CERCLA Section 104(k)(2)(B) must, during the on-site visual inspection, inspect the facilities and any improvements on the property, as well as visually inspect any other areas on the property where hazardous substances may currently be or in the past may have been used, stored, treated, handled, or disposed. In addition, depending on the terms and conditions of the grant or cooperative agreement, the on-site visual inspection requirements could include inspecting the facilities, improvements, and other areas of the property where pollutants, contaminants, petroleum and petroleum products, or controlled substances may currently be or in the past may have been used, stored, treated, handled, or disposed.

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. In all cases, every effort must be made to conduct an on-site visual inspection of a property when conducting all appropriate inquiries.

Some members of the Committee raised concerns regarding a purchaser's or environmental professional's inability to obtain on-site access to a property in limited circumstances. Some members noted that extreme and prolonged weather conditions and remote locations can impede access to a property. Another limited circumstance that could result in a purchaser or environmental professional not being able to gain on-site access to a property during the all appropriate inquiries is the situation where a local government, a non-profit organization, or other party seeks to obtain ownership of a property, but the owner refuses to provide access to the local government or non-profit organization and the local government or non-profit organization exercises all good faith efforts to gain access to the property (*e.g.*, seeking assistance from state government officials) and remains unable to gain on-site access. Such circumstances may arise due to the unique nature of such transactions. Unlike commercial property transactions conducted by two private parties, where the economic and legal liability interests of both parties and the ability of either party to abandon the transaction can work in favor of the purchasing party's ability to gain access to a property prior to acquisition, property transactions between a private party and a local government or non-profit organization acting on behalf of the public interest, may not afford the local government or non-profit organization the same leverage, even if it is indeed in the public interest to attain ownership of the property. This situation may occur when the local government or non-profit association seeks to assess, cleanup, and revitalize an area, but the owner of the property is unreachable, unavailable, or otherwise unwilling to provide access to the property. In such limited circumstances, the public benefit attained from a government entity, or the non-profit organization, gaining ownership of a property may outweigh the need to gain on-site access to the property prior to the transfer of ownership.

The proposed rule would require, in such unusual circumstances, that the purchaser make good faith efforts to gain access to the property. In addition, the proposal notes that the mere refusal of a property owner to allow the purchaser to have access to the property does *not* constitute an unusual circumstance, absent the making of good faith efforts to otherwise gain access. The proposed rule, at proposed § 312.10, would define ''good faith'' as ''the absence of any intention to seek an unfair advantage or to defraud another party; an honest and sincere intention to fulfill one's obligations in the conduct or transaction concerned.''

In those unusual circumstances where a purchaser or an environmental professional, after good faith efforts, cannot gain access to a property and therefore cannot conduct an on-site visual inspection, the proposed rule would require that the property be visually inspected, or observed, by another method, such as through the use of aerial photography, or be inspected, or observed, from the nearest accessible vantage point, such as the property line or a public road that runs through or along the property. In addition, the proposed rule would require that the all appropriate inquiries report includes documentation of efforts undertaken by the purchaser or the environmental professional to obtain on-site access to the subject property and includes an explanation of why good faith efforts to gain access to subject property were unsuccessful. The proposed rule also

would require that the all appropriate inquiries report must include documentation of other sources of information that were consulted to obtain information necessary to achieve the proposed objectives and performance factors. This documentation should include comments, from the environmental professional who signs the report, regarding any significant limitations to the ability of the environmental professional to identify conditions indicative of releases or threatened releases on, at, in, or to the subject property, that may arise due to the inability of the purchaser or environmental professional to obtain on-site access to the property.

In addition, in those limited cases where an on-site visual inspection cannot be conducted prior to the date a property is acquired, EPA recommends that once a property is purchased, the property owner conduct an on-site visual inspection of the property. Such an inspection may provide important information necessary for the property owner to fully comply with the other statutory provisions, including on-going obligations, governing the CERCLA liability protections.

2. Visual Inspections of Adjoining Properties

The proposed rule, at proposed § 312.27, would require that the all appropriate inquiries investigation include visual inspections or observations of properties that adjoin the subject property. Visual inspections of adjoining properties may provide excellent information on the potential for the subject property to be affected by migrating contamination from adjoining properties. The Negotiated Rulemaking Committee discussed the merits and legalities of requiring parties to conduct on-site visual inspections of adjoining properties. Although several Committee members expressed a preference for visual inspections to be conducted on-site, the Committee was concerned that requiring purchasers or environmental professionals to gain on-site access to properties adjoined to the subject property would not be practicable. Therefore, the Committee recommended and EPA is proposing that visual observations of adjoining properties be conducted from the subject property's property line, one or more public rights-of-way, or other vantage point (*e.g.*, via aerial photography). Where practicable, a visual on-site inspection is recommended and may provide greater specificity of information. The proposed rule would require that the visual observations of adjoining properties include observing areas where hazardous substances currently may be, or previously may have been, stored, treated, handled, or disposed. Visual inspections or observations of adjoining properties otherwise also must be conducted to achieve the proposed objectives and performance goals for the all appropriate inquiries. Physical limitations to the visual inspections or observations of adjoining properties should be noted.

The Agency requests comments on the proposed requirements for conducting visual inspections of the subject property and adjoining properties, including the proposed exemption from the on-site visual inspection requirement in cases where good faith efforts result in an ability to gain access to a property.

3. Role of the Environmental Professional in the Visual Inspection

As mentioned in section III.D.4 of this preamble, EPA and the Negotiated Rulemaking Committee considered proposing to require all activities in the all appropriate inquiries investigation to be conducted by persons meeting the proposed definition of an environmental professional. Requiring that an environmental professional conduct all activities could ensure that all data collection and investigations are conducted in a manner and to a degree of specificity that allows the environmental professional to make best use of all information in forming opinions and conclusions regarding the environmental conditions at a property. However, after careful review of the specific activities included in the statutory criteria and conducting an assessment of the costs and burdens of such a requirement, EPA and the Committee concluded that it is not necessary for each and every regulatory requirement to be conducted by an environmental professional. As outlined in section III.E.1 of this preamble, the proposed rule would allow for certain aspects of the inquiries to be conducted solely by the purchaser or property owner, while providing that all other aspects be conducted under the supervision or responsible charge of the environmental professional. Among the activities that the proposed rule would require to be conducted under the supervision or responsible charge of an environmental professional is the on-site visual inspection.

It is EPA's recommendation that visual inspections of the subject property and adjoining properties be conducted by an individual who meets the proposed regulatory definition of an environmental professional. Although many other aspects of the all appropriate inquiries may be conducted sufficiently and accurately by individuals other than an environmental professional (*e.g.*, a research associate or librarian may be well qualified to search government records, an attorney may be well qualified to conduct a search for an environmental lien), EPA believes that an environmental professional is best qualified to conduct a visual inspection and locate and interpret information regarding the physical and geological characteristics of the property as well as information on the location and condition of equipment and other resources located on the property. EPA recognizes that other individuals who do not meet the proposed regulatory definition of an environmental professional, particularly when these individuals are conducting such activities under the supervision or responsible charge of an environmental professional, may have the required skills and knowledge to conduct an adequate on-site visual inspection. However, EPA believes that the professional judgment of an individual meeting the proposed definition of an 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. An environmental professional is best qualified for identifying such situations and conditions and rendering a judgment or opinion regarding the potential existence of conditions indicative of environmental concerns.

An environmental professional should, at a minimum, be involved in planning for the on-site visual inspection. Information collected during the conduct of other required activities such as interviews with owners and occupants and reviews of government records should be reviewed in preparing for the on-site visual inspection. Although the proposed rule would not require the activities proposed as part of all appropriate inquiries investigation to be done in any particular sequence, EPA recommends that the on-site visual inspection occur after many of the other activities are completed to allow the environmental professional or other individuals conducting the inspections to make the best use of available information about the property when preparing for and conducting the on-site visual inspection. For example, if during interviews with owners and occupants of the property or during the review of government records, it becomes apparent that a property

currently used for general retail purposes once was owned by individuals issued permits for the storage or treatment of hazardous wastes, this could be noted during the preparation for the on-site visual inspection and the persons conducting the inspection should be prepared to look for remaining storage units or evidence of conditions caused by past spills or releases from on-site management units. In addition, it may be important to consider any specialized knowledge held by the purchaser or the environmental professional regarding current or past uses and ownership of the property prior to conducting the on-site visual inspection.

L. What Are the Proposed Requirements for the Inclusion of Specialized Knowledge or Experience on the Part of the ''Defendant?''

Because the conduct of all appropriate inquiries is one element of a protection against CERCLA liability, and the situation under which a property owner may need to assert that he or she qualifies for liability protection is when the property owner must defend his or her status as an innocent landowner, a contiguous property owner, or a bona fide prospective purchaser, the statute refers to the property owner, or the user of the all appropriate inquiries investigation, as the ''defendant.'' The Committee believed, and EPA agrees, that Congressional intent is to ensure that any information or special knowledge held by the purchaser or property owner with regard to a property and the conditions or situations present at the subject property be included in the pre-acquisition inquiries and be considered, along with all information collected during the conduct of all appropriate inquiries, when an environmental professional renders a judgment or opinion regarding the presence of environmental conditions indicative of releases or potentials releases of hazardous substances on, at, in, or to the subject property. This information should be revealed to all parties conducting the all appropriate inquiries and considered earlier in the inquiries process so that any specialized knowledge may be taken into account through the conduct of the other required aspects of the all appropriate inquiries.

Congress first added the innocent landowner defense to CERCLA in 1986. The Brownfields Amendments amended the innocent landowner defense and added to CERCLA the bona fide prospective purchaser and the contiguous property owner liability protections to CERCLA liability. The 1986 amendments to CERCLA established that among other elements necessary for a defendant to successfully assert the innocent landowner defense, a defendant must demonstrate that he or she had, at the time of acquisition of the property in question, made all appropriate inquiries into previous ownership and uses of the property. Congress directed courts evaluating a defendant's showing of all appropriate inquiries to take into account, among other things, ''any specialized knowledge or experience on the part of the defendant.'' Nothing in today's proposed rule would change the nature or intent of this requirement as it has existed in the statute since 1986 or in how the courts have interpreted the requirement to date.

The Negotiated Rulemaking Committee decided not to extend the proposed requirements for the consideration of any specialized knowledge or experience of the property owner beyond what was previously required under CERCLA and established through case law. The proposed rule, at proposed § 312.28, would require that all appropriate inquiries include specialized knowledge on the part of the prospective property owner of the subject property, the area surrounding the subject property, the conditions of adjoining properties, as well as other experience relative to the inquiries that may be applicable to identifying conditions indicative of releases or threatened releases at the subject property. The proposed rule also would require that the results of the inquiries take into account any specialized knowledge related to the property, surrounding areas, and adjoining properties held by the persons responsible for undertaking the inquiries, including any specialized knowledge on the part of the environmental professional.

In reviewing existing case law related to the innocent landowner defense, courts appear to have interpreted the ''specialized knowledge'' factor to mean that the professional or personal experience of the defendant may be taken into account when analyzing whether the defendant made all appropriate inquiries. For example, in *Foster* v. *United States*, 922 F. Supp. 642 (D. D.C. 1996), the owner of a property formerly owned by the General Services Administration and contaminated by, among other things, lead, mercury and PCBs, brought an action against the United States and District of Columbia, prior owners or operators of the site. The plaintiff was a principal in Long & Foster companies and purchased the property through a general partnership, and received it by quitclaim deed. The U.S. and D.C. counterclaimed against plaintiff. Foster asserted the innocent landowner defense. The court rejected the plaintiff's claim based in part on the defendant's specialized knowledge. The court found that his specialized knowledge included his position at Long & Foster, which did hundreds of millions of dollars of commercial real estate transactions, and his position as a partner in at least 15 commercial real estate partnerships. The partnership was involved as an investor in a number of real estate transactions, some of which involved industrial or commercial or mixed-use property. The court ruled that ''it cannot be said that [the partnership] is a group unknowledgeable or inexperienced in commercial real estate transactions.'' *Foster*, 922 F. Supp. at 656.

In *American National Bank and Trust Co. of Chicago* v. *Harcros Chemicals, Inc.*, 1997 WL 281295 (N.D. Ill. 1997), the plaintiff was a company ''involved in brownfields development, purchasing environmentally distressed properties at a discount, cleaning them up, and selling them for a profit.'' *American National Bank*, 1997 WL 281295 at *4. As a counter-claim defendant, the company asserted it was an innocent landowner and therefore not liable pursuant to CERCLA. The court found that among other reasons the defense failed because the company possessed specialized knowledge. The court ruled that the company was an expert environmental firm and possessed knowledge that should have alerted it to the potential problems at the site.

EPA points out that the proposed rule requires that the specialized knowledge of prospective landowners and the persons responsible for undertaking the all appropriate inquiries be taken into account when conducting the all appropriate inquiries for the purposes of identifying conditions indicative of releases or threatened releases at a property. However, as evidenced by the case law cited above, the determination of whether or not the all appropriate inquiries standard is met with regard to specialized knowledge remains within the discretion of the courts.

The Agency requests comments on the proposed provisions governing the inclusion of specialized knowledge or experience on the part of the purchaser and the environmental professional.

M. What Are the Proposed Requirements for the Relationship of the Purchase Price to the Value of the Property, if the Property Was Not Contaminated?

The proposed rule, at § 312.29, would require that the purchaser of the property consider whether or not the purchase price paid for the property reflects the fair market value of the property, assuming that the property is not contaminated. There may be many reasons that the price paid for a particular property is not an accurate reflection of the fair market value. The proposed rule would require that the purchaser consider whether any differential between the purchase price and the value of the property is due to the presence of releases or threatened releases of hazardous substances at the property.

The proposed rule does not require that a real estate appraisal be conducted to achieve compliance with this criterion. Although the Negotiated Rulemaking Committee discussed the potential value in requiring that an appraisal be conducted, the Committee determined that a formal appraisal is not necessary for the purchaser to make a general determination of whether the price paid for a property reflects its market value. Such a determination may be made by comparing the price paid for a particular property to prices paid for similar properties located in the same vicinity as the subject property, or by consulting a real estate expert familiar with properties in the general locality and who may be able to provide a comparability analysis. The objective is not to ascertain the exact value of the property, but to determine whether or not the purchase price paid for the property is reflective of its market value. Significant differences in the purchase price and market value of a property should be noted and the reasons for any differences should be noted. The Agency requests comments on these proposed requirements.

N. What Are the Proposed Requirements for Commonly Known or Reasonably Ascertainable Information About the Property?

The proposed rule, at proposed § 312.30, would require that landowners, brownfields grantees, and environmental professionals conducting the all appropriate inquiries consider commonly known information about the potential environmental conditions at a property. Commonly known information generally is information available in the local community that may be ascertained from the owner or occupant of a property, members of the local community, including owners or occupants of neighboring properties to the subject property, local or state government officials, local media sources, and local libraries and historical societies. Much of this information may be incidental to other information collected during the inquiries, but such information may be valuable to identifying conditions indicative of releases or threatened releases at the subject property. For example, neighboring property owners and local community members may have information regarding undocumented uses of a property during periods when the property was idle or abandoned. Local community sources may be good sources of information for understanding uses of a property and activities conducted at a property in the case of abandoned properties.

The collection and use of commonly known information about a property must be done in connection with the collection of all other required information for the purposes of achieving the proposed objectives and performance factors contained in proposed § 312.20. EPA recommends that persons undertaking the all appropriate inquiries make efforts to collect information on the subject property from a variety of sources, including sources located in the community in which the property is located, to the extent necessary to achieve the objectives and performance factors of § 312.20(d) and (e). Opinions included in the all appropriate inquiries report should be based upon a balance of all information collected. All information collected, including information available from the local community, should be considered in the final evaluation.

As mentioned above in section III.K., the Brownfields Amendments to CERCLA amended the innocent landowner defense previously added to CERCLA in 1986. In addition, the Brownfields Amendments added to CERCLA the bona fide prospective purchaser and the contiguous property owner liability protections to the statute. The 1986 amendments to CERCLA established that among other elements necessary for a defendant to successfully assert the innocent landowner defense, a defendant must take into account commonly known or reasonably ascertainable information about the property. Nothing in today's proposed rule would change the nature or intent of this requirement as it has existed in the statute since 1986 or in how the courts have interpreted the requirement to date.

There is some case law, related to the innocent landowner defense, that provide guidance for considering commonly known or reasonably ascertainable information about the property. For example, in *Wickland Oil Terminals* v. *Asarco, Inc.*, 1988 WL 167247 (N.D. Cal. 1988), the court noted that Wickland was aware of potential water quality problems at the subject property due to large piles of mining slag stored at the property, even though Wickland argued that previous owners withheld such information, because the information was available from other sources consulted by Wickland prior to purchasing the property, including the Regional Water Quality Control Board and a consulting firm hired by Wickland. Such information was commonly known by local sources and therefore should have been considered by Wickland during its conduct of all appropriate inquiries.

In *Hemingway Transport Inc.* v. *Kahn*, 174 F.R. 148 (Bankr. D. Mass. 1994), the court ruled against an innocent landowner claim because it found ''that had [the defendants] exerted a modicum of effort they may easily have discovered information that at a minimum would have compelled them to inspect the property further * * * the [defendants] could have taken a few significant steps, literally, to minimize their liability and discover information about the property * * *'' The court cited that one action the defendants should have taken to collect available information about the property is phone calls to city officials to inquire about conditions at the property.

EPA requests comment on the proposed requirements for including within the all appropriate inquiries commonly known or reasonably ascertainable information about the property.

O. What Are the Proposed Requirements for ''The Degree of Obviousness of the Presence or Likely Presence of Contamination at the Property, and the Ability To Detect the Contamination by Appropriate Investigation?'

The proposed rule, at § 312.31, would require that persons conducting the all appropriate inquiries consider all the information collected during the conduct of the inquiries in totality to ascertain the potential presence of a release or threatened release at the property. Persons conducting all appropriate inquiries, following the collection of all required information, must assess whether or not an obvious conclusion may be drawn that there are conditions indicative of a release or threatened release of hazardous

substances (or other substances, pollutants or contaminants) on, at, in, or to the property. In addition, the proposed rule would require parties to consider whether or not the totality of information collected prior to acquiring the property indicates that the parties should be able to detect a release or threatened release on, at, in, or to the property. Persons should undertake these considerations keeping in mind that ultimately it is for a court to assess the degree of obviousness of contamination.

The previous innocent landowner defense (added to CERCLA in 1986) required a court to consider the degree of obviousness of the presence or likely presence of contamination at a property, and the ability of the defendant (*i.e.*, the landowner) to detect the contamination by appropriate investigation. Nothing in today's proposed rule would change the nature or intent of this requirement as it has existed in the statute since 1986 or in how the courts have interpreted the requirement to date. Case law relevant to this criterion indicates that defendants may not be able to claim an innocent landowner defense if a preponderance of information available to a prospective landowner prior to acquiring the property indicates that the defendant should have concluded that there is a high likelihood of contamination at the site. In some cases (*e.g.*, *Hemingway Transport Inc.* v. *Kahn*, 174 F.R. 148 (Bankr. D. Mass. 1994), and *Foster* v. *United States*, 922 F. Supp. 642 (D.D.C. 1996), courts have ruled that if a defendant had done a bit more visual inspection or further investigation, based upon information available to the defendant prior to acquiring the property, it would have been obvious that the property was contaminated. In *Foster* v. *United States*, the court determined that the innocent landowner defense was not available based in part on the fact that the partnership presumed the site was free of contamination based upon cursory visual inspections despite evidence in the record that, at the time of the sale, the soil was visibly stained by PCB-contaminated oil. In addition, although the property was located in a run-down industrial area, the defendant did no investigation into the environmental conditions at the site prior to acquiring the property.

With regard to the conduct of sampling and analysis, today's proposed rule would not require sampling and analysis as part of the all appropriate inquiries investigation. However, members of the Committee recognized that sampling and analysis may be valuable in determining the possible presence and extent of potential contamination at a property. In addition, the fact that the all appropriate inquiry standards would not require sampling and analysis may not prevent a court from concluding that, under the circumstances of a particular case, sampling and analysis should have been conducted to meet ''the degree of obviousness of the presence or likely presence of contamination at the property, and the ability to detect the contamination by appropriate investigation'' criterion and obtain protection from CERCLA liability. Prospective landowners should keep in mind that the conduct of all appropriate inquiries prior to purchasing a property is only one requirement to which a purchaser must comply to claim protection from CERCLA liability once the purchase has taken place. The statute requires that persons, after acquiring a property, comply with continuing obligations to take reasonable steps to stop on-going releases at the property, prevent any threatened future releases, and prevent or limit any human, environmental, or natural resource exposure to any previously released hazardous substances (these criteria are summarized in detail in section II.D. of this preamble). In certain instances, depending upon site-specific circumstances and the totality of the information collected during the all appropriate inquiries prior to the property acquisition, it may be necessary to conduct sampling and analysis, either pre-or post-acquisition, to fully understand the conditions at a property, and fully comply with the statutory requirements for the CERCLA liability protections. In addition, sampling and analysis may help explain existing data gaps. Prospective purchasers should be mindful of all the statutory requirements for obtaining the CERCLA liability protections when considering whether or not to conduct sampling and analysis and when determining whether to undertake sampling and analysis prior to or after acquiring a property. Today's proposed regulation does *not* require that sampling and analysis be conducted as part of the all appropriate inquiries that must be conducted prior to acquiring a property.

The Agency requests comments on the proposed requirements for meeting the statutory provisions for including within the all appropriate inquiries the degree of obviousness of the presence or likely presence of contamination at the property, and the ability to detect the contamination by appropriate investigation. The Agency also specifically requests comments on the decision not to require sampling and analysis as part of the all appropriate inquiries regulations.

IV. Requests for Public Comments

EPA is requesting comment on the standards and practices included as part of today's proposed rule. Public comments may be submitted to the Agency electronically or by mail, as explained in the **SUPPLEMENTARY INFORMATION** section of this preamble. As explained in that section, the Agency requests that when submitting comments, please state your views as clearly as possible, describe any assumptions applicable to your comments, provide any technical information and data that support your views, and provide specific examples to illustrate your concerns. Specifically, the Agency is interested in receiving public comment on the following:

- The proposed requirements for an all appropriate inquiries report, including the signature requirements for the all appropriate inquiries report.
- The proposed qualifications included in the definition of an environmental professional and the provisions allowing for individuals who do not qualify as environmental professionals to contribute to inquiry activities.
- The proposed division of responsibilities for conducting all appropriate inquiries.
- The proposal to establish the date on which title is transferred on a property as the date on which the property is acquired.
- The proposed provisions for using previously conducted all appropriate inquiries.
- The proposed requirements for using all appropriate inquiries conducted by third parties.
- The proposed objectives and performance factors for the all appropriate inquiries requirements.
- The proposed provisions for addressing data gaps.
- The proposal to not require sampling and analysis as part of the all appropriate inquiries standards.
- The proposed standards for conducting interviews of past and present owners and occupants of a property.
- The proposed requirements to interview owners or occupants of neighboring properties in the case of abandoned properties.
- The proposed standards for reviews of historical sources of information.

- The proposed standards for searching for recorded environmental cleanup liens.
- The proposed standards for reviewing federal, state, tribal and local government records.
- The proposed requirements for conducting visual inspections of the subject property and adjoining properties, including the limited exemption from conducting an on-site inspection when good faith efforts result in an inability to obtain access to a property.
- The proposed provisions governing the inclusion of specialized knowledge or experience on the part of the purchaser and the environmental professional.
- The proposed requirements for considering the relationship of the purchase price to the value of a property, if the property was not contaminated.
- The proposed requirements for commonly known or reasonably ascertainable information about the property.
- The proposed requirements for the degree of obviousness of the presence or likely presence of contamination at the property, and the ability to detect the contamination by appropriate investigation.
- The proposed information collection requirements, including the need for such information, the accuracy of the provided burden estimates associated with the requirements, and any suggested methods for minimizing respondent burden, including through the use of automated collection techniques.
- The methodology used to estimate the costs and impacts of today's proposed rule, including the estimated incremental labor hours used to estimate the incremental cost of the proposed rule.
- The methodology employed to identify impacted small entities and estimating the potential impacts on small entities.
- The identification of voluntary consensus standards that are applicable to and compliant with today's proposed standards and practices for all appropriate inquiries.

V. Statutory and Executive Order Reviews

A. Executive Order 12866: Regulatory Planning and Review

Under Executive Order 12866 (58 FR 51735), the Agency must determine whether this regulatory action is ''significant'' and therefore subject to formal review by the Office of Management and Budget (OMB) and to the requirements of the Executive Order. The Executive Order defines ''significant regulatory action'' as one that is likely to result in a rule that may: (1) Have an annual effect on the economy of $100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or state, local, or tribal governments or communities; (2) create a serious inconsistency or otherwise interfere with an action taken or planned by another agency; (3) materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or (4) raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the Executive Order.

Pursuant to the terms of Executive Order 12866, it has been determined that today's proposed rule is a ''significant regulatory action'' because this proposed rule contains novel legal or policy issues.

Based upon the results of its Economic Impacts Analysis (EIA), EPA has determined that this proposed rule will have an annual effect on the economy of less than $100 million. The annualized benefits associated with today's proposed rule have not been monetized but are identified and summarized in the document titled ''Economic Impacts Analysis for the Proposed All Appropriate Inquiries Regulation.'' A copy of the EIA is available in the docket for today's proposed rule. The Agency solicits comment on the methodology and results from the analysis as well as any data that the public believes would be useful in a revised analysis.

1. Methodology

The value of any regulatory action is traditionally measured by the net change in social welfare that it generates. The Economic Impacts Analysis (EIA) conducted in support of today's proposed rule examines both costs and qualitative benefits in an effort to assess the overall net change in social welfare. The primary focus of the EIA document is on compliance costs and economic impacts. Below, EPA summarizes the analytical methodology and findings for the proposed all appropriate inquiries rule. The information presented is derived from the EIA.

The all appropriate inquiries regulation potentially will apply to most commercial property transactions. The requirements will be applicable to any public or private party, who may potentially claim protection from CERCLA liability as an innocent landowner, a bona fide prospective purchaser, or a contiguous property owner. However, the conduct of all appropriate inquiries, or environmental due diligence, is not new to the commercial property market. Prior to the Brownfields Amendments to CERCLA, commercial property transactions often included an assessment of the environmental conditions at properties prior to the closing of any real estate transaction whereby ownership was acquired for the purposes of confirming the conditions at the property or to establish an innocent landowner defense should environmental contamination be discovered after the property was acquired. The process most prevalently used for conducting all appropriate inquiries, or environmental site assessments, is the process developed by the American Society for Testing and Materials (ASTM) and entitled ''E1527, Phase I Environmental Site Assessment Process.'' In addition, some properties, particularly in cases where the subject property is assumed not to be contaminated or was never used for industrial or commercial purposes, were assessed using another, less rigorous process developed by ASTM, sometimes referred to as a ''transaction screen'' and entitled ''E1528 Standard Practice for Environmental Site Assessments: Transaction Screen Process.''

Our first step in assessing the economic impacts of the proposed rule was establishing a baseline to represent the relevant aspects to the commercial real estate market in the absence of any changes in regulations. Because under existing conditions almost all transactions concerning commercial properties are accompanied by either an environmental site assessment (ESA) conducted in accordance with ASTM E1527–2000 or a transaction screen as specified in ASTM E1528, these practices were assumed to continue even in the absence of the all appropriate inquiries regulation. The numbers of each type of assessment were estimated on the basis of industry data for recent years, with recent growth rates in transactions assumed to continue for the 10 year period covered by the EIA. An adjustment in the relative numbers of the ESAs and transaction screens was made to account for the fact that, under the proposed rule, an ESA will provide more certain protection from liability. This adjustment was made by comparing shifts between the two procedures that

occurred when the Brownfields Amendments established the ASTM E1527–2000 standard as the interim standard for all appropriate inquiries, and thus as one requirement for qualifying as an innocent landowner, bona fide purchaser, or contiguous property owner.

We then considered the requirements included in the recommendation of the Negotiated Rulemaking Committee and those included in a few options that the committee considered but did not adopt. We then compared the costs of each alternative option to costs associated with conducting assessments using the ASTM E1527–2000 standard. We present this cost comparison to comply with current OMB guidance to consider a less stringent alternative than the Agency's preferred alternative when conducting an economic impacts assessment. As explained in section V.I., EPA has determined that the ASTM E1527–2000 standard is inconsistent with applicable law. However, the alternative is included in the economics assessment for cost comparison purposes.

When compared to the ASTM E1527–2000 standard (*i.e.*, the baseline standard), today's proposed rule is expected to result in a reduced burden for the conduct of interviews in those cases where the subject property is abandoned; increased burden associated with documenting recorded environmental cleanup liens; increased burden for documenting the reasons for the price and market value of a property in those cases where the purchase price paid for the subject property is significantly below the market value of the property; and increased burden for recording information about the degree of obviousness of contamination at a property. The three regulatory options that were considered by the Negotiated Rulemaking Committee but not adopted would have required: (1) All non-clerical work to be performed by an individual meeting the proposed definition of an environmental professional; (2) no requirement to interview owners/occupants of neighboring properties when the subject property is abandoned; and (3) limited soil or water sampling. An additional option is presented in the EIA for the proposed rule to comply with guidance recently issued by OMB. OMB ''Circular A–4'' requires that agencies analyze a continuum of regulatory options, including a regulatory alternative that is less stringent than an agency's preferred alternative. To fully comply with the OMB guidance, the EIA includes a comparison of the cost impacts of our preferred option and the other options considered by the Negotiated Rulemaking Committee to an option that would entail using the ASTM E1527–2000 standard as the federal regulation. As explained in more detail below, it is EPA's opinion that the ASTM E1527–2000 standard is not compliant with the statutory requirements for all appropriate inquires, and therefore if adopted may not provide the benefits of the CERCLA liability protections. However, the option is provided in the EIA for the purposes of a cost comparison.

To estimate the changes in costs resulting from the rule or the regulatory options, we developed a costing model. This model estimates the total costs of conducting site assessments as the product of costs per assessment, numbers of assessments per year, and the number of years in the analysis. The costs per assessment, in turn, are calculated by dividing each assessment into individual labor activities, estimating the labor time associated with each, and assigning a per-hour labor cost to each activity on the basis of the labor category most appropriate to that activity. Labor times and categories are assumed to depend on the size and type of property being assessed, with the nationwide distribution of properties based on data from industry on environmental sites assessments and brownfield sites.[3] The estimates and assignments of categories are made based on the experience of professionals who have been involved in large numbers of site assessments, and who are therefore skilled in cost estimation for the relevant activities. Other costs, such as reproduction and the purchase of data, are added to the labor costs to form the estimates of total costs per assessment. These total costs, stratified by size and type of property, are then multiplied by estimated numbers of assessments of each size and type to generate our estimates of total annual costs. The model was tested by comparing its results to industry-wide estimates of average price of conducting assessments under baseline conditions, and found to agree quite well. We also used the model to estimate total costs per year under the proposed rule and each option; the differences between these estimated costs and the estimated costs in the baseline constituted our estimates of the incremental regulatory costs. EPA requests comments on our methodology for estimating the costs and impacts of today's proposed rule, including comments on our estimates of the incremental labor hours necessary to conduct activities required by the proposed rule but not currently conducted using the baseline standard (*i.e.*, ASTM E1527–2000).

The EIA provides a qualitative assessment of the benefits of the proposed rule. The benefits discussed are those that may be attributed to an increased level of certainty with regard to CERCLA liability provided to prospective purchasers of potentially contaminated properties, including brownfields, who comply with the provisions of the proposed rule and comply with the other statutory provisions associated with the liability protections. Our basic premise for associating certain benefits to the proposed rule is that we believe that the level of certainty provided by the liability protections may result in increased brownfields property transactions. However, it is difficult to predict how many additional transactions may occur that involve brownfields properties in response to the increased certainty of the liability protections. It also is difficult to obtain data on changes in behaviors and practices of prospective property owners in response to the liability protections. Therefore, we made no attempt to quantify potential benefits or compare the benefits to estimated incremental costs.

The Agency believes that the increased level of certainty with regard to CERCLA liability provided by complying with the proposed rule and other statutory requirements may have the affect of increasing property transactions involving brownfields and other contaminated and potentially-contaminated properties and improving information about environmental conditions at these properties. The types of indirect benefits that we believe may result from this increase in the number of transactions involving these types of properties include increased numbers of cleanups, reduced use of greenfields, potential increases in property values, and potential increases in quality of life measures (*e.g.*, decreases in urban blight, reductions in traffic, congestion, and reduced pollution due to mobile source emissions). However, as stated above, the benefits of the proposed rule are considered only qualitatively, due to the difficulty of predicting how many additional brownfields and contaminated property transactions may occur in response to the increased certainty of liability protections provided by the proposed rule, as well as the difficulty in getting data on

[3] The distribution of abandoned properties and properties with known owners, modeled as a range, is based on an estimate of vacant lands in urban areas and an estimate of abandoned Superfund sites.

changes in behaviors and practices in response to the availability of the liability protections. EPA is confident that the new liability protections afforded to prospective property owners, if they comply with the all appropriate inquiries provisions, will result in increased benefits. EPA is not able to quantify, with any significant level of confidence, the exact proportion of the benefits attributed only to the availability of the liability protections and the all appropriate inquiries regulations. For these reasons, the costs and benefits could not be directly compared.

2. Summary of Regulatory Costs

For a given property, the costs of compliance with the proposed rule relative to the baseline depend on whether that property would have been assessed, in absence of the all appropriate inquiries regulation, with an ASTM E1527–2000 assessment process or with a simpler transaction screen (ASTM E1528). The table below shows that the average incremental cost of the proposed rule relative to conducting an ASTM E1527–2000 is estimated to be between $41 and $47. For the small percentage of cases for which a transaction screen would have been preferred to the ASTM E1527–2000 in the baseline, but which now would require an assessment in compliance with the proposed rule, the average incremental cost is estimated to be between $1,448 and $1,454. We estimate that approximately 97 percent of property transactions will bear only the incremental cost of the proposed rule relative to the ASTM E1527–2000 process. Therefore, the weighted average incremental cost per transaction is estimated to be fairly low, between $84 and $89.

The three regulatory options considered by the Negotiated Rulemaking Committee, but not recommended, would result in higher incremental costs from the base case. Option 1, which would require all of the non-clerical tasks in the all appropriate inquiries to be performed by an individual meeting the definition of environmental professional, would add an average of $539 per property assessment (or approximately $1,946 per property, assuming a transition from a transaction screen). Option 2 would have the same interviewing requirements as the baseline standard (*i.e.*, ASTM E1527–2000), rather than require that interviews be conducted with neighboring property owners in the case of abandoned properties. EPA estimates that the incremental cost of Option 2, or the incremental cost of incorporating all the additional aspects of the proposed rule, over the baseline, except for the neighboring property owners/occupants interview requirement for abandoned properties, would be $54 per assessment (or $1,460 per property, assuming a transition from a transaction screen). Option 3, which would require the all appropriate inquiries to include limited sampling and analysis, would result in average incremental costs of either $1,439 or $2,845, depending on whether, under baseline conditions, an ASTM E1527–2000 process or a transaction screen (ASTM E1528) would have been used. The alternative of using the ASTM E1527–2000 standard as the federal regulation would result in no ($0) incremental cost per property assessment (or, on average, $1,407 per property, assuming a transition from a transaction screen). We note, however, that EPA has found that the ASTM E1527–2000 standard is inconsistent with the statutory requirements for all appropriate inquiries.

SUMMARY OF INCREMENTAL PER-ASSESSMENT COST ESTIMATES

	Average incremental cost relative to phase I ESA under ASTM E1527–2000 (97% of transactions)	Average incremental cost for transition from transaction screen (under ASTME1528) (3% of transactions)
Proposed AAI Rule	$41–$47	$1,448–$1,454
Option 1—Environmental Professional Only	539	1,946
Option 2—Unchanged Interview Requirement	54	1,460
Option 3—Limited Sampling ASTM E1527–2000	1,439	2,845
	0	1,407

The total annualized costs of the proposed rule and the four additional options considered, in total and relative to the base case, are shown in the exhibit below. The total costs were calculated over a period of ten years from the start of 2004 and then annualized at a three and seven percent discount rate. When a discount rate of three percent is used, the estimated total annual costs for the options considered by the Negotiated Rulemaking Committee range from just under $700 million to over $1 billion per year, compared to the baseline costs of $663.8 million and the costs associated with the option of using the ASTM E1527–2000 standard of over $677 million. The proposed regulation adds between $26 and $28 million per year, while the incremental costs association with the options considered by the Negotiated Rulemaking Committee range from $30 million to almost $460 million per year. The incremental cost of the alternative of using the ASTM 1527–2000 standard is over $13 million. When a discount rate of seven percent is used, the estimated total annual costs for the options considered by the Negotiated Rulemaking Committee range from $710 million to over $1 billion per year, compared to the baseline costs of $683.5 million and the costs associated with using the ASTM E1527 standard of over $697 million. The proposed regulation adds between $27 and $29 million per year, while the incremental costs association with the options considered by the Negotiated Rulemaking Committee range from $31 million to over $470 million per year. The incremental cost of using the ASTM E1527–2000 standard is close to $14 million.

SUMMARY OF ANNUAL COST ESTIMATES (IN MILLIONS), DISCOUNTED AT THREE PERCENT

	Base case	Proposed rule	Option 1	Option 2	Option 3	ASTM E1527
Total Annual Cost	$663.8	$690.1–$691.9	$844.0	$693.9	$1,122.0	$677.3
Incremental Total Annual Cost Relative to the Base Case	0	26.3–28	180.2	30.0	458.1	13.5

SUMMARY OF ANNUAL COST ESTIMATES (IN MILLIONS), DISCOUNTED AT THREE PERCENT

	Base case	Proposed rule	Option 1	Option 2	Option 3	ASTM E1527
Total Annual Cost	$683.5	$710.5–$712.3	$868.9	$714.4	$1,155.0	$697.3
Incremental Total Annual Cost Relative to the Base Case	0	27–28.8	185.4	30.8	471.5	13.8

As shown in the table above, the estimated total annual cost of today's proposed rule, calculated using a discount rate of seven percent, would be between $710.5 and $712.3 million and the estimated total annual incremental cost would be between $27 and $29 million. Thus, the proposed rule will have an incremental annual effect on the economy of less than $100 million per year.

B. Paperwork Reduction Act

The information collection requirements contained in this proposed rule have been submitted for approval to the Office of Management and Budget under the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.* The Information Collection Request (ICR) document prepared by EPA has been assigned EPA ICR Number 2144.01.

Under the PRA, EPA is required to estimate the notification, reporting and recordkeeping costs and burdens associated with the requirements specified in the proposed rule. This proposed rule, if it is promulgated, will require persons wanting to claim one of the liability protections under CERCLA to conduct some activities that go beyond current customary and usual business practices (*i.e.*, beyond ASTM E1527–2000) and therefore will impose an information collection burden under the provisions of the Paperwork Reduction Act. The information collection activities are associated with the activities mandated in Section 101(35)(B) of CERCLA for those persons wanting to claim protection from CERCLA liability. None of the information collection burdens associated with the provisions of today's rule include requirements to submit the collected information to EPA or any other government agency. Information collected by persons affected by today's proposed rule may be useful to such persons if their liability under CERCLA for the release or threatened release of a hazardous substance is challenged in a court.

The activities associated with today's proposed rule that go beyond current customary and usual business practices include interviews with neighboring property owners and/or occupants in those cases where the subject property is abandoned, documentation of all environmental cleanup liens in the Phase I Environmental Site Assessment report, discussion of the relationship of purchase price to value of the property in the report, and consideration and discussion of whether additional environmental investigation is warranted. Paperwork burdens are estimated to be 487,676 hours annually, with a total cost of $26,546,749 annually. The estimated average burden hours per response is estimated to be approximately one hour (or 25 hours per response, assuming a transition from a transaction screen). The estimated average cost burden per response is estimated to be either $56 or $1,456, depending on whether, under baseline conditions, an ASTM E1527–2000 process or a transaction screen (ASTM E1528) would have been used.

Under the Paperwork Reduction Act ''burden'' means the total time, effort, or financial resources expended by persons to generate, maintain, retain, or disclose or provide information to or for a Federal agency. This includes the time needed to review instructions; develop, acquire, install, and utilize technology and systems for the purposes of collecting, validating, and verifying information, processing and maintaining information, and disclosing and providing information; adjust the existing ways to comply with any previously applicable instructions and requirements; train personnel to be able to respond to a collection of information; search data sources; complete and review the collection of information; and transmit or otherwise disclose the information.

An agency may not conduct or sponsor, and a person is not required to respond to a collection of information unless it displays a currently valid OMB control number. The OMB control numbers for EPA's regulations in 40 CFR are listed in 40 CFR part 9.

To comment on the Agency's need for this information, the accuracy of the provided burden estimates, and suggested methods for minimizing respondent burden, EPA has established a public docket for this proposed rule, which includes this ICR, under Docket ID Number SFUND–2004–0001. Submit any comments related to the ICR for this proposed rule to EPA and OMB. See **ADDRESSES** section at the beginning of this document for where to submit comments to EPA. Send comments to OMB at the Office of Information and Regulatory Affairs, Office of Management and Budget, 725 17th Street, NW., Washington, DC 20503, Attention: Desk Officer for EPA.

Since OMB is required to make a decision concerning the ICR between 30 and 60 days after August 26, 2004, a comment to OMB is best assured of having its full effect if OMB receives it by September 27, 2004. The final rule will respond to any OMB or public comments on the information collection requirements contained in this proposed rule.

C. Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA), as amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), 5 U.S.C. 601 *et. seq.,* generally requires an agency to prepare a regulatory flexibility analysis of any rule subject to notice and comment rulemaking requirements under the Administrative Procedure Act or any other statute, unless the agency certifies that the rule will not have a significant

economic impact on a substantial number of small entities. Small entities include small businesses, small organizations, and small governmental jurisdictions.

For the purposes of assessing the impacts of today's rule on small entities, small entity is defined as: (1) A small business that is defined by the Small Business Administration by category of business using the North American Industrial Classification System (NAICS) and codified at 13 CFR 121.201; (2) a small governmental jurisdiction that is a government of a city, county, town, school district or special district with a population of less than 50,000; and (3) a small organization that is any not-for-profit enterprise which is independently owned and operated and is not dominant in its field.

Since all non-residential property transactions could be affected by today's proposed rule, if it is promulgated, large numbers of small entities could be affected to some degree. However, we estimate that the effects, on the whole, will not be significant for small entities. We estimate that, for the majority of small entities, the average incremental cost of today's proposed rule relative to conducting an ASTM E1527–2000 will be between $41 and $47. When we annualize the incremental cost of $47 per property transaction over ten years at a seven percent discount rate, we estimate that the average annual cost increase per establishment per property transaction will be $7. Thus, the cost impact to small entities is estimated to not be significant. A more detailed summary of our analysis of the potential impacts of today's proposed rule to small entities is included in ''Economic Impacts Analysis of the Proposed All Appropriate Inquiries Regulation.'' This document is included in the docket for today's proposed rule.

After considering the economic impacts of today's proposed rule on small entities, I certify that this action will not have a significant economic impact on a substantial number of small entities. We estimate that, on average, 266,000 small entities may purchase commercial real estate in any given year and therefore could potentially be impacted by today's proposed rule. Though large numbers of small entities could be affected to some degree, we estimated that the effects, on the whole, would not be significant for small entities. We estimate that, for the majority of small entities, the average incremental cost of today's proposed rule relative to conducting an ASTM E1527–2000 will be between $41 and $47. For the small percentage of cases for which a transaction screen would have been preferred to the ASTM E1527–2000 in the baseline, but which now will require an assessment in compliance with the proposed rule, the average incremental cost of conducting an environmental site assessment will be between $1,448 and $1,454. When we annualize the incremental cost per property transaction over ten years at a seven percent discount rate, we estimate that for the majority of small entities the average annual cost increase per establishment per property transaction will be approximately $7. For the small percentage of entities transitioning from transaction screens to the all appropriate inquiries requirements of the proposed rule, the average annual cost increase per establishment per property transaction will be $207.[4]

Although this proposed rule will not have a significant economic impact on a substantial number of small entities, EPA nonetheless considered impacts to small entities in the development of this rule. As described in Section II.F. of this preamble, we developed this proposed rule using a negotiated rulemaking committee. The interests of small entities, including small businesses and small communities, were represented on the Negotiated Rulemaking Committee for All Appropriate Inquiries. Committee members representing small entities, including representatives from small environmental services firms and representatives from organizations representing small and rural communities, participated in each meeting of the Committee. Today's proposed rule includes provisions that are the direct result of input from these representatives to the Committee.

EPA continues to be interested in the potential impacts of the proposed rule on small entities. EPA welcomes comments on issues related to such impacts. In addition, EPA requests comments on the methodology employed to identify impacted small entities and estimate the potential impacts on small entities.

D. Unfunded Mandates Reform Act

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA), Public Law 104–4, establishes requirements for federal agencies to assess the effects of their regulatory actions on State, local, and tribal governments and the private sector. Under section 202 of the UMRA, EPA must prepare a written statement, including a cost-benefit analysis, for proposed and final rules with ''Federal mandates'' that may result in expenditures to State, local, and tribal governments, in the aggregate, or to the private sector, of $100 million or more in any one year. Before promulgating an EPA rule for which a written statement is needed, section 205 of the UMRA generally requires EPA to identify and consider a reasonable number of regulatory alternatives and adopt the least costly, most cost-effective, or least burdensome alternative that achieves the objectives of the rule. The provisions of section 205 do not apply when they are inconsistent with applicable law. Moreover, section 205 allows EPA to adopt an alternative other than the least costly, most cost-effective or least burdensome alternative if the Administrator publishes with the final rule an explanation of why that alternative was not adopted.

Before EPA establishes any regulatory requirements that may significantly or uniquely affect small governments, including tribal governments, it must have developed under section 203 of the UMRA, a small government agency plan. The plan must provide for notifying potentially affected small governments, enabling officials to have meaningful and timely input in the development of regulatory proposals with significant federal intergovernmental mandates, and informing, educating, and advising small governments on compliance with the regulatory requirements.

Today's proposed rule contains no federal mandates (under the regulatory provisions of Title II of the UMRA) for state, local, or tribal governments or the private sector. The proposed rule imposes no enforceable duty on any state, local, or tribal governments. EPA also determined that this proposed rule contains no regulatory requirements that might significantly or uniquely affect small governments. In addition, as discussed above, the private sector is not expected to incur costs of $100 million or more as a result of today's proposed rule. Therefore, today's proposed rule is not subject to the requirements of Sections 202 and 205 of UMRA.

E. Executive Order 13132: Federalism

Executive Order 13132, entitled ''Federalism'' (64 FR 43255, August 10, 1999), requires EPA to develop an

[4] For a very small percentage of entities transitioning from transaction screens to the all appropriate inquiries requirements, the maximum increase per establishment per property transaction is estimated to be approximately $2,830. When we annualize this incremental cost per property transaction over ten years at a seven percent discount rate, we estimate that the maximum annual cost increase per establishment per property transaction will be $400. We estimate that approximately one fifth of one percent of the properties transitioning from a transaction screen to a Phase I ESA will have an impact of this magnitude each year.

accountable process to ensure ''meaningful and timely input by State and local officials in the development of regulatory policies that have federalism implications.'' ''Policies that have federalism implications'' is defined in the Executive Order to include regulations that have ''substantial direct effects on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government.''

This proposal does not have federalism implications. It will not have substantial direct effects on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132. No state and local government bodies will incur compliance costs as a result of today's rulemaking. Therefore, Executive Order 13132 does not apply to this proposed rule.

Although section 6 of Executive Order 13132 does not apply to this rule, EPA did ensure that meaningful and timely input was obtained from state and local government officials when developing the proposed rule. Representatives from two different state agencies participated on the Negotiated Rulemaking Committee. In addition, representatives from three different organizations representing local government officials participated on the Committee. State and local government representatives participated in the Committee negotiations at each meeting of the Committee. Today's proposed rule includes provisions that are the direct result of input from the state and local government representatives to the Committee negotiations.

In the spirit of Executive Order 13132, and consistent with EPA policy to promote communications between EPA and state and local governments, EPA specifically solicits comment on this proposed rule from state and local officials.

F. Executive Order 13175: Consultation and Coordination With Indian Tribal Governments

Executive Order 13175, entitled ''Consultation and Coordination with Indian Tribal Governments'' (65 FR 67249, November 9, 2000), requires EPA to develop an accountable process to ensure ''meaningful and timely input by tribal officials in the development of regulatory policies that have tribal implications.'' This proposed rule does not have tribal implications, as specified in Executive Order 13175. Today's proposed rule does not significantly or uniquely affect the communities of Indian tribal governments, nor would it impose direct compliance costs on them. Thus, Executive Order 13175 does not apply to this rule.

Although Executive Order 13175 does not apply to this proposed rule, EPA did ensure that meaningful and timely input was obtained from tribal officials when developing the proposed rule. Representatives from two different tribal communities participated on the Negotiated Rulemaking Committee. A tribal government representative participated in the Committee negotiations at each meeting of the Committee. Today's proposed rule includes provisions that are the direct result of input from the tribal representatives to the Committee negotiations.

EPA specifically solicits additional comment on this proposed rule from tribal officials.

G. Executive Order 13045: Protection of Children From Environmental Risks and Safety Risks

Executive Order 13045, entitled ''Protection of Children from Environmental Health Risks and Safety Risks (62 FR 19885, April 23, 1997) applies to any rule that: (1) Is determined to be ''economically significant'' as defined under Executive Order 12866, and (2) concerns an environmental health or safety risk that EPA has reason to believe may have a disproportionate effect on children. If the regulatory action meets both criteria, the Agency must evaluate the environmental health or safety effects of the planned rule on children; and explain why the planned regulation is preferable to other potentially effective and reasonably feasible alternatives considered by the Agency.

This proposal is not subject to the Executive Order because it is not economically significant as defined in Executive Order 12866.

H. Executive Order 13211: Actions that Significantly Affect Energy Supply, Distribution or Use

This proposed rule is not a ''significant energy action'' as defined in Executive Order 13211, ''Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use'' (66 FR 28355, May 22, 2001) because it is not likely to have a significantly adverse effect on the supply, distribution, or use of energy. Further, we have concluded that this rule is not likely to have any adverse energy effects.

I. National Technology Transfer and Advancement Act

Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (''NTTAA''), Public Law 104–113, section 12(d) (15 U.S.C. 272 note) directs EPA to use voluntary consensus standards in its regulatory activities, unless to do so would be inconsistent with applicable law or otherwise impractical. Voluntary consensus standards are technical standards (*e.g.*, materials specifications, test methods, sampling procedures, and business practices) that are developed or adopted by voluntary consensus standards bodies. The NTTAA directs EPA to provide Congress, through OMB, explanations when the Agency decides not to use available and applicable voluntary consensus standards. Today's proposed rule involves technical standards. Therefore, the requirements of section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272) apply.

EPA proposes to use the all appropriate inquiries standard developed with the assistance of a regulatory negotiation committee comprised of various affected stakeholder groups. EPA considered using the existing standard developed by ASTM as the federal standard for all appropriate inquiries. This standard is known as the ASTM E1527–2000 standard (''Standard Practice for Environmental Site Assessment: Phase I Environmental Site Assessment Process''). EPA estimates that the adoption of the ASTM standard would be less costly than the Agency's preferred option (the option developed by the Negotiated Rulemaking Committee) or any of the other options considered by the Negotiated Rulemaking Committee and presented in the Economic Impact Analysis. The existing ASTM E1527–2000 standard equates to the base case in the economic impact analysis. The adoption of this alternative would reduce the annual paperwork burden associated with the proposed rule by approximately 236,000 hours. However, for reasons provided below, EPA has determined that the ASTM E1527–2000 standard is inconsistent with applicable law.

In CERCLA Section 101(35)(B), Congress included ten specific criteria to be used in promulgating the all appropriate inquiries rule. The ASTM standards do not address all of the required criteria. For example, the ASTM standards do not provide for interviews of past owners, operators, and occupants of a facility. The statute, however, states that the promulgated

standard ''shall include * * * interviews with past and present owners, operators, and occupants of the facility for the purpose of gathering information regarding the potential for contamination at the facility.'' CERCLA Section 101(35)(B)(iii)(II).

In addition, ASTM's existing standard does not meet other statutory requirements. CERCLA 101(35)(B)(iii)(III) mandates that EPA shall include in the federal regulations setting standards for all appropriate inquiries: ''Reviews of historical sources, such as chain of title documents, aerial photographs, building department records, and land use records, to determine the previous uses and occupancies of the real property since the property was first developed.'' ASTM E1527–2000 requires identification of all obvious uses of the property from the present, back to the property's obvious first developed use or back to 1940, whichever is earlier. Congress did not qualify the review to obvious uses, and did not give an alternate date regarding the review.

Further, CERCLA 101(35)(B)(iii)(VI) states that: ''Visual inspections of the facility and adjoining properties'' shall be included in the inquiry. ASTM E1527–2000 does not mandate visual inspections of adjoining properties. ASTM's standard requires noting any observed past uses, but does not require the conduct of an actual visual inspection of adjoining properties. This contrasts with the mandatory language Congress required with respect to the intent to conduct visual inspection of adjoining properties.

CERCLA 101(35)(B)(iii)(VIII) also states that the standards for all appropriate inquiries shall include: ''The relationship of the purchase price to the value of the property, if the property was not contaminated.'' In its E1527–2000 standard, ASTM limits this requirement to actual knowledge by the defendant of a significantly lower price for a property when compared with comparable properties. The statute's criteria does not limit this to actual knowledge.

Finally, CERCLA 101(35)(B)(iii)(IV) states that the standards for all appropriate inquiries shall include: ''Searches for recorded environmental cleanup liens against the facility that are filed under Federal, State, or local law.'' ASTM's E1527–2000 standard describes a much more limited scope for this search than the statute requires. We are aware that in some instances, liens may be filed in places other than recorded land title records and therefore a more comprehensive standard is necessary to match the scope intended by the statute.

As a result, use of the ASTM standards would be inconsistent with applicable law. We welcome comments on this aspect of the proposed rulemaking. Specifically, we invite the public to comment on our determination that the alternative of adopting the ASTM E1527–2000 standard as the federal standards for conducting all appropriate inquiries would be inconsistent with applicable law. In addition, we invite the public to identify other potentially applicable voluntary consensus standards for conducting all appropriate inquiries and to explain why EPA should use such standards in promulgating this regulation. Prior to promulgating a final regulation setting federal standards and practices for all appropriate inquiries, the Agency will cite or reference applicable and compliant voluntary consensus standards in the final regulation to facilitate implementation of the final regulations and avoid disruption to parties using voluntary consensus standards that are found to be fully compliant with the federal regulations.

J. Executive Order 12898: Federal Actions To Address Environmental Justice in Minority Populations and Low-Income Populations

Executive Order 12898, ''Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations'' (February 11, 1994), is designed to address the environmental and human health conditions of minority and low-income populations. EPA is committed to addressing environmental justice concerns and has assumed a leadership role in environmental justice initiatives to enhance environmental quality for all citizens of the United States. The Agency's goals are to ensure that no segment of the population, regardless of race, color, national origin, income, or net worth bears disproportionately high and adverse human health and environmental impacts as a result of EPA's policies, programs, and activities. Our goal is to ensure that all citizens live in clean and sustainable communities. In response to Executive Order 12898, and to concerns voiced by many groups outside the Agency, EPA's Office of Solid Waste and Emergency Response (OSWER) formed an Environmental Justice Task Force to analyze the array of environmental justice issues specific to waste programs and to develop an overall strategy to identify and address these issues (OSWER Directive No. 9200.3–17). EPA's brownfields program has a particular emphasis on addressing concerns specific to environmental justices communities. Many of the communities and neighborhoods that are most significantly impacted by brownfields are environmental justice communities. EPA's brownfields program targets such communities for assessment, cleanup, and revitalization. The brownfields program has a long history of working with environmental justice communities and advocates through our technical assistance and grant programs. In addition to the monies awarded to such communities in the form of assessment and cleanup grants, the brownfields program also works with environmental justice communities through our job training grants program. The job training grants provide money to government entities to facilitate the training of persons living in or near brownfields communities to attain skills for conducting site assessments and cleanups.

Given that environmental justice communities are significantly impacted by brownfields, and the federal standards for all appropriate inquiries may play a primary role in encouraging the assessment and cleanup of brownfields sites, EPA made it a priority to obtain input from representatives of environmental justice interest groups during the development of the proposed rulemaking. The Negotiated Rulemaking Committee tasked with developing the all appropriate inquiries proposed rule included three representatives from environmental justice advocacy groups. Each representative played a significant role in the negotiations and in the development of today's proposed rule.

List of Subjects in 40 CFR Part 312

Environmental protection, Administrative practice and procedure, Hazardous substances, Intergovernmental relations, Reporting and recordkeeping requirements.

Dated: August 18, 2004.

Michael O. Leavitt,

Administrator.

For reasons set out in the preamble, title 40, chapter I of the Code of Federal Regulations is proposed to be amended by revising part 312 as follows:

PART 312—INNOCENT LANDOWNERS, STANDARDS FOR CONDUCTING ALL APPROPRIATE INQUIRIES

Subpart A—Introduction

Subpart B—Definitions and References

Authority: Section 101(35)(B) of CERCLA, as amended, 42 U.S.C. 9601(35)(B).

Subpart A—Introduction

§ 312.1 Purpose, applicability, scope and disclosure obligations.

(a) *Purpose.* The purpose of this section is to provide standards and procedures for ''all appropriate inquiries'' for the purposes of CERCLA Section 101(35)(B).

(b) *Applicability.* The requirements of this part are applicable to:

(1) Persons seeking to qualify for:

(i) The innocent landowner defense pursuant to CERCLA Sections 101(35) and 107(b)(3);

(ii) The bona fide prospective purchaser liability protection pursuant to CERCLA Sections 101(40) and 107(r);

(iii) The contiguous property owner liability protection pursuant to CERCLA Section 107(q); and

(2) Persons conducting site characterization and assessments with the use of a grant awarded under CERCLA Section 104(k)(2)(B).

(c) *Scope.* (1) Persons seeking to qualify for one of the liability protections under paragraph (b)(1) of this section must conduct investigations as required in this part, including an inquiry by an environmental professional, as required under § 312.21, and the additional inquiries defined in § 312.22, to identify conditions indicative of releases or threatened releases, as defined in CERCLA Section 101(22), of hazardous substances, as defined in CERCLA Section 101(14).

(2) Persons identified in paragraph (b)(2) of this section must conduct investigations required in this part, including an inquiry by an environmental professional, as required under § 312.21, and the additional inquiries defined in § 312.22, to identify conditions indicative of releases and threatened releases of hazardous substances, as defined in CERCLA Section 101(22), and as applicable per the terms and conditions of the grant or cooperative agreement, releases and threatened releases of:

(i) Pollutants and contaminants, as defined in CERCLA Section 101(33);

(ii) Petroleum or petroleum products excluded from the definition of ''hazardous substance'' as defined in CERCLA Section 101(14); and

(iii) Controlled substances, as defined in 21 U.S.C. 802.

(d) *Disclosure obligations.* None of the requirements of this part limits or expands disclosure obligations under any federal, state, tribal, or local law, including the requirements under CERCLA Sections 101(40)(C) and 107(q)(1)(A)(vii) requiring persons, including environmental professionals, to provide all legally required notices with respect to the discovery of releases of hazardous substances. It is the obligation of each person, including environmental professionals, conducting the inquiry to determine his or her respective disclosure obligations under Federal, State, tribal, and local law and to comply with such disclosure requirements.

Subpart B—Definitions and References

§ 312.10 Definitions.

(a) Terms used in this part and not defined below, but defined in either CERCLA or 40 CFR part 300 (the National Oil and Hazardous Substances Pollution Contingency Plan) shall have the definitions provided in CERCLA or 40 CFR part 300.

(b) When used in this part, the following terms have the meanings provided as follows:

Abandoned property means: property that can be presumed to be deserted, or an intent to relinquish possession or control can be inferred from the general disrepair or lack of activity thereon such that a reasonable person could believe that there was an intent on the part of the current owner to surrender rights to the property.

Adjoining properties means: any real property or properties the border of which is (are) shared in part or in whole with that of the subject property, or that would be shared in part or in whole with that of the subject property but for a street, road, or other public thoroughfare separating the properties.

Data gap means: a lack of or inability to obtain information required by the standards and practices listed in subpart C of this part despite good faith efforts by the environmental professional or persons identified under § 312.1(b), as appropriate, to gather such information pursuant to §§ 312.20(d)(1) and 312.20(d)(2).

Environmental Professional means:

(1) A person who possesses sufficient specific education, training, and experience necessary to exercise professional judgment to develop opinions and conclusions regarding the presence of releases or threatened releases (per § 312.1(c)) to the surface or subsurface of a property, sufficient to meet the objectives and performance factors in § 312.20(d) and (e).

(2) Such a person must:

(i) Hold a current Professional Engineer's or Professional Geologist's license or registration from a state, tribe, or U.S. territory (or the Commonwealth of Puerto Rico) and have the equivalent of three (3) years of full-time relevant experience; or

(ii) Be licensed or certified by the federal government, a state, tribe, or U.S. territory (or the Commonwealth of Puerto Rico) to perform environmental inquiries as defined in § 312.21 and have the equivalent of three (3) years of full-time relevant experience; or

(iii) Have a Baccalaureate or higher degree from an accredited institution of higher education in a relevant discipline of engineering, environmental science, or earth science and the equivalent of five (5) years of full-time relevant experience; or

(iv) As of the date of the promulgation of this rule, have a Baccalaureate or higher degree from an accredited institution of higher education and the equivalent of ten (10) years of full-time relevant experience.

(3) An environmental professional should remain current in his or her field through participation in continuing education or other activities and should be able to demonstrate such efforts.

(4) The definition of environmental professional provided above does not preempt state professional licensing or registration requirements such as those for a professional geologist, engineer, or site remediation professional. Before commencing work, a person should determine the applicability of state professional licensing or registration laws to the activities to be undertaken as part of the inquiry identified in § 312.21(b).

(5) A person who does not qualify as an environmental professional under the foregoing definition may assist in the conduct of all appropriate inquiries

in accordance with this part if such person is under the supervision or responsible charge of a person meeting the definition of an environmental professional provided above when conducting such activities.

Good faith means: the absence of any intention to seek an unfair advantage or to defraud another party; an honest and sincere intention to fulfill one's obligations in the conduct or transaction concerned.

Institutional controls means: Non-engineered instruments, such as administrative and/or legal controls, that help to minimize the potential for human exposure to contamination and/or protect the integrity of a remedy.

Relevant experience, as used in the definition of environmental professional in this section, means: participation in the performance of environmental site assessments that may include environmental analyses, investigations, and remediation which involve the understanding of surface and subsurface environmental conditions and the processes used to evaluate these conditions and for which professional judgment was used to develop opinions regarding conditions indicative of releases or threatened releases (per § 312.1(c)) to the subject property.

§ 312.11 References.

(a) When used in part 312 of this chapter, the following publications are incorporated by reference:

(1)–(2) [Reserved]

(b) [Reserved]

Subpart C—Standards and Practices

§ 312.20 All appropriate inquiries.

(a) ''All appropriate inquiries'' pursuant to CERCLA section 101(35)(B) must include:

(1) An inquiry by an environmental professional (as defined in § 312.10), as provided in § 312.21;

(2) The collection of information pursuant to § 312.22 by persons identified under § 312.1(b); and

(3) Searches for recorded environmental cleanup liens, as required in § 312.25.

(b) All appropriate inquiries may include the results of and information contained in an inquiry previously conducted by, or on the behalf of, persons identified under § 312.1(b) and who are responsible for the inquiries for the subject property, provided:

(1) Such information was collected during the conduct of all appropriate inquiries in compliance with the requirements of this part (40 CFR Part 312) and with CERCLA Sections 101(35)(B), 101(40)(B) and 107(q)(A)(viii);

(2) Such information was collected or updated within one year prior to the date of acquisition of the subject property;

(3) Not withstanding paragraph (b)(2) of this section, the following components of the inquiries were conducted or updated within a 180 days of and prior to the date of purchase of the subject property:

(i) Interviews with past and present owners, operators, and occupants (see § 312.23);

(ii) Searches for recorded environmental cleanup liens (see § 312.25);

(iii) Reviews of federal, tribal, state, and local government records (see § 312.26);

(iv) Visual inspections of the facility and of adjoining properties (see § 312.27); and

(v) The declaration by the environmental professional (see § 312.21(d)).

(4) Previously collected information is updated to include relevant changes in the conditions of the property and specialized knowledge, as outlined in § 312.28, of the persons conducting the all appropriate inquiries for the subject property, including persons identified in § 312.1(b) and the environmental professional, defined in § 312.10.

(c) All appropriate inquiries can include the results of report(s) specified in § 312.21(c), that have been prepared by or for other persons, provided that:

(1) The report(s) meets the objectives and performance factors of this regulation, as specified in paragraphs (d) and (e) of this section; and

(2) The person specified in § 312.1(b) and seeking to use the previously collected information reviews the information and conducts the additional inquiries pursuant to §§ 312.28, 312.29 and 312.30 and the all appropriate inquiries are updated per paragraph (b)(3) of this section, as necessary.

(d) *Objectives.* The standards and practices set forth in this part for All Appropriate Inquiries are intended to result in the identification of conditions indicative of releases and threatened releases of hazardous substances on, at, in, or to the subject property.

(1) In performing the all appropriate inquiries, as defined in this section and provided in the standards and practices set forth this subpart, the persons identified under § 312.1(b)(1) and the environmental professional, as defined in § 312.10, must seek to identify through the conduct of the standards and practices set forth in this subpart, the following types of information about the subject property:

(i) Current and past property uses and occupancies;

(ii) Current and past uses of hazardous substances;

(iii) Waste management and disposal activities that could have caused releases or threatened releases of hazardous substances;

(iv) Current and past corrective actions and response activities undertaken to address past and on-going releases of hazardous substances;

(v) Engineering controls;

(vi) Institutional controls; and

(vii) Properties adjoining or located nearby the subject property that have environmental conditions that could have resulted in conditions indicative of releases or threatened releases of hazardous substances to the subject property.

(2) In the case of persons identified in § 312.1(b)(2), the standards and practices for All Appropriate Inquiries set forth in this part are intended to result in the identification of conditions indicative of releases and threatened releases of hazardous substances, pollutants, contaminants, petroleum and petroleum products, and controlled substances (as defined in 21 U.S.C. 802) on, at, in, or to the subject property. In performing the all appropriate inquiries, as defined in this section and provided in the standards and practices set forth in this subpart, the persons identified under § 312.1(b) and the environmental professional, as defined in § 312.10, must seek to identify through the conduct of the standards and practices set forth in this subpart, the following types of information about the subject property:

(i) Current and past property uses and occupancies;

(ii) Current and past uses of hazardous substances, pollutants, contaminants, petroleum and petroleum products, and controlled substances (as defined in 21 U.S.C. 802);

(iii) Waste management and disposal activities;

(iv) Current and past corrective actions and response activities undertaken to address past and on-going releases of hazardous substances, pollutants, contaminants, petroleum and petroleum products, and controlled substances (as defined in 21 U.S.C. 802);

(v) Engineering controls;

(vi) Institutional controls; and

(vii) Properties adjoining or located nearby the subject property that have environmental conditions that could have resulted in conditions indicative of releases or threatened releases of hazardous substances, pollutants, contaminants, petroleum and petroleum products, and controlled substances (as

defined in 21 U.S.C. 802) to the subject property.

(e) Performance factors. In performing each of the standards and practices set forth in this subpart and to meet the objectives stated in paragraph (d) of this section, the persons identified under § 312.1(b) or the environmental professional as defined in § 312.10 (as appropriate to the particular standard and practice) must seek to:

(1) Gather the information that is required for each standard and practice listed in this subpart that is publicly available, obtainable from its source within reasonable time and cost constraints, and which can practicably be reviewed; and

(2) Review and evaluate the thoroughness and reliability of the information gathered in complying with each standard and practice listed in this subpart taking into account information gathered in the course of complying with the other standards and practices of this subpart.

(f) To the extent there are data gaps (as defined in § 312.10) in the information developed as part of the inquiries per paragraph (e) of this section that affect the ability of persons (including the environmental professional) conducting the all appropriate inquiries to identify conditions indicative of releases or threatened releases (such as in the historical record of property uses) in each area of inquiry under each standard and practice such persons should identify such data gaps, identify the sources of information consulted to address such data gaps, and 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 [and in the case of persons identified in § 312.1(b)(2), hazardous substances, pollutants, contaminants, petroleum and petroleum products, and controlled substances (as defined in 21 U.S.C. 802)] on, at, in, or to the subject property. Sampling and analysis may be conducted to develop information to address data gaps.

(g) Releases and threatened releases identified as part of the all appropriate inquiries should be noted in the report of the inquiries. These standards and practices however are not intended to require the identification of quantities or amounts, either individually or in the aggregate, of hazardous substances pollutants, contaminants, petroleum and petroleum products, and controlled substances (as defined in 21 U.S.C. 802) that because of said quantities and amounts, generally would not pose a threat to human health or the environment.

§ 312.21 Results of inquiry by an environmental professional.

(a) Persons identified under § 312.1(b) must undertake an inquiry, as defined in paragraph (b) of this section, by an environmental professional, or conducted under the supervision or responsible charge of, an environmental professional, as defined in § 312.10. Such inquiry is hereafter referred to as ''the inquiry of the environmental professional.''

(b) The inquiry of the environmental professional must include the requirements set forth in §§ 312.23 (interviews with past and present owners * * *), 312.24 (reviews of historical sources * * *), 312.26 (reviews of government records), 312.27 (visual inspections), 312.30 (commonly known or reasonably attainable information), and 312.31 (degree of obviousness of the presence * * * and the ability to detect the contamination * * *). In addition, the inquiry should take into account information provided to the environmental professional as a result of the additional inquiries conducted by persons identified in § 312.1(b) and in accordance with the requirements of § 312.22.

(c) The results of the inquiry by an environmental professional must be documented in a written report that, at a minimum, includes the following:

(1) An opinion as to whether the inquiry has identified conditions indicative of releases or threatened releases of hazardous substances [and in the case of inquiries conducted for persons identified in § 312.1(b)(2) conditions indicative of releases and threatened releases of pollutants, contaminants, petroleum and petroleum products, and controlled substances (as defined in 21 U.S.C. 802)] on, at, in, or to the subject property;

(2) An identification of data gaps (as defined in § 312.10) in the information developed as part of the inquiry that affect the ability of the environmental professional to identify conditions indicative of releases or threatened releases of hazardous substances [and in the case of inquiries conducted for persons identified in § 312.1(b)(2) conditions indicative of releases and threatened releases of pollutants, contaminants, petroleum and petroleum products, and controlled substances (as defined in 21 U.S.C. 802)] on, at, in, or to the subject property and comments regarding the significance of such data gaps on the environmental professional's ability to provide an opinion as to whether the inquiry has identified conditions indicative of releases or threatened releases on, at, in, or to the subject property. 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 per paragraph (c)(1) of this section; and

(3) The qualifications of the environmental professional(s).

(d) The environmental professional must place the following statement in the written document identified in paragraph (c) of this section and sign the document:

> [I, We] declare that, to the best of [my, our] professional knowledge and belief, [I, we] meet the definition of Environmental Professional as defined in § 312.10 of this part.
>
> [I, We] have the specific qualifications based on education, training, and experience to assess a property of the nature, history, and setting of the subject property. [I, We] have developed and performed the all appropriate inquiries in conformance with the standards and practices set forth in 40 CFR part 312.

§ 312.22 Additional inquiries.

(a) Persons identified under § 312.1(b) must provide the following information to the environmental professional responsible for conducting the activities listed in § 312.21:

(1) As required by § 312.25 and if not otherwise obtained by the environmental professional, environmental cleanup liens against the subject property that are filed or recorded under Federal, tribal, State, or local law;

(2) As required by § 312.28, specialized knowledge or experience of the person identified in § 312.1(b);

(3) As required by § 312.29, the relationship of the purchase price to the fair market value of the subject property, if the property was not contaminated; and

(4) As required by § 312.30, commonly known or reasonably ascertainable information about the subject property.

(b) [Reserved].

§ 312.23 Interviews with past and present owners, operators, and occupants.

(a) Interviews with past and present owners, operators, and occupants of the subject property must be conducted for the purposes of achieving the objectives and performance factors of § 312.20(d) and (e).

(b) The inquiry of the environmental professional must include interviewing the current owner and occupant of the

subject property. If the property has multiple occupants, the inquiry of the environmental professional shall include interviewing major occupants, as well as those occupants likely to use, store, treat, handle or dispose of hazardous substances [and in the case of inquiries conducted for persons identified in § 312.1(b)(2) pollutants, contaminants, petroleum and petroleum products, and controlled substances (as defined in 21 U.S.C. 802)], or those who have likely done so in the past.

(c) The inquiry of the environmental professional also should include, to the extent necessary to achieve the objectives and performance factors of § 312.20(d) and (e), interviewing one or more of the following persons:

(1) Current and past facility managers with relevant knowledge of uses and physical characteristics of the property;

(2) Past owners, occupants, or operators of the subject property; or

(3) Employees of current and past occupants of the subject property.

(d) In the case of inquiries conducted at ''abandoned properties,'' as defined in § 312.10, where there is evidence of potential unauthorized uses of the subject property or evidence of uncontrolled access to the subject property, the environmental professional's inquiry must include interviewing one or more (as necessary) owners or occupants of neighboring or nearby properties from which it appears possible to have observed uses of, or releases at, such abandoned properties for the purpose of gathering information necessary to achieve the objectives and performance factors of § 312.20(d) and (e).

§ 312.24 Reviews of historical sources of information.

(a) Historical documents and records must be reviewed for the purposes of achieving the objectives and performance factors of § 312.20(d) and (e). Historical documents and records may include, but are not limited to, aerial photographs, fire insurance maps, building department records, chain of title documents, and land use records.

(b) Historical documents and records reviewed must cover a period of time as far back in the history of the subject property as it can be shown that the property contained structures or from the time the property was first used for residential, agricultural, commercial, industrial, or governmental purposes. For the purpose of achieving the objectives and performance factors of § 312.20(d) and (e), the environmental professional may exercise professional judgment in context of the facts available at the time of the inquiry as to how far back in time it is necessary to search historical records.

§ 312.25 Searches for recorded environmental cleanup liens.

(a) All appropriate inquiries must include a search for the existence of environmental cleanup liens against the subject property that are filed or recorded under federal, tribal, state, or local law.

(b) All information collected regarding the existence of such environmental cleanup liens associated with the subject property must be provided to the environmental professional.

§ 312.26 Reviews of Federal, State, tribal and local government records.

(a) Federal, tribal, State, and local government records or data bases of government records of the subject property and adjoining properties must be reviewed for the purposes of achieving the objectives and performance factors of § 312.20(d) and (e).

(b) With regard to the subject property, the review of federal, tribal, and state government records or data bases of such government records and local government records and data bases of such records should include:

(1) Records of reported releases or threatened releases, including site investigation reports for the subject property;

(2) Records of activities, conditions, or incidents likely to cause or contribute to releases or threatened releases as defined in § 312.1(c), including landfill and other disposal unit location records and permits, storage tank records and permits, hazardous waste handler and generator records and permits, federal, tribal and state government listings of sites identified as priority cleanup sites, and spill reporting records;

(3) CERCLIS records;

(4) Public health records;

(5) Emergency Response Notification System records;

(6) Registries or publicly available lists of engineering controls; and

(7) Registries or publicly available lists of institutional controls, including environmental land use restrictions, applicable to the subject property.

(c) With regard to nearby or adjoining properties, the review of federal, tribal, state, and local government records or databases of government records should include the identification of the following:

(1) Properties for which there are government records of reported releases or threatened releases. Such records or databases containing such records and the associated distances from the subject property for which such information should be searched include the following:

(i) Records of NPL sites or tribal- and state-equivalent sites (one mile);

(ii) RCRA facilities subject to corrective action (one mile);

(iii) Records of federally-registered, or state-permitted or registered, hazardous waste sites identified for investigation or remediation, such as sites enrolled in state and tribal voluntary cleanup programs and tribal- and state-listed brownfields sites (one-half mile);

(iv) Records of leaking underground storage tanks (one-half mile); and

(2) Properties that previously were identified or regulated by a government entity due to environmental concerns at the property. Such records or databases containing such records and the associated distances from the subject property for which such information should be searched include the following:

(i) Records of delisted NPL sites (one-half mile);

(ii) Registries or publicly available lists of engineering controls (one-half mile);

(iii) Registries or publicly available lists of institutional controls (one-half mile); and

(iv) Records of former CERCLIS sites with no further remedial action notices (one-half mile).

(3) Properties for which there are records of federally-permitted, tribal-permitted or registered, or state-permitted or registered waste management activities. Such records or databases that may contain such records include the following:

(i) Records of RCRA small quantity and large quantity generators (adjoining properties)

(ii) Records of federally-permitted, tribal-permitted, or state-permitted (or registered) landfills and solid waste management facilities (one-half mile); and

(iii) Records of registered storage tanks (adjoining property).

(4) A review of additional government records with regard to sites identified under paragraphs (c)(1) through (c)(3) of this section may be necessary in the judgment of the environmental professional for the purpose of achieving the objectives and performance factors of § 312.20(d) and (e).

(d) The search distance from the subject property boundary for reviewing government records or databases of government records listed in paragraph (c) of this section may be modified based upon the professional judgment of

the environmental professional. The rationale for such modifications must be documented by the environmental professional. The environmental professional may consider one or more of the following factors in determining an alternate appropriate search distance:

(1) The nature and extent of a release;

(2) Geologic, hydrogeologic, or topographic conditions of the subject property and surrounding environment;

(3) Land use or development densities;

(4) The property type;

(5) Existing or past uses of surrounding properties;

(6) Potential migration pathways (*e.g.*, groundwater flow direction, prevalent wind direction); or

(7) Other relevant factors.

§ 312.27 Visual inspections of the facility and of adjoining properties.

(a) For the purpose of achieving the objectives and performance factors of § 312.20(d) and (e), the inquiry of the environmental professional must include:

(1) A visual on-site inspection of the subject property and facilities and improvements on the subject property, including a visual inspection of the areas where hazardous substances may be or may have been used, stored, treated, handled, or disposed. Physical limitations to the visual inspection must be noted.

(2) A visual inspection of adjoining properties, from the subject property line, public rights-of-way, or other vantage point (*e.g.*, aerial photography), including a visual inspection of areas where hazardous substances may be or may have been stored, treated, handled or disposed. Physical limitations to the inspection of adjacent properties must be noted.

(b) Persons conducting site characterization and assessments using a grant awarded under CERCLA section 104(k)(2)(B) must include in the inquiries referenced in § 312.27(a) visual inspections of areas where hazardous substances, and may include, as applicable per the terms and conditions of the grant or cooperative agreement, pollutants and contaminants, petroleum and petroleum products, and controlled substances as defined in 21 U.S.C. 802 may be or may have been used, stored, treated, handled or disposed at the subject property and adjoining properties.

(c) Except as noted in this subsection, a visual on-site inspection of the subject property must be conducted. In the unusual circumstance where an on-site visual inspection of the subject property cannot be performed because of physical limitations, remote and inaccessible location, or other inability to obtain access to the property, provided good faith (as defined in § 312.10) efforts have been taken to obtain such access, an on-site inspection will not be required. (The mere refusal of a voluntary seller to provide access to the subject property does not constitute an unusual circumstance.) In such unusual circumstances, the inquiry of the environmental professional must include:

(1) Visually inspecting the subject property via another method (such as aerial imagery for large properties), or visually inspecting the subject property from the nearest accessible vantage point (such as the property line or public road for small properties);

(2) Documentation of efforts undertaken to obtain access and an explanation of why such efforts were unsuccessful; and

(3) Documentation of other sources of information regarding releases or threatened releases at the subject property that were consulted in accordance with § 312.20(e). Such documentation should include comments by the environmental professional on the significance of the failure to conduct a visual on-site inspection of the subject property with regard to the ability to identify conditions indicative of releases or threatened releases on, at, in, or to the subject property, if any.

§ 312.28 Specialized knowledge or experience on the part of the defendant.

(a) Persons to whom this part is applicable per § 312.1(b) must take into account, their specialized knowledge of the subject property, the area surrounding the subject property, the conditions of adjoining properties, and any other experience relevant to the inquiry, for the purpose of identifying conditions indicative of releases or threatened releases at the subject property, as defined in § 312.1(c).

(b) All appropriate inquiries, as outlined in § 312.20, are not complete unless the results of the inquiries take into account the relevant and applicable specialized knowledge and experience of the persons responsible for undertaking the inquiry (as described in § 312.1(b)).

§ 312.29 The relationship of the purchase price to the value of the property, if the property was not contaminated.

(a) Persons to whom this part is applicable per § 312.1(b) must consider whether the purchase price of the subject property reasonably reflects the fair market value of the property, if the property were not contaminated.

(b) Persons who conclude that the purchase price of the subject property does not reasonably reflect the fair market value of that property, if the property were not contaminated, should consider whether or not the differential in purchase price and fair market value is due to the presence of releases or threatened releases of hazardous substances.

(c) Persons conducting site characterization and assessments with the use of a grant awarded under CERCLA section 104(k)(2)(B) and who know that the purchase price of the subject property does not reasonably reflect the fair market value of that property, if the property were not contaminated, should consider whether or not the differential in purchase price and fair market value is due to the presence of releases or threatened releases of hazardous substances, pollutants, contaminants, petroleum and petroleum products, and/or controlled substances as defined in 21 U.S.C. 802.

§ 312.30 Commonly known or reasonably ascertainable information about the property.

(a) Throughout the inquiries, persons to whom this part is applicable per § 312.1(b) and environmental professionals conducting the inquiry must take into account commonly known or reasonably ascertainable information within the local community about the subject property and consider such information when seeking to identify conditions indicative of releases or threatened releases, as set forth in § 312.1(c), at the subject property.

(b) Commonly known information may include information obtained by the person to whom this part applies per § 312.1(b) or by the environmental professional about releases or threatened releases at the subject property that is incidental to the information obtained during the inquiry of the environmental professional.

(c) To the extent necessary to achieve the objectives and performance factors of § 312.20(d) and (e), the environmental professional should gather information from varied sources whose input either individually or taken together may provide commonly known or reasonably ascertainable information about the subject property; the environmental professional may refer to one or more of the following sources of information:

(1) Current owners or occupants of neighboring properties or properties adjacent to the subject property;

(2) Local and state government officials who may have knowledge of, or

information related to, the subject property;

(3) Others with knowledge of the subject property; and

(4) Other sources of information (*e.g.*, newspapers, websites, community organizations, local libraries and historical societies).

§ 312.31 The degree of obviousness of the presence or likely presence of contamination at the property, and the ability to detect the contamination by appropriate investigation.

(a) Persons to whom this part is applicable per § 312.1(b) and environmental professionals conducting an inquiry of a property on behalf of such persons must take into account the information collected under § 312.23 through 312.30 in considering the degree of obviousness of the presence of releases or threatened releases at the subject property.

(b) Persons to whom this part is applicable per § 312.1(b) and environmental professionals conducting an inquiry of a property on behalf of such persons must take into account the information collected under § 312.23 through 312.30 in considering the ability to detect contamination by appropriate investigation. The inquiry of the environmental professional should include an opinion regarding additional appropriate investigation, if any.

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ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 312

[SFUND–2004–0001; FRL–7806–8]

RIN 2050–AF04

Notice of Public Meeting To Discuss Standards and Practices for All Appropriate Inquiries

AGENCY: U.S. Environmental Protection Agency.

ACTION: Notice of public meeting.

SUMMARY: The U.S. Environmental Protection Agency (EPA) will hold a public meeting to discuss EPA's proposed rule that would set federal standards and practices for conducting all appropriate inquiries, as required under Sections 101(35)(B)(ii) and (iii) of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA). The proposed rule is published elsewhere in this issue of the **Ferderal Register** and will be available on the EPA Web site at *http://www.epa.gov/brownfields* before the date of the public meeting. The public meeting will be held on Wednesday, September 22, 2004 in St. Louis, Missouri at the times and location specified below.

The purpose of the public meeting is for EPA to listen to the views of stakeholders and the general public on the Agency's proposed standards and practices for all appropriate inquiries. During the public meeting, EPA officials will discuss the proposed rule, as well as accept public comment and input on the proposed rule.

DATES: The public meeting will be held on September 22, 2004 at America's Center in St. Louis, Missouri. The meeting will be held from 1 p.m. to 3 p.m. c.d.t.

ADDRESSES: The public meeting will be held in America's Ballrooms 221 and 222 of The America's Center, 701 Convention Plaza, St. Louis, Missouri, 63101.

FOR FURTHER INFORMATION CONTACT: For additional information, contact Patricia Overmeyer of EPA's Office of Brownfields Cleanup and Redevelopment at 202–566–2774 or *overmeyer.patricia@epa.gov.*

SUPPLEMENTARY INFORMATION: The meeting is open to the general public. Interested parties and the general public are invited to participate in the public meeting. Parties wishing to provide their views to EPA on the proposed rule, or to listen to the views of other parties, are encouraged to attend the public meeting. Any person may speak at the public meeting; however, we encourage those planning to give oral testimony to pre-register with EPA. Those planning to speak at the public meeting should notify Patricia Overmeyer, of EPA's Office of Brownfields Cleanup and Redevelopment, at 202–566–2774, U.S. Environmental Protection Agency (mc:5105T), 1200 Pennsylvania Avenue, NW., Washington, DC 20460, or via e-mail at *overmeyer.patricia@epa.gov* no later than September 17, 2004. If you cannot pre-register, you may sign up at the door until two hours before the start of the meeting in St. Louis on September 22, 2004. Oral testimony will be limited to 7 minutes per participant. Any member of the public may file a written statement in addition to, or in lieu of, making oral testimony. A verbatim transcript of the hearing and any written statements received by EPA at the public meeting will be made available at the OSWER Docket and on the EDOCKET Web site, at the addresses provided below. If you plan to attend the public hearing and need special assistance, such as sign language interpretation or other reasonable accommodations, contact Patricia Overmeyer, at the above email address or phone number.

Interested parties not able to attend the public meeting on September 22, 2004 may submit written comments to the Agency. All written comments must be submitted to EPA in compliance with the instructions that will be provided in the preamble to the proposed rule. This instructions are summarized below.

Parties wishing to comment on the proposed rule may submit written comments to EPA. Submit your written comments, identified by Docket ID No. SFUND–2004–0001, by one of the following methods:

1. *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the on-line instructions for submitting comments.

2. *Agency Web site: http://www.epa.gov/edocket.* EDOCKET, EPA's electronic public docket and comment system, is EPA's preferred method for receiving comments. Follow the on-line instructions for submitting comments.

3. *E-mail:* Comments may be sent by electronic mail to *superfund.docket@epa.gov,* /Attention Docket ID No. SFUND–2004–0001.

4. *Mail:* Send comments to the OSWER Docket, Environmental Protection Agency, Mailcode: 5305T, 1200 Pennsylvania Ave. NW., Washington, DC 20460, Attention Docket ID No. SFUND–2004–0001. In addition, please mail a copy of your comments on the information collection provisions to the Office of Information and Regulatory Affairs, Office of Management and Budget (OMB), Attn: Desk Officer for EPA, 725 17th St. NW., Washington, DC 20503.

5. *Hand Delivery:* Deliver your comments to the EPA Docket Center, EPA West Building, Room B102, 1301 Constitution Ave. NW., Washington, DC, Attention Docket ID No. SFUND–2004–0001. Such deliveries are only accepted during the Docket's normal hours of operation, and special arrangements should be made for deliveries of boxed information.

Instructions: Direct your comments to Docket ID No. SFUND–2004–0001. EPA's policy is that all comments received will be included in the public docket without change and may be made available online at *http://www.epa.gov/edocket*, including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute.