SECTION 4: Comments on the Economic Impact Analysis

Commenter Organization Name: Lourie Consultants
Comment Number: 0353
Excerpt Number: 3
Excerpt Text:
It's my opinion that cost for complying with the proposed AAI rule will not be significantly different from the cost of performing a thorough, well-conducted ESA according to current ASTM E 1527 guidelines.

Response:
EPA thanks the commenter for the stated position on the burden under the rule. EPA agrees that the cost of complying with the AAI rule will not be significantly different from the cost of complying with the ASTM E1527-2000.

Commenter Organization Name: Dismukes, James
Comment Number: 0416
Excerpt Number: 5
Excerpt Text:
The cost analysis does not state the average cost range that was used in estimating the economic impact but the document states that in addition to commercial data the EPA used the cost for Phase I's performed on Brownfield sites. These cost are extremely high compared to the commercial property transaction Phase I costs. In our areas of operations, Phase I's average costs are between $900 to $1600 for a standard ASTM Phase I.

Response:
EPA thanks the commenter for stating his position regarding the potential burden of the rule. In the Economic Impact Analysis (EIA) for the proposed rule, EPA developed a range of unit costs for performing a Phase I ESA under the ASTM E1527-2000, where the range was based on the distribution of properties by size and type. In the EIA developed for the proposed rule, Exhibit 7-3 presents the estimated level of effort (in hours) under the ASTM E1527-2000 by property type and size and Exhibit 8-1 presents the estimated unit costs under the ASTM E1527-2000 by property type and size. In developing the cost model, EPA estimated total incremental costs using the data on the distribution of brownfields properties by size. These data, serving as a proxy variable for the size distribution of the affected properties, were used to derive the weighted average unit cost for Phase I ESAs. Our estimated weighted average unit cost of a Phase I ESA is very close to the 2002 average price of Phase I ESA reported by the Environmental Data Recourses (EDR). Due to data limitations, we did not adjust the weighted average unit cost for regional differences which may exist.

Commenter Organization Name: Small, Arthur
Comment Number: 0424
Excerpt Number: 2

Other Sections: NEW - 3.9 - Considering commonly known or reasonably ascertainable information about the property

Excerpt Text:

It is through this prism that we should examine the proposed section 312.30. This section requires, as a qualifying condition for the innocent landowner defense, that a prospective buyer investigate "Commonly Known or Reasonably Ascertainable Information About the Property." In particular, it is through this prism that we should examine the open-ended search requirements embodied in the new standard. As has been noted elsewhere, these new open-ended search requirements effectively compel potential buyers to search through a potentially large and open-ended set of possible information sources. These include unnamed "other" persons and un-enumerated "other" sources.

Should these standards in fact be open-ended?

First I wish to clarify a conceptual point: the decision to include an open-ended search requirement should be judged on the basis of marginal costs and marginal benefits. The key questions here concern a calculation at the margin. How much additional environmental or economic benefits accrue to society (if any) by virtue of making the standard open-ended, as opposed to a closed-ended standard? What are the likely additional economic and environmental costs (if any) along this margin? Is this marginal increase in search requirements justified by benefits that can reasonably be anticipated?

In this vein I wish to take issue with some of the findings of the cost-benefit analysis performed by ICF Consulting. One of the authors' principle findings is an estimate that the new AAI regulations will increase the transaction costs of real estate sales by some $41-47 per transaction. This figure is associated with higher costs of Phase I site assessment and document search. ICF's figure may in fact be correct (although I do have quibbles with their data collection protocols [Footnote: It raises at least one eyebrow that ICF bases this estimate on an internal survey of its own staff. By contrast, EDR reports an estimated increase closer to $200 per transaction, based on a survey of over 500 environmental professionals from multiple firms who attended conferences in nine cities earlier this year. See Environmental Site Assessment Report by EDR Business Information Services, July 2004.].). But is this the right question?

I believe it is not - or at least, it is not the central question. The most important effect of making these standards open-ended is probably not how they increase the costs of those transactions that eventually go through. The more important effect of the new standards concerns the possibility that they may discourage some otherwise-viable transactions from being undertaken at all. Transactions may be discouraged not so much because of the small increase in transaction costs, but because of the potentially large increase in residual liability.

As experts on the subject of brownfields, I expect you don't need to be convinced that open-ended liabilities have been shown to have real and negative impacts on incentives to undertake projects.

Response:

The Agency disagrees with the commenter that the EIA was based solely on an internal survey of ICF Consulting’s professionals. Members of the Negotiated Rulemaking Committee, including four individuals with extensive experience in conducting environmental site assessments reviewed

the estimated labor distribution, unit cost estimates, and other cost analysis assumptions and generally agreed with the estimates developed by ICF Consulting's professional engineers.

To address the commenter's concern that the EDR results may be more reliable than the estimates presented in the EIA, the Agency conducted a sensitivity analysis on our cost estimates. The results of the sensitivity analysis are presented in an addendum to the EIA, which is available in the docket for the final rule. We show that the final rule would not have annual impacts in excess of the $100 million threshold set for major rules even if the final rule results in an increase in the price of a Phase I ESA by an amount close to the EDR respondents' estimate.

4.1 The Impact of the Rule is Underestimated

Commenter Organization Name: Morris, Michael
Comment Number: 0114
Excerpt Number: 3
Excerpt Text:
My final and greatest disagreement is the estimated increase in cost for an AAI assessment. The increased time, which is required to complete the additional criteria required by AAI, is far more than what was used in the official estimates. Also there is an increased requirement for a higher paid professional to perform or review the work. Finally the estimated cost for a professional doing one additional hour of the work is above the total increased cost used in the model (for AAI comparated to the full ASTM).

Response:
In the final rule, EPA modified the definition of an environmental professional. In response to the concerns raised by commenters, the final rule provides that individuals who do not meet the required educational requirement (i.e., do not have a Baccalaureate or higher degree in a field of engineering or science from an accredited institution of higher education) will qualify as an environmental professional if they have ten (10) years of relevant full-time experience in the conduct of all appropriate inquiries investigations, or Phase I environmental site assessments.

The more flexible qualifications within the definition of environmental professional provided in the final rule most likely will have the effect of decreasing the average incremental increase in hourly labor rates associated with the final rule activities. It is important to note that both the EIA developed for the proposed rule and the addendum estimate a weighted average incremental cost per Phase I ESA, where the increased effort under the final rule is weighted by the probability that incremental hours may be needed to address the final rule activities.

Commenter Organization Name: Worlund, John
Comment Number: 0256
Excerpt Number: 17
Excerpt Text:
There are several other possible impacts that were not considered.

The Review of IC's identified with in ½ mile of the property represent a considerable expansion of effort beyond current industry practice. Especially as the number of IC's increase with time. Requiring the environmental professional to review every site specific IC identified is burdensome and the cost would need to be factored into the economic analysis. An estimate of the added cost of review of an IC would be in the range of 200 to 400 dollars.

The rule does not allow the use of reports over one year old and requires updates of reports over 180 days old. This will require a substantial number of reports to be redone. I am not sure how one would get a good estimate of the number of reports that would be redone. It is probably not

unreasonable to assume it could be in the range of 5 to 10 % of the reports prepared if the AAI rule is widely followed.

Depending upon how the issues of data gaps, interviews with past owners and the extent of visual inspection of adjacent properties are resolved in practice, there could be significant cost impacts. If all of these activities remain in the purview of the environmental professional and are conducted as required by the principles of the current industry practice there will not be significant additional cost. Arguably all of these items can and are done now if appropriate. If, however, it is contemplated that AAI or revisions to ASTM 1527 will incorporate requirements for these specific task in all reports there will be additional cost.

Response:
EPA agrees with the commenter that searching for institutional controls associated with properties located within a half mile of the subject property is overly burdensome. The final rule requires that the search for institutional controls be confined to the subject property only.

With respect to the shelf-life of previously conducted all appropriate inquiries, or environmental site assessment reports, EPA clarified the language in the final rule to allow for the use of information contained in previously-conducted assessments, even if the information was collected more than a year prior to the purchase date of the subject property. The final rule retains the provision that requires that many portions of a previously-conducted all appropriate inquiries be updated, if the investigation was completed more than 180 days prior to the date of acquisition of the property. Because the rule allows for the use of previously collected information, the cost of updating a Phase I ESA should be lower, on average, than the cost of an initial Phase I ESA. The shelf-life requirement, therefore, would not increase the average cost of conducting all appropriate inquiries investigations.

Commenter Organization Name: Carvalho, Michael
Comment Number: 0257
Excerpt Number: 1
Excerpt Text:
EPA's attempt at developing new regulations to satisfy the "All Appropriate Inquiry" (AAI) standard under CERCLA, as amended by the recent Brownfields law, has resulted in a proposed rule that will significantly increase the cost and timeframe for completing environmental due diligence. Unfortunately, EPA significantly and materially understates these costs, which should be carefully considered by the regulated community and re-examined by the Agency for consistency with existing federal law.

In its proposed rule published in the Federal Register on August 28, 2004, EPA states that the cost increase for completing a Phase I Environmental Site Assessment (ESA) is "estimated to be between $41 and $47." However, an informal survey of the regulated community and literature search on the subject finds that virtually no one believes EPA's estimate. Indeed, most professionals engaged in the prEPAration and review of Phase I ESAs believe that the additional obligations imposed by the proposed rule will actually increase costs between $400 and $600 per report - an order of magnitude greater than the Agency estimate. An informal poll of attendees at

ASTM's AAI Conference held in Washington, DC on October 5, 2004, found support for this view. In fact, none of the Conference panelists - with the notable exception of EPA - were "on record" as supporting the Agency's cost assessment. Even EPA's own review considered - then quickly dismissed - alternative projections that put the cost increase at $647 per assessment. Other estimates are in excess of $1,500 to meet the Agency's proposed requirements.

Assuming EPA's estimate that 240,000 Phase I ESAs are performed annually, the regulated community will conservatively be expected to bear an additional $96,000,000 to $144,000,000 in transactional costs. This is an important figure as regulatory burdens on the private sector in excess of $100,000,000, annually, trigger Secs. 202 and 205 of the Unfunded Mandate Reform Act of 1995, a position the Agency outright rejects. By undervaluing the impact of the proposed regulation, EPA's proposed rule comes in "under the radar screen" of federal law.

Why the increase in cost? Much of the increase can be directly attributed to EPA's definition of "Environmental professional" and the role such individuals play in the completion of Phase I ESAs. Currently, Environmental professionals and the companies that employ them are able to staff work based on the complexity of the property and other factors. This market-driven process allows environmental consultants to develop the professional abilities of junior staff, while ensuring that more complicated sites get the attention that they deserve. However, because EPA specifically "…recommends that visual inspections…be conducted by an individual who meets the proposed regulatory definition of an environmental professional the staffing of such projects will necessarily change. The impact of such staffing requirements, particularly on "out-of-town" projects, will result in the higher-cost environmental professional completing routine tasks that are currently completed by junior employees under the guidance of seasoned professionals. Looking forward, the inability to economically train up-and-coming staff will necessarily create an even more limited number of individuals who meet EPA's definition, which will result in a tendency to further restrict access to this market and, correspondingly, to increase transaction costs. The EPA's economic cost assessment fails to account for such businesses realties.

Moreover, it is widely assumed that the Certification requirements under the proposed rule, coupled with the potential liability for professional engineers and geologists, and the need to evaluate "Data Gaps" will introduce more conservatism into the ESA process and result in an increasing number of projects moving towards more complex (and expensive) Phase II sampling and testing. The costs to complete Phase II ESAs routinely run into the thousands and, often, tens of thousands of dollars. The Agency's cost assessment ignores this issue completely.

Most federal agencies are required by law to submit their proposed regulations to the Office of Management & Budget, among others, to assess the economic impact of these rules before they are adopted. There is both good and well-settled reasoning for this requirement. While EPA did retain a "Beltway economist" to prepare an evaluation of the proposed AAI regulation, the report left many environmental practitioners wondering whether the study was prepared with a specific objective in mind, rather than an impartial undertaking of such modifications on industry practice. By minimizing the real cost of EPA's proposed regulation in an attempt to meet its Congressional mandate with the least amount of scrutiny, the Agency does a disservice to the similarly-mandated regulatory review process.

Response:
In response to many comments EPA received on the proposed definition of an environmental professional, the final rule provides that individuals that do not meet the required educational requirement (i.e., do not have a Baccalaureate or higher degree in a field of engineering or science from an accredited institution of higher education) will qualify as an environmental professional if they have ten (10) years of relevant full-time experience in the conduct of all appropriate inquiries investigations, or Phase I environmental site assessments. EPA continues to recommend that the on-site visual inspection be performed by persons meeting the qualification of an environmental professional. The definition in the final rule is less stringent than the proposed one allowing for most people currently practicing to qualify as environmental professionals. Therefore, we do not believe that the recommendation would impose any significant cost burden.

During the negotiated rulemaking process, the FACA Committee did consider the option of requiring sampling and analysis as part of the all appropriate inquiries requirements but did not adopt it. In the Economic Impact Analysis developed for the proposed rule, EPA estimated the incremental costs of requiring sampling and analysis as part of the all appropriate inquiries rule (AAI Option 3).

The final rule does not require the conduct of analyses and investigations usually associated with Phase II site assessment standards. In fact, as shown in the economic impact analysis for the rule, the final rule includes activities that are similar to the activities required under the interim standard. The incremental costs associated with the final rule therefore are estimated to be low.

Commenter Organization Name: Carvalho, Michael
Comment Number: 0257
Excerpt Number: 3
Excerpt Text:
EPA's proposed AAI rule will undoubtedly increase the cost and time required to complete environmental assessments. Whether the Agency's proposed rule amounts to significant regulatory action as defined under applicable federal statutes remains to be seen. The Agency should re-evaluate its cost estimates in a manner that is consistent and respectful of both federal law and business realty.

Response:
The Economic Impact Analysis developed for the final rule was developed in full compliance with the Office of Management and Budget guidance provided in Circular A-4. Costs associated with conducting the incremental activities required by the proposed rule (over those required by the interim standard) were estimated across a variety of property types and sizes. A weighted average incremental cost per property assessment was then estimated. EPA also estimated annual costs based upon an industry estimate of the total number of environmental site assessments performed annually. For a full explanation of how the cost estimates were derived, please see *"Economic Impact Analysis for the All Appropriate Inquiries Regulation,"* August 2004, which is available in the docket for the final rule.

Commenter Organization Name: Miles & Stockbridge
Comment Number: 0277
Excerpt Number: 1
Excerpt Text:
1. Economic Impact - In the prEPAration of our comments, Miles & Stockbridge reviewed the proposed rule's Economic Impact Analysis (EIA), dated August 3, 2004 (conducted by ICF Consulting). After a careful review, we have determined that the economic impact analysis has several shortcomings, such as the failure to accurately address the financial impacts that this rule will have on small businesses. Although the Agency agrees that the proposed standards on how to conduct "all appropriate inquiries" will be an additional workload burden on an innocent landowner, a contiguous property owner, or a bona fide prospective purchaser, the cost calculations are not accurately portrayed. EPA's cost estimates were in a range of $41 to $47 for this additional workload. This is unrealistic, given that this workload is associated with broader due diligence standards.

The current established practices, including CERCLA interim standards rely on due diligence standards established by the American Society for Testing and Materials (ASTM) in its Standard E1527 (entitled "Standard Practice for Environmental Site Assessment: Phase I Environmental Site Assessment process"). EPA's proposed rule will introduce performance-based standards that are similar to the ASTM standards. However, as mentioned above, several of the new AAI standards are broader in scope. These broader standards require visual inspections, interviews with previous owners and adjoining neighbors, historical reviews, reviews of government records, searches for environmental cleanup liens, land use records, analysis and determination of whether purchase prices are reflective of fair market values, and service requirements of an environmental professional. Although, these additional requirements may not influence a large company's redevelopment efforts, it may prove to be a significant disadvantage for a small business.

2. 180 Day Time Limit - The proposed rule not only requires additional site information, but also establishes time limits associated with the date of the inquiry. Site information will warrant updates for information collected more than 180 days prior to the date of purchase of the property. Information that may potentially require updates includes: interviews with past and present owners, searches for environmental cleanup liens, review of Local, State and Federal records, visual inspections, and a declaration by an environmental professional. These tasks and attendant costs may not be a significant issue or a 'deal breaker' for a large business that usually relies on hired consultants to update this information. However, such cost will have a significant financial burden on a small business, or small innocent purchaser, if for any reason the property transaction is delayed. Earlier due diligence work would be at risk, resulting in delay, expense and replication of efforts. Unfortunately, the Economic Impact Analysis did not consider or calculate the time and/or cost this requirement would have on replicating the inquiry efforts, especially when the property transaction is delayed. Our experience suggests that the average length of a transaction typically will exceed 180 days. The EIA needs a more thorough analysis of time that is required for a commercial property transfer. The Agency may already have a great deal of the data that could be analyzed in its internal audits and reports associated with the Brownfield's program nationally.

Response:
EPA estimates that the final rule will not significantly impact small entities for the following reasons.

In response to many comments EPA received on the proposed definition of an environmental professional, the final rule provides that individuals that do not meet the required educational requirement (i.e., do not have a Baccalaureate or higher degree in a field of engineering or science from an accredited institution of higher education) will qualify as an environmental professional if they have ten (10) years of relevant full-time experience in the conduct of all appropriate inquiries investigations, or Phase I environmental site assessments. EPA continues to recommend that the on-site visual inspection be performed by persons meeting the qualification of an environmental professional. The definition in the final rule is less stringent than the proposed definition, allowing for most people currently practicing to qualify as environmental professionals. Therefore, we do not believe that the recommendation would impose any significant cost burden.

With respect to historical sources review, the final rule does not require any additional sources to be reviewed that are not already within the realm of sources required to be consulted by the ASTM E1527 standard. With respect to governmental records review, we recognize that the proposed rule did extend the search for institutional controls to a one-half mile radius of the subject property while the search requirement under the ASTM E1528-2000 standard is limited to the subject property. EPA, however, has revised the search requirement under the final rule by limiting the search for institutional controls to the subject property.

Under the ASTM E1527-2000 standard, it is the user's responsibility to check for environmental liens that are currently recorded against the subject property, and to report these to the environmental professional who is conducting the Phase I ESA. The requirements in the final rule are the same; therefore, there will be no incremental cost (labor or expenses) incurred due to promulgation of the final rule.

With respect to the requirement that the environmental professional consider whether or not the property's purchase price reasonably reflects the fair market value of the property (assuming the property is not contaminated), the final rule does not require that a real estate appraisal be conducted. Therefore, there is no reason for a more extensive search to have to be performed in response to the final rule than what is currently required under the ASTM E1527-2000.

The final rule does not explicitly require interviews with past owners and occupants, but provides that the environmental professional include interviews of past owners, operators, or occupants as necessary to meet the objectives of the rule and in accordance with the performance factors. We recognize that such interviews will need to be performed in the case of some properties and we revised the cost estimates for the final rule to properly account for the incremental burden associated with conducting additional interviews. The incremental burden, however, is expected to be minimal. The revised cost estimates are provided in the addendum to the EIA, which is available in the docket for the final rule.

With respect to shelf-life of ESA reports, EPA clarified the regulatory language in the final rule to allow for the use of information contained in previously-conducted assessments, even if the

information was collected more than a year prior to the purchase date of the subject property. EPA agrees with the commenters that the shelf-life requirement may result in a small fraction of Phase I ESAs been redone. Because the rule allows for the use of previously collected information, the cost of re-doing a Phase I ESA should be lower, on average, than the cost of the initial Phase I ESA. The shelf-life requirements of the final rule, therefore, are not expected to increase the average cost of Phase I ESAs.

Commenter Organization Name: ENSR International
Comment Number: 0314
Excerpt Number: 7
Excerpt Text:
The preamble includes (pages 52569-52572) a comparison of the cost to perform an assessment in accordance with the proposed rule to the current cost to prEPAre an ASTM 1527-00 level assessment, and states that the cost increase would be $41-$47/site, or $539/site if an environmental professional performed all the work. The comparison notes the following assumptions, which were the basis for the comparison:
-A reduced burden for the conduct of interviews in the cases where the property is abandoned;
-An increased burden associated with documenting recorded environmental cleanup liens;
-An increased burden for documenting the comparison of price vs. market value of a property, and concluding the reason; and,
-An increased burden for recording degree of obviousness.

Comment: The ultimate cost difference will obviously depend on what changes occur to the proposed rule, along the lines of our comments presented here. However, based on the proposed rule as it currently exists, these costs appear to grossly underestimate the potential cost increase. We currently meet or exceed the ASTM 1527-00 standard in all reports, including performance of municipal research, which we understand is not always performed in the industry. Our comments are based on incremental increases that we see over that baseline of assessment. We have provided our comments relative to each of the assumptions, then added points which we feel were not addressed in the cost analysis.

-Interviews - In the vast majority of cases, the interview burden increases, as the requirements now include not just current owners or operators, but past owners, operators or occupants. The time required to locate and interview these individuals is likely to be anywhere from one to several hours. In the case chosen for the evaluation, the burden to interview past owners, operators and occupants is not reduced, and the need to interview the current owner, etc. is replaced by an interview of abutter(s). Therefore, we do not agree that the burden would be reduced even in this case. We feel that the price increase for this portion of the work would be in the range of $70 - $210 (assuming an average billing rate of a non- environmental professional of $70/hr, which holds for the remainder of these examples).

-Environmental Liens (which ENSR understands to include Engineering and Institutional controls) - Based on the current requirement of researching these to a one-half mile radius, the lack of publicly available databases for these in several states (EDR reports that Institutional Controls databases are available in 35 states, and Engineering Controls database are available in only 13

states), and the implication of the need (per the preamble) to perform extensive municipal research to obtain this information for all sites within one-half mile radius, and the increased labor could range from at least several hours to over a day (and perhaps several days in the case of an urban area). Here we are estimating this at $210 (3 hours) to $560 (one day). We have hopes that the final rule will clarify that the intent is not to perform the detailed municipal research beyond the site and abutters, which would make the lower number the more likely. Add to this the likely need to perform a title search in order to be certain of the presence or absence of such a control to the subject site, and the cost per site increases by another $250 - $300.

-Price vs. Market Value - As this will be a statement of the buyer's opinion, this is not considered likely to significantly impact costs, beyond that of an interview question.

-Degree of Obviousness - Again, as a statement of opinion and the inclusion of recommendations, this is not considered to add significantly to overall costs, and impact would likely be in the range of $35/site (1/2 hour).

-Tribal Records - The evaluation does not consider an increased burden for researching tribal records. According to EDR, 46 states have tribal databases for USTs and LUSTs only (via EPA records). All other tribal record research would have to be performed by interviews with the tribal government, and direct record review. If performed in concurrence with municipal research (i.e. if the site and vicinity are in multiple jurisdictions) and the tribal government is present in the site locale, this could add up to a few hours to the process (estimated at $140). If the tribal government is present at a remote location, this cost would be increased further. We have not calculated this further increase, as we understand that a minority of sites would fall under this category, although we do not expect the numbers to be insignificant.

-Data Gap Documentation - The proposed rule carries strong requirements for documentation of data gaps, efforts made to fill them, and an evaluation (for each data gap) of whether or not this affects the environmental professional's ability to make a conclusion regarding the potential for the site to have been impacted by a release or threat of release. We expect this to add to the report writing burden at the level of one to two hours, depending on the availability of records for the site ($70 - $140).

Response:
EPA thanks the commenter for providing detailed explanations on the activities that would be associated with a higher level of effort under the proposed rule than estimated in the EIA.

The final rule does not explicitly require interviews with past owners and occupants, but provides that the environmental professional include interviews of past owners, operators, or occupants as necessary to meet the objectives and performance factors of the final rule. We agree with the commenters that locating past owners and occupants may be more time consuming than locating the current owners and occupants of a property and that in some cases the environmental professional will need to complete the full interview with the current owner before determining that it is necessary to interview a past owner or occupant.

In response to this and similar public comments, EPA revised the cost estimate developed for the proposed rule to account for the incremental burden associated with locating and interviewing past owners and occupants. The revised cost estimates are provided in the addendum to the EIA, which is available in the docket for the final rule.

With respect to the requirements to search for institutional controls, EPA agrees with the commenter that the EIA underestimated the incremental cost associated with this requirement. The proposed rule extended the search for institutional controls to a one-half mile radius of the subject property, while the search requirement under the ASTM E1527-2000 standard is limited to the subject property. Had the EIA for the proposed rule properly accounted for the extended scope of the institutional controls search requirement (as it was included in the proposed rule), the estimated average incremental cost per Phase I ESA would have been higher than $47. EPA, however, has revised the requirements for searching for institutional controls under the final rule by limiting the search to the subject property. This revision is in line with the commenters' recommendations and the search requirements for institutional controls in the ASTM E1527-2000 standard. Therefore, due to the revision of the requirements, the EIA does not need to be revised to account for incremental costs.

With respect to the search for environmental liens, we disagree with the commenter that this requirement would impose an incremental burden on a prospective property purchaser. The EIA developed for the proposed rule assumed that, under the ASTM E1527-2000 standard, it is the user's responsibility to check for environmental liens that are currently recorded against the subject property, and to report these to the environmental professional conducting the Phase I ESA. The requirements in the final rule are no different; therefore, there will be no incremental cost (labor or expenses) incurred as a result of the final rule. Thus, even if the cost of a title search is explicitly accounted for under the base case and under the final rule in the EIA, the estimated average incremental cost per transaction would stay unchanged.

With respect to the requirement that the purchaser of the property consider whether or not the property's purchase price reflects the fair market value of the property (assuming the property is not contaminated), we agree with the commenter that this requirement will not significantly impact the cost of Phase I ESAs since the final rule does not require that a real estate appraisal be conducted. The EIA did incorporate an incremental labor hour burden in the cost analysis for the rule for the environmental professional to document the results of an inquiry into the relationship of the purchase price to the fair market value of the property. The EIA assumed, however, that this requirement would impact only a fraction of the total number of properties assessed annually.

With respect to the documentation requirement regarding the degree of obviousness of contamination, the incremental burden suggested by the commenter is consistent with the EIA incremental labor hour estimate, which ranges from 0.5 to 1 hour per Phase I ESA depending on the property type/size.

With respect to the requirement to search tribal records, EPA clarifies in the preamble to the final rule that tribal records need only be searched for and reviewed in those instances where the subject property is located on or near tribal-owned lands. When such records are not available, necessary information should be sought from other sources. The EIA assumed that this requirement would be

fulfilled to the extent that tribal records are easily available, through, for example, the EDR database. If such records are not available, it is likely that the environmental professional will attempt to obtain the relevant information during the interview process, and therefore there will be no incremental cost associated with the requirement.

With respect to the requirement for documenting data gaps, the EIA did not explicitly account for this performance factor. Data gaps will need to be documented only in the cases in which the environmental professional cannot perform one or more of the required tasks. The EIA implicitly assumed that if the documentation of data gaps is necessary, the time saved by omitting the required tasks would offset the time needed for the documentation.

Commenter Organization Name: Rose and Westra
Comment Number: 0320
Excerpt Number: 5
Other Sections: NEW - 6.6 - Impact of the rule on the cost of liability insurance
Excerpt Text:
The Pre-Amble further states that the environmental professional's failure to identify an environmental condition or identify a release or threatened release may invalidate defenses to CERCLA liability. This essentially raises the standard of professional care for the environmental professional to perfection. If any condition is not identified by the environmental professional, the landowner might lose CERCLA defenses, even if the environmental professional strictly followed the AAI Rules. Certainly, the EPA is far from perfect, so how can it expect the environmental professional to be in every case? R&W recommends a specific statement addressing the environmental professional's standard of care be included in the AAI rules. Failure to do so will increase the cost of the inquiries due to the increased cost of liability insurance, and will create a need for environmental professional's to charge a risk premium relative to E-1527 Phase I ESAs due to inevitable increases in litigation. These costs were not addressed in the Economic Impact Analysis and, therefore, must be controlled in the Proposed Rules. R&W requests that the EPA remove this statement from the Pre-Amble and specifically address this vital issue in any future Proposed Rules.

Response:
In today's final rule, §312.20(g) 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 petroleum products, and controlled substances). The final rule requires such persons to identify the sources of information consulted to address the data gaps and comment upon the significance of the data gaps with regard to the ability to identify conditions indicative of releases or threatened releases. Section 312.21(c)(2) also requires 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.

In response to issues raised by commenters, we point out that the final regulation, as did the proposal, requires that environmental professionals document and comment on the significance of

only those data gaps that "affect the ability of the environmental professional to identify conditions indicative of releases or threatened releases of hazardous substances...on, at, in, or to the subject property." If certain information included within the objectives and performance factors for the final rule cannot be found and the lack of certain information, in light of all other information that was collected about the property, has no bearing on the environmental professional's ability to render an opinion regarding the environmental conditions at the property, the final rule does not require the lack of such information to be documented in the final report. Given the restriction on the type of data gaps that must be documented, and given that the documentation is restricted to instances where the lack of information hinders the ability of the environmental professional to render an opinion regarding the environmental conditions at the property, we disagree with the commenters who assert that the requirement is overly burdensome or will result in the inability to complete the required investigations.

The commenter is taking an extreme interpretation of EPA's discussion of the importance of conducting a sound and thorough all appropriate inquiries investigation. The intent of the preamble discussion is to note that every effort should be made to conduct a thorough all appropriate inquiries investigation so that the prospective property owner is able to comply with all of the statutory provisions required for obtaining protection from CERCLA liability. Should an undiscovered release because an issue at a later date, after a person has acquired a property, the landowner's defense may in part or in whole depend upon his or her ability to demonstrate the caliber and quality of the all appropriate inquiries investigation that was completed prior to acquiring the property.

The conduct of an incomplete all appropriate inquiries investigation, or 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. Failure to comply with any of the statutory requirements may be problematic in a claim for protection from liability.

It is not clear that the insurance industry would react to the final rule as the commenter has indicated. It is also possible, for example, that insurance companies will cut premiums for all policies that might be affected by CERCLA as a result of additional liability protection the final rule will offer to prospective purchasers who follow the requirements of the final rule.

Commenter Organization Name: Rose and Westra
Comment Number: 0320
Excerpt Number: 15
Other Sections: NEW - 3.3.1 - Scope of the review - how far back in time/history historical records must be reviewed
Excerpt Text:
Furthermore, the proposed § 312.24(b) does not limit the duration of investigation for historically unimproved properties. The E 1527-00 requirement to investigate such properties back to 1940 is more economically efficient and poses virtually no threat of not identifying conditions posing material environmental risk. This has made the E 1527-00 process much more efficient. The Economic Impact Analysis failed to address the increased requirements over the E 1527-00 requirements. Therefore, it understates the impact of the Proposed Rules. R&W requests that the

EPA further clarify the historical research requirement to avoid needless historical investigation of vacant property (prior to 1940). In the absence of such, R&W requests that the EPA provide a realistic economic assessment of this section of the Proposed Rules.

Response:
Historical land use is typically determined through interviewing current and past property owners, but also largely through reviewing of historical fire insurance maps, aerial photographs, topographic maps, tax files, land title records, etc. These historical sources are reviewed under the ASTM E1527-2000 standard; therefore, there will be no additional labor or cost burden to collect and review these sources under the final rule. With respect to the required timeframe for reviewing historical records, the requirements of the rule are essentially the same as the ASTM E1527-2000 standard. The ASTM standard requires (at section 7.3.2) that "all obvious uses of the property shall be identified from the present, back to *the property's obvious first developed use*, or back to 1940, *whichever is earlier*." [emphasis added] The final rule for all appropriate inquiries requires that historical documents and recorders be reviewed "for 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 government purposes." Given that the requirements of the final rule are essentially the same as the requirements under the interim standard, there will be no incremental cost associated with the historical records review requirement of the final rule.

Commenter Organization Name: Rose and Westra
Comment Number: 0320
Excerpt Number: 20
Other Sections: NEW - 3.9.2 - The Agency should provide additional guidance
Excerpt Text:
Section 312.30, Commonly Known or Reasonably Ascertainable Information about the Property, is not workable in its current form. The implication to interview owners and occupants of adjoining property poses the same confidentiality and security law issues as mentioned previously about interviewing past owners, occupants, etc. The suggestion that the environmental professional should review or consult "Others with knowledge of the subject property; and other sources of information [e.g., newspapers, websites, community organizations, local libraries, and historical societies]" is too vague in the absence of some further guidance. ASTM Committee E-50 addressed this with practically reviewable and likely to be useful limitations. The sources cited in the example cannot be reviewed on the property-by-property basis. For example, does the EPA contemplate microfilms of newspapers be searched back to the beginning of the collection for each property having some form of a data gap? The Economic Impact Analysis suggests no further costs will be incurred by the proposed AAI rules than with E 1527-00. Thus, the Analysis is clearly not consistent with the Proposed Rules and, therefore, understates the impact of the Proposed Rules. R&W requests that the EPA reform the Proposed Rules to include specific limitations similar to E 1527-00.

Response:
The final rule requires that the environmental professional to supplement the searches and reviews of historical and governmental records with commonly known or reasonably ascertainable

information about the subject property. This requirement was included in the previous provisions for the CERCLA innocent landowner defense and, therefore, is not an incremental burden imposed by the final rule. The final rule provided a few examples of where commonly known or reasonably ascertainable information may be found. The final rule does require that the suggested sources be used, only that commonly known or reasonably ascertainable information be accounted for during the inquiries.

Commenter Organization Name: Rose and Westra
Comment Number: 0320
Excerpt Number: 21
Excerpt Text:
In addition to the technical issues raised above, the Economic Impact Analysis (EIA) is fundamentally flawed. ICF Consulting derived hourly cost of staff and consulting experience with Phase I ESAs from only one source: itself. The EIA cites several polls conducted by EDR, but fails to cite the recent poll of environmental professionals by EDR. These polls indicate that the vast majority of environmental professionals and associated consulting staff interviewed believe the cost of the AAI inquiries as proposed will increase by greater than 10% over the current E 1527-00. This would be approximately four times the increase estimated by the Economic Impact Analysis. R&W requests that the EPA perform a new Analysis to address this, as wells as other flaws and omissions described previously.

The EIA also states, "The proposed regulation also should not result in any increase in the amount of work performed by those individuals who meet the environmental professional definition …" R&W cannot speak to nationwide practices, but in the midwestern states, it is common to use experienced environmental staff who may not meet the definition of environmental professional to perform site observations on low risk properties (e.g., vacant land, commercial office buildings, etc.). While the Proposed Rules do not require it, the Pre-Amble specifically recommends that site observations be performed by an environmental professional. R&W restates its request that the EPA obtain an EIA that includes all the requirements of the Proposed Rules and guidance in the Pre-Amble.

The EIA suggests that review of federal, state, tribal, and local government records "… is not likely to impose any additional burden hours above the current environmental assessment practices …" This does not account for the fact that reasonably ascertainable lists of brownfield sites, engineering controls and institutional controls are not available. The EIA does not describe how this additional information is going to be obtained at no cost increase compared to the E 1527-00.

The EIA makes similar discounting of the commonly known or reasonably ascertainable requirements of the Proposed Rules. Without qualifications such as 'likelihood to be useful' and 'able to be searched by property,' this requirement is a significant expansion over the E 1527-00 practice. The EIA patently ignores this.

As stated above, the proposed scope of the AAI historical investigation is significantly more vague and more onerous than E 1527-00, but the EIA states, "The proposed regulation will not impose any additional burden hours above the current environmental assessment practices." R&W restates

its request that the EPA obtain an Analysis that includes all the requirements of the Proposed Rules and guidance in the Pre-Amble.

The EPA claims that the Proposed Rules will increase the cost of the "all appropriate inquiry" by $46. This is clearly understated, as described above. Furthermore, the Proposed Rules require property developers or investors to consult with a title company in order to consider whether the purchase price of a property reasonably reflects the fair market value of the property, should the property be contaminated. Property developers or investors could incur costs estimated at $300 to complete this single requirement. R&W requests that the EPA re-evaluate the increase in cost that the Proposed Rules will create.

Response:
EPA thanks the commenters for providing detailed explanations on the incremental burden under the proposed rule.

To address the commenter's concern that the EDR results may be more reliable than the estimates presented in the EIA, the Agency conducted a sensitivity analysis in the addendum to the EIA. We show that if the EDR survey results are correct, the incremental cost of the final rule may be higher than we originally estimated. However, the final rule would not have annual impacts in excess of the $100 million threshold set for major rules even if the final rule increases the cost per Phase I ESA by an amount close to the EDR respondents' estimate.

In response to many comments EPA received on the proposed definition of environmental professional, EPA modified the definition in the final rule to provide for persons who have 10 years of full-time relevant experience, but do not have a Baccalaureate degree, to qualify as environmental professionals. Although EPA continues to recommend that the on-site visual inspection be performed by persons meeting the qualification of an environmental professional, the definition in the final rule is less stringent than the proposed one and will allow for most people currently practicing to qualify as environmental professionals. Therefore, EPA estimates that no additional, or incremental cost, is associated with the need to hire an individual who meets the definition of environmental professional to oversee the conduct of the all appropriate inquiries.

With respect to requirements in the final rule to review federal, state, tribal, and local government records, the final rule requires that governmental records of engineering controls and institutional controls be searched only for information on engineering and institutional controls at the subject property. The rule is, therefore, consistent with the current industry practices and the ASTM E1527-2000 standard. There is no incremental cost or burden associated with the requirement to search for institutional or engineering controls.

The final rule requires environmental professionals to supplement the searches and reviews of historical and governmental records with commonly known or reasonably ascertainable information about the subject property. This requirement was included in the previous provisions for the CERCLA innocent landowner defense and, therefore, is not an incremental burden imposed by the final rule.

With respect to the requirement that the purchaser of the property consider whether or not the property's purchase price reflects the fair market value of the property (assuming the property is not contaminated), we disagree with the commenter's assertion that this requirement will significantly impact the cost of Phase I ESAs. First, the final rule does not specifically require that a real estate appraisal be conducted. Therefore, the EIA assumed that a more extensive search would not be required beyond what is currently required under the ASTM E1527-2000 standard. Second, the EIA did account for the incremental labor hour burden for the environmental professional to document the results of an inquiry into the relationship of the purchase price to the value of the property. This requirement, however, is expected to impact only a fraction of the properties (i.e., those properties where there is a significant difference between the purchase price and the fair market value of the property). Lastly, it is the current industry practice to perform a search for environmental cleanup liens. Also, the ASTM E1527-2000 standard includes a requirement to identify environmental cleanup liens, but identifies the search as the responsibility of the "user," or prospective property owner. In the final rule, the search for environmental cleanup liens may be assigned to either the prospective property owner or the environmental professional. Therefore, the cost for conducting a search for environmental cleanup liens does not represent an incremental cost associated with the requirements of the final rule.

Commenter Organization Name: Holm, Wright, Hyde, & Hays
Comment Number: 0323
Excerpt Number: 3
Excerpt Text:
Comment 1: While the CERCLA definition of releases (and threatened releases) is very broad, typically a release can be identified (although past air emissions can be a challenge where the plume "touched down"). Threatened releases on most properties are reasonably identifiable (e.g., rusting drums, and USTs no longer in service without any closure report) but become much more difficult with the transfer of ongoing manufacturing operations along with the property. With the transfer of ongoing manufacturing operations, generally, operations experts representing the buyer review the condition of equipment but not relative to a threatened release to the environment.

In fact, the experience of environmental professional, is that a review of major permits and all spill/release/response plans is frequently performed (20% of the time in 2004) to identify items that may constitute a threatened release at "ongoing operations" to be transferred. The time it takes to perform this activity averages 16 hours. In addition, more in depth reviews of key operations took place about 2% of the time and required about 40 hours of effort of highly skilled professionals (more costly per hour). While certain environmental professionals may not focus as heavily as the norm on standard transfers that have value almost entirely because of planned future redevelopment (the prime focus of Brownfields activities), it is expected that the AAI regulations and any revised ASTM Standards that follow will set the standard and will be followed by most environmental professionals for all types of transfers.

Recommendation:

1) Reflect the above in the upper end of the AAI cost range and the maximum annual cost increase in foot note 4 on page 52573 of the August 26, 2004 Federal Register.

2) Recognize in the preamble that meeting these new standards may be particularly difficult for sites with ongoing operations so that appropriate expectations are set for all likely stakeholders.

Response:
The definition of releases and threatened releases included in the final rule is the same as defined in CERCLA. CERCLA liability attaches to releases and threatened releases of hazardous substances. Therefore, the scope of the all appropriate inquiries investigation always has been relative to identifying releases and threatened releases of hazardous substances. The final rule does not change the scope of the CERCLA liability provisions, nor does EPA have the authority to modify the scope of the CERCLA liability in the all appropriate inquiries rule. Additionally, the final rule does not impose any additional burden associated with the scope of CERCLA liability.

The fact that the commenter points out that a review of major permits and spill response plans is frequently performed when conducting a site assessment points to a conclusion that the activity does not represent an incremental cost associated with the final rule.

Commenter Organization Name: FAA
Comment Number: 0334
Excerpt Number: 25
Excerpt Text:
INCREASED LIABILITY COSTS

1) Requiring a statement and signature of the environmental professional on the AAI report will lead to increased costs as environmental professionals will seek increased liability protection for possible errors and/or omissions in their judgments and identification of data gaps. The estimated $41-$47 increase over current ASTM 1527-2000 costs does not take into account the increased costs that environmental professionals will charge based on their increased liability. FAA does not believe that EPA has addressed this added cost effectively in the economic impact section of the proposed rule and would like EPA to include this fact in their calculations.

Response:
EPA thanks the commenters for their suggestions. The final rule requires that the written report include two signed declarations by the environmental professional. One declaration must state that the environmental professional meets the professional criteria as defined by the final rule under §312.10. The second required declaration must state that all appropriate inquiries have been carried out in accordance with the rule's requirements. We disagree with the commenter's suggestion that these declaration requirements would lead to an increase in the cost of Phase I ESAs since they are not significantly different from what is required under the ASTM E1527-2000 standard.

In response to issues raised by commenters, we point out that the final regulation, as did the proposal, requires that environmental professionals document and comment on the significance of only those data gaps that "affect the ability of the environmental professional to identify conditions indicative of releases or threatened releases of hazardous substances...on, at, in, or to the subject property." If certain information included within the objectives and performance factors for the final rule cannot be found and the lack of certain information, in light of all other information that

was collected about the property, has no bearing on the environmental professional's ability to render an opinion regarding the environmental conditions at the property, the final rule does not require the lack of such information to be documented in the final report. Given the restriction on the type of data gaps that must be documented, and given that the documentation is restricted to instances where the lack of information hinders the ability of the environmental professional to render an opinion regarding the environmental conditions at the property, we disagree with the commenters who assert that the requirement is overly burdensome or will result in the inability to complete the required investigations.

Commenter Organization Name: Montana DEQ
Comment Number: 0335
Excerpt Number: 9
Excerpt Text:
Unfunded Mandates Reform Act: DEQ believes EPA must conduct a more detailed cost-benefit analysis. This proposed rule will result in expenditures to State, local and Tribal governments and to the private sector. As stated earlier, DEQ will have to contract AAI investigations to outside contractors because not all of its project officers would be qualified to conduct AAI investigations under the proposed definition of an "Environmental professional." This will result in much larger costs per investigation. EPA has stated that an "Environmental professional" does not have to perform all of the AAI investigation, but DEQ cannot take qualified "Environmental professional" project officers off of high priority enforcement sites to review work by other project officers. DEQ believes that EPA must conduct a more detailed cost evaluation to determine whether this proposed rule will result in expenditures to State, local and Tribal governments and to the private sector in amounts over $100 million. It appears the cost evaluation discussed in the Summary of Regulatory Costs did not take into account the affect the definition of an "Environmental professional" will have on the cost of an AAI investigation.

Response:
In response to the many comments EPA received on the proposed definition of environmental professional, EPA modified the definition in the final rule to provide for persons who have 10 years of full-time relevant experience in performing ESAs, but do not have a Baccalaureate degree, to qualify as environmental professionals. Although EPA continues to recommend that the on-site visual inspection be performed by persons meeting the qualification of an environmental professional, the definition in the final rule is less stringent than the proposed one allowing for most people currently conducting environmental site assessments to qualify as environmental professionals.

Commenter Organization Name: CBPA
Comment Number: 0344
Excerpt Number: 2
Excerpt Text:
We also believe that the additional cost of the new procedures will greatly exceed the estimate provided by EPA.

Response:
Please see response to comment 0344, excerpt 5.

Commenter Organization Name: CBPA
Comment Number: 0344
Excerpt Number: 5
Other Sections: NEW - 3.8.1 - The environmental professional should not be required to consider the relationship of the purchase price to the value of the property
Excerpt Text:
-Proposed § 312.29 "The Relationship of the Purchase Price to the Value of the Property, if the Property was not Contaminated" Imposes a new Requirement for a Property Valuation Analysis and Unduly Intrudes Into Market Transactions

Proposed § 312.29 requires that purchasers "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."

With this requirement in place, failure to commission a valuation analysis of the property would expose prospective purchasers to subsequent claims that the purchase price was below market and should have alerted the purchaser to the presence of contamination. Although the preamble of the proposed rule states that a formal appraisal is not necessary, it states that the intent is to determine if the "price paid for the property is reflective of its market value," and may be accomplished by retaining a "real estate expert" to conduct a "comparability analysis" (page 52567). It is often difficult to ascertain market value without making various adjustments to comparable sales, such as size, location, availability of parking, rail or truck access, etc. Given the potential exposure to second guessing, prudent purchasers will probably commission appraisals, and in any event it is not likely that the non-appraisal market valuation envisioned by proposed rule will differ much in scope or cost from a formal appraisal. Therefore, the cost of an appraisal should be included in the additional costs associated with the rule

The rulemaking committee may believe that § 312.29 is required by the Brownfields Act of 2002, which does recite the phrase "the relationship of the purchase price to the value of the property, if the property was not contaminated." However, this element of All Appropriate Inquiry remains unchanged since 1986 and to the extent that EPA may believe that it is a statutorily required element of future All Appropriate Inquiries, it is already covered by ASTM El 527. ASTM El 527 properly limits "the relationship of the purchase price to the value of the property" to "actual knowledge that the purchase price is significantly less than the purchase price of comparable properties." ASTM El527-00 § 5.4 There is no requirement that the purchaser ascertain and consider the price of comparable properties or ascertain and consider the fair market value of the subject property. Hence, existing practice does not intrude into market transactions and does not require an appraisal.

Response:
The statute requires that the federal regulations for all appropriate inquiries include a requirement to consider the relationship of the purchase price to the value of the property. This provision has

been part of the statutory requirements for all appropriate inquiries since 1986, it is not a new or incremental requirement. The provision is not limited to "actual knowledge." The statute requires that the relationship between purchase price and market value be considered in case of all properties, without limitation.

The final rule, however, does not require that a real estate appraisal be conducted to achieve compliance with this criterion. Although some commenters requested that the final rule require that a formal appraisal be conducted and we acknowledge that there may be potential value in conducting an appraisal, we determined that a formal appraisal is not necessary for the prospective landowner or grantee to make a general determination of whether the price paid for a property reflects its fair market value. In the case of many property transactions, a formal appraisal may be conducted for other purposes (*e.g.*, to establish the value of the property for the purposes of establishing the conditions of a mortgage or to provide information of relevance where a windfall lien may be filed). In cases where the results of a formal property appraisal are available, the appraisal results may serve as an excellent source of information on the fair market value of the property.

In cases where the results of a formal appraisal are not available, the determination of fair market value 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 generally is reflective of its fair market value. Significant differences in the purchase price and fair market value of a property should be noted and the reasons for any differences also should be noted.

In the EIA for the proposed rule, EPA assumed that a more extensive search would not be required under the rule to document the reasons for discrepancies between the purchase price and the fair market value of a property (assuming it were not contaminated) than what is currently required under the ASTM E1527-2000 standard. The EIA did incorporate an incremental labor hour burden in the cost analysis for the rule for the environmental professional to document the results of an inquiry into the relationship of the purchase price to the fair market value of the property. The EIA assumed, however, that this requirement would impact only a fraction of the total number of properties assessed annually.

Commenter Organization Name: Grand Rapids C of C
Comment Number: 0345
Excerpt Number: 6
Excerpt Text:
The Grand Rapids Area Chamber of Commerce remains concerned with the economic impacts associated with the proposed rule on investors and the real estate industry. The EPA claims that the proposed rule will increase the cost of the "all appropriate inquiry" by $46. It is our belief that this figure is severely underestimated. The various additional requirements in the proposed rule would increase the cost of "all appropriate inquiries" by a much larger dollar figure. For example, the proposed rule requires that property developers or investors may have to consult with a title

company in order to consider whether the purchase price of a property reasonably reflects the fair market value of the property should the property be contaminated. Property developers or investors could incur costs estimated at $300 to complete this single requirement. In addition, the increase in property investigations and background checks, will result in a lengthy interview process requiring additional manpower and expenses paid by the investors. Therefore, the Grand Rapids Area Chamber of Commerce requests that the EPA re-evaluate the increase in cost that the proposed rule will create.

Response:
EPA thanks the commenters on their suggestion that the estimates of the costs under the AAI rule should be reevaluated. With respect to the requirement that the purchaser of the property consider whether or not the property's purchase price reflects the fair market value of the property (assuming the property is not contaminated), we disagree with the commenter's assertion that this AAI requirement will significantly impact the cost of Phase I ESAs.

The final rule does not require that a real estate appraisal be conducted to achieve compliance with this criterion. Although some commenters requested that the final rule require that a formal appraisal be conducted and we acknowledge that there may be potential value in conducting an appraisal, we determined that a formal appraisal is not necessary for the prospective landowner or grantee to make a general determination of whether the price paid for a property reflects its fair market value. In the case of many property transactions, a formal appraisal may be conducted for other purposes (*e.g.*, to establish the value of the property for the purposes of establishing the conditions of a mortgage or to provide information of relevance where a windfall lien may be filed). In cases where the results of a formal property appraisal are available, the appraisal results may serve as an excellent source of information on the fair market value of the property.

In cases where the results of a formal appraisal are not available, the determination of fair market value 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 generally is reflective of its fair market value. Significant differences in the purchase price and fair market value of a property should be noted and the reasons for any differences also should be noted.

In the EIA for the proposed rule, EPA assumed that a more extensive search would not be required under the rule to document the reasons for discrepancies between the purchase price and the fair market value of a property (assuming it were not contaminated) than what is currently required under the ASTM E1527-2000 standard. The EIA did incorporate an incremental labor hour burden in the cost analysis for the rule for the environmental professional to document the results of an inquiry into the relationship of the purchase price to the fair market value of the property. The EIA assumed, however, that this requirement would impact only a fraction of the total number of properties assessed annually.

Lastly, it is the current industry practice to perform a search for environmental cleanup liens. Also, the ASTM E1527-2000 standard includes a requirement to identify environmental cleanup liens,

but identifies the search as the responsibility of the "user," or prospective property owner. In the final rule, the search for environmental cleanup liens may be assigned to either the prospective property owner or the environmental professional. Therefore, the cost of conducting a search for environmental cleanup liens does not represent an incremental cost associated with the requirements of the final rule.

Commenter Organization Name: Potter and Adams
Comment Number: 0351
Excerpt Number: 1
Excerpt Text:
The anticipated incremental cost increase of less than $50, as stated in the Preamble section V.A.2, is lower than the actual incremental cost increase anticipated by this firm. Certain assumptions in Section 5 of the Economic Impact Analysis for the Proposed All Appropriate Inquiries Regulation (August 3, 2004) ("EIA") do not accurately reflect the increased burden of the proposed AAI. For example,
a) Section 5.6.1.7 of the EIA states an assumption that half of the time spent interviewing local government officials is completed during the site visit. This does not reflect usual practice nor is it practical.

b) Section 5.6.4 of the EIA includes direct costs of up to $25 per property associated with obtaining state and local records. For an industrial property, direct costs greater than $150 are typical. This section also includes direct costs of up to $25 per property associated with obtaining historical source records. Typical costs for obtaining Sanborn maps and aerial photographs are greater than $200. Additional costs would be incurred if a title search were performed.

c) Section 5.6.5.2 of the EIA, footnote 21, suggests that when interviews of past owners/occupants are required, this activity serves as a substitute for interviews of current owners/occupants rather than an additional activity. Practically speaking, however, interviews of current owners/occupants must first be performed to identify a data gap and to identify other persons to interview, and then the additional interviews may be conducted. Tracking down past owners/occupants is a time consuming activity. This represents an additional burden not captured in the EIA.

d) Section 5.6.5.3 of the EIA states an assumption that it will take approximately a half hour to compose, review and edit text regarding explanations of purchase price/market value discrepancies. Section 5.6.5.4 of the EIA states an assumption that it will take approximately ½ to 1 hour to compose, review and edit text regarding the user's environmental lien and institutional control search results. Section 5.6.5.5 of the EIA states an assumption that it will take approximately one-half to 1 hour to compose, review and edit text regarding the degree of obviousness of the presence or likely presence of contamination and recommendations for next steps that the user should consider in the ESA process. These activities alone account for a minimum increased burden of 1.5 hours labor, which cannot be accomplished in most firms for less than $50. The EIA assumes an average billing rate of $67 per hour.

e) The EIA does not address the increased burden of additional documentation requirements for data gaps. The ASTM 1527, which is considered the base case, requires documentation of data gaps

specifically with regard to historical use research, while the proposed AAI places no limits on the requirement for documentation of data gaps. Furthermore, the AAI will carry the weight of federal law, which places even greater liability on the environmental professional in an already litigious industry. Therefore, even in cases where a fully "compliant" ASTM 1527 is the base case, the proposed AAI will induce additional burden on the environmental professional to document procedures and results of inquiries.

f) As noted above, clarification is needed regarding the role of the environmental professional in conducting the site visit. In some cases, requiring environmental professional to conduct site visit will have a significant effect on the cost, which is not addressed in the EIA.

The average ASTM 1527 Phase I ESA cost of $2,132 in Exhibit 8-1 of the EIA is in line with national average pricing surveys conducted by Environmental Data Resources ("EDR"). However, the incremental cost increase of $47 is not. EDR's survey of consultants who perform Phase I ESAs shows that the vast majority of consultants predict an incremental cost increase due to AAI, with 45% of consultants anticipating an increase of 10-20% or more, which translates to a $200 to $400 or more incremental cost increase. Our firm believes this estimate is more accurate than the estimate presented in the EIA.

Response:
EPA thanks the commenters for providing detailed explanations on which particular activities would be associated with a higher level of effort under the proposed rule than estimated in the EIA.

With respect to interview(s) with the local government officials, the timing of the interview(s) largely depends on the location of the subject property relative to the environmental professional's office or base location. Based on ICF Consulting's experience, when significant travel is required (e.g., plane ride, multiple hour drive), interviewing local officials is more efficiently done in conjunction with the site visit, and supplemented by telephone interviews. In-person interviews of local officials also are likely to occur when searching for local historical documentation, as often times the documentation is in the same location as the local officials that need to be interviewed. We do not believe that the commenters' remark warrants a revision to the cost assumptions and burden estimates presented in the EIA conducted for the proposed rule.

Sanborn maps and aerial photographs are often times included as an additional product that is ordered along with the standard environmental database report. Based on our communications with EDR at the time the EIA was prepared, the costs of database search reports typically ranged from approximately $160 (for the standard database search report) to approximately $315 (for the standard database search report, plus up to four historical sources, which could include Sanborn maps, aerial photographs, historical topographic maps, city directories, or other various sources). With respect to other direct costs (ODCs), the EIA assumed, both under the base case and the final AAI rule, $250 for the database search report, plus an additional $45-$75 for historical use information, state and local environmental records, and documents provided by the client. Therefore, the EIA estimates of the average total ODCs for the database report, historical, and governmental records range from $295 to $325 and are very close to the ODC estimates suggested by the commenter.

The commenter suggests that the title search would be an incremental cost under the AAI rule. The EIA assumed that, under the current ASTM standard, it is the user's responsibility to check for environmental liens that are currently recorded against the subject property, and to report these to the environmental professional conducting the Phase I ESA. The final rule's requirements for environmental lien searches are no different; therefore, there would be no incremental cost (labor or expenses) incurred as a result of the final AAI rule. Thus, even if the cost of a title search is explicitly accounted for under the base case and under the final regulation, the average incremental cost per transaction would stay unchanged.

With respect to the requirement to interview past owners and occupants, we agree with the commenter that the environmental professional may need to complete the full interview with the current owner before determining whether the interview with past owner and occupants would be necessary. In response to this and similar public comments, the EIA was revised to account for the incremental burden associated with locating and interviewing past owners and occupants. The revised cost estimates are provided in the addendum to the EIA, which is provided in the docket for the final rule.

The commenters failed to recognize that the documentation requirements in the final rule regarding the purchase price of the property and the degree of obviousness of the presence or likely presence of contamination at the property would not need to be satisfied in the case of each property or site assessment. The EIA weighted the increased effort under the final rule by the probability that the incremental hours may be needed. In many cases, there will be no discrepancy between the purchase price and the fair market value of the property, therefore no documentation of the reasons for the discrepancy will be necessary.

With respect to data gaps, the EIA did not explicitly account for this performance factor. Data gaps would need to be documented only in the cases in which the environmental professional cannot perform one or more of the required tasks. The EIA implicitly assumed that if the documentation of data gaps is necessary, the time saved by omitting the required tasks would offset the time needed for the documentation.

With respect to the on-site visual inspection requirement, EPA continues to recommend that the on-site visual inspection be performed by persons meeting the qualification of an environmental professional. However, EPA modified the definition of environmental professional in the final rule to provide for persons who have 10 years of full-time relevant experience in performing ESAs, but do not have a Baccalaureate degree, to qualify as environmental professionals. The definition in the final rule is less stringent than the definition included in the proposed rule and allows for most people currently conducting environmental site assessments to qualify as environmental professionals. Therefore, we do not believe that the recommendation will impose any significant incremental cost burden.

To address the commenters' suggestion that the EDR survey results may be more reliable than the estimates presented in the EIA, the Agency conducted a sensitivity analysis in the addendum to the EIA. We show that the final rule will not have annual impacts in excess of the $100 million threshold set for major rules even if the final rule increases the cost per Phase I ESA by an amount close to the EDR respondents' estimate.

Commenter Organization Name: Greenlining Institute
Comment Number: 0354
Excerpt Number: 17
Excerpt Text:
VI. ICF's ESTIMATE OF ADDITIONAL TRANSACTION COSTS AND TIME IS NOT CREDIBLE, AND THE RULE WILL DISPROPORTIONATELY IMPACT LOW INCOME AND MINORITY COMMUNITIES, AND SMALL ENTITITES

-A. The New Rule will Significantly Increase the Cost and Time Involved in Conducting Phase One Site Assessments

ICF Consulting prepared the Economic Impact Analysis for the proposed rule and contends that the new rule will result in an average additional cost for conducting a phase one site assessment of $47. This is simply not credible. In California, a good quality phase one costs between three and five thousand dollars. The environmental consultants in the San Francisco Bay Area we have consulted have informed us that under the new rule it will increase to five to ten thousand.

An industry leader in providing environmental site assessments located in Seattle, Washington has carefully analyzed the new rule and concluded that costs may increase by up to 50%. See Comments on Proposed Rule-All Appropriate Inquires, submitted by Geomatrix Consultants Inc. (Nov. 30, 2004).

ICF's Economic Impact Analysis chose to disregard a survey of five hundred environmental consultants in nine cities that concluded that cost of the new rule would raise the cost of a phase 1 by at least 10%. See EDR Business Information Services, Environmental Site Assessment Report (July 7, 2004). Even this figure is very low but it is almost five times ICF's estimate and throws off all of ICF's other economic calculations.

The Economic Impact Analysis does not account for many cost impacts that will be associated with the new rule. It does not allow any time or cost for the conduct of an appraisal or market valuation analysis. It only allows a modicum of time for the environmental professional's consideration of the market analysis. This market valuation requirement is new. It is not currently performed and its added cost should be included in any valid economic impact analysis. Because purchasers will be conducting All Appropriate Inquiry in order to gain liability protection, we do not believe they will leave themselves exposed by electing not to conduct a market valuation or by not requiring the environmental professional to consider it. Yet ICF includes time for the environmental professional to consider the valuation in only 15% of cases.

The depth of review and number of historical sources that must be reviewed under the new rule are both greatly increased, but ICF allows no additional time. There is also no additional time allotted for the expanded review of local government records, nor is any additional time allowed for the expanded adjoining property analysis.

We also believe that the increased number and scope of tasks required, combined with the performance based approach, will increase the time required to complete All Appropriate Inquiry. We think that it will not be possible in many real estate transactions to comply with the new rule under the time constraints imposed by purchase and sale closing deadlines. We think the time factor makes the new rule impracticable.

We believe meaningful public comment on the proposed rule is not possible until a realistic Economic Impact Analysis is prepared. We request that EPA consider our comments and the comments of others regarding the cost impact and use the information in these comments to commission a new Economic Impact Analysis that realistically assesses the new rule. We believe you will find that the overwhelming, if not unanimous, opinion is that ICF's analysis does not provide meaningful information. We request that public comment be extended or reopened to allow public consideration of the new Economic Impact Analysis before any final decision is made.

Response:
EPA thanks the commenters on their position on the burden under the proposed AAI requirements. To address the commenters' concern that the EDR survey results may be more reliable than the estimates presented in the EIA, the Agency conducted a sensitivity analysis in the addendum to the EIA. We show that the final rule would not have annual impacts to the economy in excess of the $100 million threshold set for major rules even if the final rule increased the average cost per Phase I ESA by an amount close to the EDR survey respondents' estimate.

The final rule does not require that a real estate appraisal be conducted to achieve compliance with this criterion. Although some commenters requested that the final rule require that a formal appraisal be conducted and we acknowledge that there may be potential value in conducting an appraisal, we determined that a formal appraisal is not necessary for the prospective landowner or grantee to make a general determination of whether the price paid for a property reflects its fair market value. In the case of many property transactions, a formal appraisal may be conducted for other purposes (*e.g.,* to establish the value of the property for the purposes of establishing the conditions of a mortgage or to provide information of relevance where a windfall lien may be filed). In cases where the results of a formal property appraisal are available, the appraisal results may serve as an excellent source of information on the fair market value of the property.

In cases where the results of a formal appraisal are not available, the determination of fair market value 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 generally is reflective of its fair market value. Significant differences in the purchase price and fair market value of a property should be noted and the reasons for any differences also should be noted.

In the EIA for the proposed rule, EPA assumed that a more extensive search would not be required under the rule to document the reasons for discrepancies between the purchase price and the fair market value of a property (assuming it were not contaminated) than what is currently required under the ASTM E1527-2000 standard. The EIA did incorporate an incremental labor hour burden in the cost analysis for the rule for the environmental professional to document the results of an inquiry into the relationship of the purchase price to the fair market value of the property. The EIA assumed, however, that this requirement would impact only a fraction of the total number of properties assessed annually.

With respect to the requirements to review historical sources of information, the final rule does not require any additional historical sources to be reviewed that are not already within the realm of sources consulted under the ASTM E1527-2000 standard.

With respect to the adjoining property analysis, the EIA underestimated the incremental cost associated with the proposed requirement to search for institutional controls. The proposed rule extended the search for institutional controls to a one-half mile radius of the subject property while the search requirement under the ASTM E1527-2000 standard is limited to the subject property. Had the EIA properly accounted for the extended scope of the search requirement for institutional controls under the proposed rule, the estimated average incremental cost per Phase I ESA would have been higher than $47. EPA, however, has revised the search requirement for institutional controls in the final rule by limiting the search to the subject property. Therefore, the EIA does not need to be revised to account for additional incremental costs associated with the search for institutional controls.

Although EPA received comments that raised issues relative to the assumptions and results presented in the EIA conducted for the proposed rule, very few commenters provided data or documentation to support their claims. We did conduct a sensitivity analysis using the limited information provided from the results of the EDR customer survey. In addition, EPA received a significant number of comments from parties who conduct environmental site assessments stating that they generally agreed with the results of our cost analysis. Therefore, EPA did not develop a new or additional cost analysis or re-open the public comment period.

Commenter Organization Name: NPCA
Comment Number: 0403
Excerpt Number: 15
Excerpt Text:
EPA estimates that the average incremental cost relative to Phase I ESAs under the ASTM El 527-2000 of the new standards will be $41 to S47 dollars. NPCA strongly disagrees with this assertion. As outlined above the additional expenses related to the much expanded and prolonged title and record searches, the real possibility that sampling, testing and analysis will have to take place and the need to continually update much of the information within the time periods specified, will greatly increase the cost under the new AAIs above traditional Phase I ESAs. In addition, NPCA reiterates that the added cost of hiring an environmental professional, as defined in the Proposed Rule, alone will greatly increase price of Phase 1 ESAs under the proposed AAIs.

Response:
With respect to the title and historical records search, the final rule does not require any additional sources to be reviewed that are not already within the realm of sources required to be considered under the ASTM E1527-2000 standard. EPA revised the search requirement for institutional controls that was included in the proposed rule. In the final rule, the required search for institutional controls is limited to the subject property. Therefore, the search requirement in the final rule is the same as required under the ASTM E1527-2000 standard.

With respect to shelf-life of ESA reports, EPA clarified the regulatory language in the final rule to allow for the use of information contained in previously conducted assessments, even if the information was collected more than a year prior to the purchase date of the subject property. However, most aspects of a site assessment completed more than 180 days prior to the date of acquisition of the subject property must be updated to reflect current conditions and current property-specific information. This requirement may result in the redoing of a small fraction of Phase I ESAs. Because the rule allows for the use of previously collected information, the cost of re-doing a Phase I ESA should be lower, on average, than the cost of the conducting an initial Phase I ESA. The shelf-life requirement, therefore, would not increase the average cost of Phase I ESAs.

The final rule does not require that sampling and analysis be conducted as part of all appropriate inquiries.

In response to many comments EPA received on the proposed definition of environmental professional, EPA modified the definition in the final rule to allow persons who have 10 years of full-time relevant experience, but do not have a Baccalaureate degree, to qualify as environmental professionals. The definition in the final rule is less stringent than the definition in the proposed rule and allows for most people currently conducting Phase I environmental site assessments to qualify as environmental professionals.

Commenter Organization Name: CCLR
Comment Number: 0415
Excerpt Number: 5
Excerpt Text:
CCLR has carefully reviewed the Economic Impact Analysis (EIA) prepared by ICF Consulting, and have discussed its contents with numerous environmental professionals and community developers. We also had an opportunity to discuss the cost impact of the proposed rule with participants at the St. Louis 2004 Brownfields Conference. The consensus is that the EIA does not accurately reflect the additional cost and time that will be involved in conducting All Appropriate Inquiry according to the proposed rule.

In our discussions with environmental professionals, we have found a consistent opinion that existing phase I costs in California under ASTM E1527 vary between $3,000 and $5,000, and that under the proposed rule, these costs will increase to a range of $5,000 to $10,000. Given the open-ended nature of the new performance based approach and lack of actual experience with the new

rule, we believe the holistic estimates provided by seasoned front line phase I providers offer a more accurate estimate than the EIA provides.

The EIA contains carefully drawn paragraphs and box charts that attempt to analyze tasks required in the preparation of a phase I report down to the fraction of an hour. However, as it is based on the following assumptions: 1) there is not much that was not already required by ASTM E1527; 2) the tasks required have definite boundaries; and 3) the new rule will increase certainty; it is our opinion that the EIA does not accurately reflect the additional cost and time inherent in the proposed rule. These issues are discussed below.

-Concern 1: The EIA assumes many tasks are not new

--The EIA assumes that the valuation analysis is already routinely prepared and will involve no new costs. Although The EIA allows some time for the environmental professional to consider the valuation analysis, it does not allow any cost for a real estate expert or appraiser to prepare the analysis because it believes a valuation analysis already exists. This is an inaccurate assumption, and contradicts EPA's rejection of ASTM E1527 on grounds that it does not require a valuation analysis. In the hundreds of phase I reports we have reviewed, we have never seen a valuation analysis. The EIA also assumes that environmental professionals will have to take time to consider valuation analyses in only 15% of the cases. Every brownfield redeveloper we have spoken with claims that it will be absolutely necessary to conduct a valuation analysis in every transaction, because failure to do so would expose them to plaintiff's claims that purchase price should have alerted them to contamination. Plaintiffs will hire appraisers to make their point in court so community developers will have to hire appraisers as a part of their 'defensive phase I." The appraisal will be transmitted to the environmental professional because it is required by the new rule. And the new rule requires the environmental professional to consider it. EPA should add the cost of the appraisal and allow time for the environmental professional to consider it in 100% of transactions.

--The EIA also allows no additional time or cost for review of historical sources under the new rule. Yet EPA concludes that ASTM E1527 isn't thorough enough in its requirements for historical source review. Under the new rule all uses and occupancies, not just obvious ones, must be identified. If there is a difference between all uses and only obvious uses, there must be more time involved in finding all uses instead of just obvious ones. The new rule also greatly expands the universe of information that must be searched.

--The EIA allows no extra cost for more frequent sampling and analysis. The performance based approach requires the environmental professional to keep looking until answers are found. In many cases this will require sampling and analysis. ASTM E1527 requires the environmental professional to consult enumerated sources and report on what is found. This does not produce the need to use the sampling and analysis process to produce answers. The EIA estimates that the additional cost of limited sampling is $1439. Based on our experience with phase I assessments as they are currently conducted and familiarity with many transactions, and our interviews with brownfield redevelopers who have reviewed the proposed rule, we estimate that sampling and analysis will be triggered by the new rule in 50% of transactions. We recommend that EPA add at least $700 in average transaction costs for this item.

--The EIA allows no extra cost for review of local government records. Section 312.26 of the proposed rule states that "local government records. . . must be reviewed," and represents an expanded scope and liability exposure because it, too, is "performance based." The point of this performance based approach is to make it more thorough and searching than ASTM's checklist approach, however, no additional time was allotted to the estimate.

--The EIA allows no time for the new "adjoining and nearby" property analysis. This is a sweeping new requirement, and an appropriate average time should be allotted for this.

-Concern 2: The EIA treats performance based tasks as if they have definite boundaries

--The EIA presents charts with precise hour estimates even though it is not clear that anyone with industry experience conducted a test of the new tasks under the performance based approach. A representative set of phase I reports under the new rule and under the old rule to provide the actual time spent along with the reports produced would be of great assistance. This would allow for meaningful public comment by brownfield redevelopers on how much time is really needed to produce a "performance based" phase I that truly lessens their fear of CERCLA liability, as Congress intended. The assumptions in the EIA unfortunately provide little real-world information. The EIA cannot know how long it will take to keep going until the answers are found in a way that reduces the potential for a plaintiff's criticism on the phase I. And there is no meaningful way to judge this question until qualified lawyers have the opportunity to have input into the cost estimate process by gauging the re[orts that are produced. The EIA's presentation unfortunately does not contain sufficient research to provide a realistic basis for evaluating what is actually involved in the new rule.

-Concern 3: The EIA makes an assumption that the new rule produces certainty

--The EIA assumes without discussion or supporting documentation, that the new rule will provide more certainty for brownfield redevelopers.

Lastly, the EIA does not include the impact of the increased time involved in tracking down many new sources of information and continuing performance based searches until definitive conclusions are reached. The increased time involved in sampling and analysis is also not included in the estimates. Based on our experience, we believe that the new rule could potentially add weeks to the time required to complete a phase I on average, and in some cases will extend the time to an extent that will make it impossible to complete the phase I on schedule to meet closing deadlines.

The increased time involved in the performance based approach will reduce the possibility of successfully conducting the required research within impending deadlines of escrow, financing, government permitting, and the business needs of buyers and sellers.

In many cases, it will probably be impossible to complete the phase I within the standard 30 day closing period of commercial real estate transactions. Unless the rules can be modified to meet this standard business practice, the performance based rules will not support successful transactions.

Response:
With respect to the requirement that the environmental professional consider whether or not the property's purchase price reflects the fair market value of the property (assuming the property is not contaminated), we disagree with the commenter's assertion that the requirements of the final rule will significantly impact the cost of conducting Phase I ESAs. To comply with the provisions of the final rule, a prospective property owner does not have to conduct a formal appraisal of the property. A formal appraisal is not necessary for the purchaser to make a general determination of whether the price paid for a property reasonably reflects its fair market value. Additionally, the requirement to consider the relationship between the purchase price and the fair market value of a property, if the property were not contaminated, is not a new or incremental requirement imposed by the final rule. This provision has been part of the requirements for conducting all appropriate inquiries since CERCLA was amended to include the innocent landowner provisions in 1986. Therefore, the economic impact analysis includes no additional costs for complying with this provision.

The commenter claims that Phase I ESA reports typically do not include property valuation analyses. This observation is consistent with the Agency's understanding of the requirements of the ASTM E1527-2000 standard; unlike the final rule, the ASTM E1527-2000 standard does not require the environmental professional to document any information about the relationship between purchase price and the fair market value of the property in the ESA report. The documentation requirement is new to the final rule and costs associated with the documentation requirement have been accounted for into the EIA for the final rule.

The commenters failed to recognize that the final rule requires that the environmental professional document the inquiries about the property's purchase price only in those cases in which the prospective purchaser found that the purchase price is significantly different from the fair market value of the property (if it were not contaminated). It is not reasonable to assume, as the commenters have suggested, that this requirement would impact 100 percent of transactions.

With respect to historical sources review, the final rule does not require any additional historical sources be reviewed that are not already within the realm of sources required to be consulted by the ASTM E1527-2000 standard.

The final rule does not require that sampling and analysis be conducted to comply with the all appropriate inquiries requirements. Therefore, no incremental costs to conduct such activities were included in the economic impact analysis.

With respect to review of local government records, the final rule requires that local government records be reviewed to the extent necessary to achieve the objectives and performance factors specified under the rule. While the current ASTM E1527-2000 standard does not specifically require the review of local records, it does state under *7.2.2 Additional Environmental Record Sources: State or Local* that "*[o]*ne or more additional state sources or local sources of environmental records may be checked, in the discretion of the environmental professional, to enhance and supplement federal and state sources identified above." In practice, a properly performed ASTM Phase I ESA (which is the assumed baseline approach for the EIA) typically includes a review of at least some local records (either as part of or in conjunction with

interviewing local government officials and reviewing local historical sources). Therefore, in conducting the EIA, EPA assumed a similar level of effort would be conducted to comply with the final rule as is currently undertaken when conducting an environmental site assessment in compliance with the ASTM E1527-2000 standard.

With respect to analyses of conditions of "adjoining and nearby" properties, the final rule does not require any additional investigations that are not already within the scope of the ASTM E1527-2000 standard. Sections 8.4.1.3, 8.4.1.4, and 8.4.1.5 of the ASTM E1527-2000 standard require that an evaluation and documentation (in the ESA report) of the current uses of adjoining properties, past uses of adjoining properties, and current or past uses in the surrounding area be performed to the extent that the uses are visually and/or physically observed on the site visit, or are identified in the interviews or record review.

With respect to the commenter's remarks on the EIA methodology and a need for an input from lawyers (concern 2), the FACA Committee members, including individuals with a background in law, were provided with opportunities to review and comment on the EIA methodology.

We disagree with the commenter that the Agency did not discuss the benefits under the rule. The benefits of the final rule were discussed in the EIA, at Chapter 6.

With respect to the commenter's concerns regarding the Agency's statements that the final rule will increase certainty, the Agency points out that the final rule establishes certainty with regard to what a prospective property owner must do to comply with the statutory requirements relative to conducting all appropriate inquiries. The promulgation of a final rule will establish federal standards that are easily accessible. In addition, the final rule and preamble provide the public with guidance regarding EPA's interpretation of the statutory criteria for conducting all appropriate inquiries.

Certainty with regard to CERCLA liability is beyond the provisions of the final all appropriate inquiries rule. All appropriate inquiries are only one of many criteria imposed by the statute to obtain protection from CERCLA liability. Property owners must comply with all statutory criteria to obtain liability protection.

Commenter Organization Name: Dismukes, James
Comment Number: 0416
Excerpt Number: 4
Other Sections: NEW - 3.5.2.1 - Search distance for institutional and engineering controls
Excerpt Text:
Review of Industrial Controls within ½ mile of the property is a considerable expansion of the effort beyond the current industry practice that significantly increases costs without yielding information useful to the process. IC's are very specific to the properties they affect. The most common form of an institutional control is a risk based closure that allows for residual contamination to remain on site given the current site specific property use. In many areas these IC are plentiful, particularly with respect to leaking underground storage tanks. Requiring review of

every site specific IC identified within ½ mile is overly burdensome, the cost of which is not factored into the economic analysis. It is recommended that the requirement be limited to searching for IC on the subject site and the adjoining properties.

Response:
EPA agrees with the commenter that searching for institutional controls associated with properties located within a half mile of the subject property is overly burdensome. The final rule requires that the search for institutional controls be confined to the subject property only and, thus, does not differ from the current industry practice.

Commenter Organization Name: Tryon, Bill
Comment Number: 0418
Excerpt Number: 6
Other Sections: NEW - 3.13.4 - Shelf life should be extended beyond 180 days/one year
Excerpt Text:
Age of Due Diligence - The rule does not allow for the use of prior reports that are older than one year. Some industry publications have suggested that this means a Phase I ESA literally expires after one year and a completely new inquiry is required. The specified level of effort to be conducted within 6 months is precisely the scope of work that would need to be conducted if the report were six months old or six years old. The rule should 1) remove the one-year requirement, 2) specifically state that reports older than one year can be used, or 3) the economic analysis must account for the thousands of reports that will need to be re-created.

Response:
In the final rule, EPA clarified the regulatory language to allow for the use of information contained in previously conducted environmental site assessments, even if the information for the assessment was collected more than a year prior to the purchase date of the subject property. Information from previous ESA reports may be used. However, the final rule requires that most information be **updated** if the information was collected more than 180 days prior to the date of acquisition of the property. All appropriate inquiries investigations must include an assessment of the current conditions of a property, or the conditions of the property at the point in time that the property is acquired.

Commenter Organization Name: Tryon, Bill
Comment Number: 0418
Excerpt Number: 7
Other Sections: NEW - 3.5.2.1 - Search distance for institutional and engineering controls
Excerpt Text:
Institutional Controls - Review of ICs identified within ½-mile of the property is a considerable expansion of effort beyond the current industry practice that significantly increases costs without yielding information useful to the process. ICs are very specific to the properties they affect. The most common form of an institutional control is a risk-based closure that allows for residual contamination to remain on site given a current site-specific property use. In a highly industrialized

area, these ICs are plentiful, particularly with respect to leaking USTs. Requiring the environmental professional to review every site-specific IC identified within ½-mile is overly burdensome, the cost of which is not factored into the economic analysis. I recommend that the requirement be limited to searching for ICs on the subject site and adjoining properties.

Response:
EPA agrees with the commenter that searching for institutional controls associated with properties located within a half mile of the subject property is overly burdensome. The final rule requires that the search for institutional controls be confined to the subject property only and, thus, does not differ from the current industry practice.

Commenter Organization Name: Westward Environmental
Comment Number: 0429
Excerpt Number: 6
Excerpt Text:
Regarding the heading of Summary of Regulatory Costs on page 52571 of the proposed rule:

-it states "…the average incremental cost of the proposed rule relative to…is estimated to be between $41 and $47."

-This incremental cost estimate is less than one half-hour of time from a typical environmental professional fee schedule. Although many similarities exist between the proposed rule and ASTM E1527, just becoming aware of the differences will far exceed the estimated incremental cost difference.

-As noted in the Requirements for Public Comments on page 52568 of the proposed rule, the EPA is requesting comments on at least 23 topics in the proposed rule. This request suggests that something more or different in these 23 topics than what is currently suggested in ASTM E1527. Just assuming a minimum of one half-hour is required to adequately address each topic (which we believe is a very conservative estimate) and an average environmental professional fee of $75/hour, this would result in an additional cost of $ 862.50.

Response:
The cost of becoming familiar with the final rule would be a one-time cost for environmental professionals. The environmental professionals would likely pass some or all of that cost onto their customers. The more Phase I ESAs an environmental professional performs, all other things equal, the lower would be the average cost per Phase I ESA passed through by that environmental professional. Therefore, we expect that this one-time activity would have a negligible impact on the average cost of Phase I ESAs. Further, once the final rule is promulgated, the new environmental professionals' education/training would be based on the final rule's requirements.

EPA requested public comments on the standards and practices included as part of the proposed rule. The list of topics included in the Federal Register was intended to aid the public in commenting on the proposed rule and was not suggestive of the activities or tasks in which the proposed rule differed from the current ASTM E1527-2000 standard.

Commenter Organization Name: Geomatrix Consultants
Comment Number: 0433
Excerpt Number: 6
Excerpt Text:
The EPA's Economic Impact Analysis for the proposed AAI rules state that the average incremental cost for an AAI-compliant ESA versus an ASTM-compliant ESA would increase up to $47 per assessment. We believe the average incremental costs would be much more than that amount. As discussed above, greater costs will be incurred during an AAI-compliant ESA for (1) the expanded research requirements (review of government records and historic sources), (2) the need for additional interviews (especially tracking down neighboring property owners), (3) the requirement for written justification of the environmental professional's interpretation of the rules (professional discretion), and, perhaps, (4) liability insurance premiums. We estimate that the costs for an AAI-compliant ESA may be as much as 50% greater than for an ASTM-compliant ESA.

Additional costs for the prospective buyer include the need to obtain a full chain-of-title to search for possible environmental cleanup liens. The costs for a full chain-of-title may run several hundred dollars and should be included in the economic impact analysis for the proposed AAI rules.

Response:
With respect to historical sources review, the final rule does not require any additional sources to be reviewed that are not already within the realm of sources required to be consulted under the ASTM E1527-2000 standard.

With respect to governmental records review, we recognize that the proposed rule did extend the search for institutional controls to a one-half mile radius of the subject property while the search requirement under the current ASTM E1527-2000 standard is limited to the subject property. EPA, however, has revised the requirement to search for institutional controls in the final rule by limiting the search to the subject property.

The final rule does not explicitly require interviews with past owners and occupants, but provides that the environmental professional include interviews of past owners, operators, or occupants as necessary to meet the proposed objectives and in accordance with the proposed performance factors. EPA recognizes that locating past owners and occupants may be more time consuming than originally assumed in the EIA developed for the proposed rule. Therefore, we revised the cost estimates in the EIA to account for the incremental burden associated with locating and interviewing past owners and occupants of the subject property. The revised cost estimates are provided in the addendum to the EIA, which is included in the public docket for the final rule.

We disagree with the commenter’s assertion that the requirement to locate neighboring property owners will impose a significant burden under the final rule. Neighboring property owners will need to be interviewed only if the subject property is abandoned. Although the current ASTM E1527-2000 standard does not have explicit requirements for abandoned properties, it is reasonable to assume that the environmental professional would try to locate past owners and occupants of

such properties. In most cases, locating neighboring property owners should be less time consuming then locating the past owners and occupants of the subject property.

With respect to the environmental professional signature requirements, the final rule requires that the written report include two signed declarations by the environmental professional. One declaration must state that the environmental professional meets the professional criteria as defined by the final rule under §312.10. The second required declaration must state that all appropriate inquiries investigation was conducted in accordance with the requirements of the final rule. We disagree with the commenter's suggestion that these declaration requirements will lead to an increase in the cost of conducting a Phase I ESA. The requirements are not significantly different from what is required under the ASTM E1527-2000 standard.

With respect to the comment regarding liability insurance, it is not clear that the insurance industry will react to the final rule as the commenter indicates. It is also possible, for example, that insurance companies will cut premiums for all policies that might be affected by CERCLA as a result of additional liability protection the statute offers to prospective purchasers who follow the standards of the final rule.

With respect to the requirement to search for environmental cleanup liens, we disagree with the commenter that this requirement imposes an incremental burden on a property purchaser. Under the current ASTM E1527 standard, it is the prospective property owner's responsibility to search for environmental liens that are currently recorded against the subject property, and to report these to the environmental professional conducting the Phase I ESA. The requirements in the final rule are no different; therefore, there will be no incremental cost (labor or expenses) incurred under the final rule. Thus, even if the cost of a title search is explicitly accounted for under the base case and under the final rule, the average incremental cost per transaction would stay unchanged.

Commenter Organization Name: Hearn, J Clark
Comment Number: 0434
Excerpt Number: 1
Excerpt Text:
At issue herein are selected cost factors as evaluated in the "Economic Impact Analysis for the Proposed All Appropriate inquiries Regulation as prepared by ICF Consulting and dated August 3, 2004. This document renders a bottom line determination of an expected increase in Phase I costs to the marketplace as being less than $50 per report. It is the unanimous opinion in our office that this result is not only invalid but that the formulations on which it is based are also fundamentally flawed.

A recently conducted survey by Environmental Data Resources, Inc. addressed the anticipated cost impacts of the EPA AAI proposed rules on Phase 1 assessments. The survey included more than 500 Phase I providers in nine U.S. cities. The majority of respondents (or 60%) anticipate cost increases of more than 10%, with 16% predicting increases of more than 20%. A companion survey also indicated that most consultants in the private sector marketplace charge between $1,700 to $2,300 for a Phase 1 report, depending factors such as type of property and geographic area. The

anticipated cost increases relating to the proposed rules are obvious and substantial. The question arises, how can so many front line providers of Phase 1 reports be wrong. I submit that they are not. In my opinion the cost for a phase 1 will increase by at least 15 to 20% if the new rule goes into effect. Because the proposed rule is vague and untested it is hard to give an exact estimate, but I am confident it will be at least this much.

Response:
The Agency based its cost estimates on an evaluation of the differences between the proposed standards for the rule and the content of the ASTM E1527-2000 standard. EPA identified the technical differences between the proposed rule and the ASTM E1527-2000 standard and then estimated the costs associated with conducting those regulatory activities that represent tasks over and above those conducted in implementing the ASTM standard.

To address the commenter's concern that the EDR survey results may be more reliable than the estimates presented in the EIA, the Agency conducted a sensitivity analysis using the alternative cost estimates and presents the results in an addendum to the EIA developed for the proposed rule. The addendum is available in the public docket for the final rule. Our sensitivity analysis shows that the final rule would not have annual incremental cost impacts in excess of the $100 million threshold set for significant regulatory actions even if the average incremental costs per Phase I ESA were of the magnitude suggested by the EDR survey respondents.

Commenter Organization Name: Hearn, J Clark
Comment Number: 0434
Excerpt Number: 2
Excerpt Text:
As the table acknowledges, "All" property types will affect, however, no incremental increase in labor costs is expected. This is because ICF states that the proposed rule does not require any more review of these record sources than current ASTM practice. This assumption is incorrect. ASTM E1527 limits records reviews to standard enumerated sources. The new rule, on the other hand, requires a "performance based" review that is essentially open ended. The new rule will require searching substantially more records and will take many additional hours. Once again, using Environmental Data Resources as a reference, their website presently posts that in response to the AAI proposed rules that they have "added 475 new databases and counting" so as to assist their clientele in dealing with the upcoming AAI rules. While we cannot give an exact number, it is reasonable to assume that a significant number of additional database records will be added. The resulting bottom line labor costs impacts are related to the significantly increased labor time in the review, and more importantly the evaluation of the additional information. Additionally, the new source research item must be added to the resulting due diligence report along with the written evaluation of the result.

Sec. 312.29, Commonly Known or Reasonably Ascertainable Information About the Property

What information is commonly known and who commonly knows it? The environmental professional may refer to one or more of four listed sources of information. At such time that this rule is eventually sorted out in the courts, will only one of the four be enough? This question begs

specific resolve now rather than later because of the liability issues. Was the information reasonably obtainable? This is extremely arbitrary. The performance based approach of the new rule will, however, force environmental consultants to spend many hours researching the commonly known category newly created by this rule. ICF assumes that this category is already included in searches conducted pursuant to ASTM E1527 and allocates no additional cost. This is incorrect. ASTM E1527-00 § 7.1.4; and 7.3.2.3 fulfill the requirements of CERCLA and strictly limit the application of commonly known or reasonably ascertainable information to specifically enumerated sources. The new rule requires consultants to conduct an open-ended search throughout the local community.

Even the sources have fundamental flaws in being obtainable or practical. Source (1) Current owners or occupants of neighboring properties who may have knowledge of, or, information related to the subject property - Problem: in a private sector transaction, the existence of the transaction itself, particularly in the early stages, is confidential in nature. Source (2) Local and State government officials who may have knowledge of, or, information related to the subject property - Problem: Fire Marshals and other such individuals in local government departments have their own responsibilities and are spread thin due to inadequate staffing. Thusly, these resources are not practical or readily ascertainable, but would the courts see it in the light of such practical reality? Source (3) Others with knowledge of the subject property - Problem: who are others and will the courts decide. Source (4) Other sources of information, eg. newspapers, websites, community organizations, local libraries and historical societies, Problem: also concerns me from a liability perspective. Does a Google search turn something up? Does the librarian know something that the other librarian doesn't?

The above paragraph references some of the practical considerations and liability issues but the economic dynamic remains. What are the cost dynamics of discovering this "commonly known and reasonably ascertainable information?" Exhibit 7-7 indicates that no price increase will occur. ICF's conclusion is based on invalid assumptions and is erroneous.

Response:
With respect to historical sources review, the final rule does not require any additional historical sources to be reviewed that are not already within the realm of sources required to be consulted by the ASTM E1527-2000 standard. With respect to governmental records, the final rule does explicitly require review of tribal records. EPA, however, clarified in the preamble to the final rule that tribal records need only be searched for and reviewed in those instances where the subject property is located on or near tribal-owned lands. When such records are not available, necessary information should be sought from other sources. The EIA assumed that this requirement would be fulfilled to the extent that tribal records are easily available, through, for example, the EDR database. If such records are not available, it is likely that the environmental professional would attempt to obtain the relevant information during the interview process, and therefore there would be no incremental cost associated with the requirement.

The final rule requires environmental professionals to supplement the searches and reviews of historical and governmental records with commonly known or reasonably ascertainable information about the subject property. This requirement was included in the previous provisions for the CERCLA innocent landowner defense and, therefore, is not an incremental burden imposed by the

final rule. The sources of information listed in the final rule are provided as examples only. There may be additional, or better, sources of commonly known information. Many sources of information may be reasonably attainable.

Commenter Organization Name: Hearn, J Clark
Comment Number: 0434
Excerpt Number: 3
Other Sections: NEW - 3.8.1 - The environmental professional should not be required to consider the relationship of the purchase price to the value of the property
Excerpt Text:
Although the proposed rule apparently envisions that the valuation analysis will be conducted by the purchaser rather than the environmental professional, it also requires the report of the environmental professional to take into account this information. The Environmental professional simply has no business in this part of a real estate transaction. In the private sector, the purchase price of a property is confidential to the buying and selling parties involved in the transaction. The third party vendors are not commonly privy to this information and are not expected to ask. If I were to make common practice of asking my clients about the financial specifics of their deal, they would tell me that it is none of my business, and they would be right. Private sector transactions as they are being conducted are just that, private.

In any event, the ICF analysis includes a modicum of time for the environmental professional to consider this market value information, but no time or cost allocation for the purchaser to conduct the market value analysis. The actual conduct of the market valuation will definitely have some cost. If the environmental professional were to be responsible for considering this information (which I oppose) it would surely take longer than the half hour allotted by ICF and would surely come into play in virtually all transactions because the purchaser would conduct a defensive appraisal for fear of liability exposure.

Beyond this, an environmental professional is not in an informed position to be able to "take into account" such comparable price analyses of multiple parcels of real estate in an area and draw an experienced conclusion regarding purchase price. But that is what proposed section 312.21(b) would require. This is a separate industry altogether. I urge that this proposed section 3.12.29 be removed.

Response:
EPA disagrees with the commenter that the requirement to consider the relationship between the purchase price and the fair market value of the property (if it were not contaminated) will significantly impact the costs of conducting Phase I ESAs. The final rule does not require that a formal real estate appraisal be conducted. In addition, this requirement has been part of the all appropriate inquiries requirements since Congress amended CERCLA to provide for the innocent landowner defense in 1986. The requirement in the final rule includes no changes to the previous requirement. Therefore, the EIA only accounts for some incremental labor hour burden for the environmental professional to document the results of an inquiry into the relationship of the purchase price to the value of the property. This requirement, however, is expected to impact only

a fraction of the properties (i.e., those where there are significant differences between the purchase price and the fair market value of the property).

With respect to the commenter's request that the requirement under §312.29 be removed from the rule, the Agency notes that this requirement is one of the ten statutory criteria specifically required by Congress to be included in the final regulation. In addition, this requirement has been part of the all appropriate inquiries provisions under the CERCLA innocent landowner defense since 1986. Therefore, the Agency did not make any modification to this requirement in the final rule.

Commenter Organization Name: Hearn, J Clark
Comment Number: 0434
Excerpt Number: 4
Other Sections: NEW - 6.6 - Impact of the rule on the cost of liability insurance
Excerpt Text:
In addition to the sections discussed above, the interviews, historical sources, and lien search provisions of the new rule all add substantial cost and uncertainty to the conduct of a phase 1 site assessment.

The ASTM -1527 protocol serves the private sector efficiently from both the performance and cost perspectives. The proposed AAI rules essentially forces a public sector approach to real estate transactions on a private sector marketplace that operates under strict time and cost constraints. Nonetheless, the overall time and cost ramifications on the private sector marketplace have not been been credibly addressed by ICF in the document issued for the EPA. The zero time and related cost allowances put forth by ICF not only ignore the obvious labor cost burdens but also the related abstract costs such as increased professional liability premiums, more conducted Phase II's to close data gaps, and fewer providers in the marketplace as a result of the proposed stringent Environmental professional qualifications.

ICF's determinations are arbitrary in nature and may well be based on arbitrarily established foundations. Such arbitrary foundations were voiced by EPA representatives at an AAI workshop held as part of ASTM's meeting in Washington DC on October 5, 2004, "ICF's baseline was E 1527, but that's not being met right now by many poor-quality consultants. If the industry was truly following ASTM, the impact wouldn't be as great. Many are claiming their Phase Is are ASTM-compliant when in fact they're falling short of the bar." Seems to be a perception among committee members and EPA players here that if you're doing good work now, then there's not a whole lot that's changing.

The base line is, in fact, that the private sector market place is functioning well under E 1527 and that most consultants are doing their jobs in compliance with the protocol. The new rule simply adds a significant amount of work that is not required by current industry practice. The proposed AAI rules significantly expand consultant liability exposure, which will result in higher errors and omissions insurance premiums. The new rule will increase labor costs and associated time dynamics of the due diligence process. In many instances it may be impossible to comply with the new rule within the timeframe that the marketplace allows for closing commercial real estate transactions.

Response:
The Agency based its cost estimates on an evaluation of the differences between the proposed standards for the rule and the content of the ASTM E1527-2000 standard. EPA identified the technical differences between the proposed rule and the ASTM E1527-2000 standard and then estimated the costs associated with conducting those regulatory activities that represent tasks over and above those conducted in implementing the ASTM standard.

With respect to the commenter's remark regarding the incremental burden, the commenter failed to recognize that the EIA includes estimates of incremental burden hours for a number of the new requirements included in the proposed and final rules.

With respect to the commenter's remark regarding liability insurance, it is not clear that the insurance industry would react to the final rule as the commenter indicates. It is also possible, for example, that insurance companies will cut premiums for all policies that might be affected by CERCLA as a result of additional liability protection the statute offer to prospective landowners who comply with the provisions of the final rule.

With respect to the commenter's remark regarding the proposed definition of environmental professional, EPA has modified the definition in the final rule to provide for persons who have 10 years of full-time relevant experience, but do not have a Baccalaureate degree, to qualify as environmental professionals. The definition in the final rule is less stringent than the definition included in the proposed rule and allows for most people currently conducting environmental site assessments to qualify as environmental professionals.

Commenter Organization Name: Wike, Dennis
Comment Number: PM-0127-0003
Excerpt Number: 2
Excerpt Text:
My one question I saw in here is the issue of the proposed cost. Help me if I'm wrong, but is that proposed in there that they think it will only cause a $46 increase to go from a Phase I today to the all appropriate inquiries?

If that's correct, I would disagree with that. I think you'll see a several hundred dollar increase per Phase I. I believe the product to be substantially better and I believe the qualifications of those conducting it will be substantially better, and I think you will do the general industry a great service by keeping those standards in there and requiring that the professionals that do this demonstrate that they are professionals.

Response:
EPA thanks the commenter for the stated support of the provisions of the final rule.

The Agency based its cost estimates on an evaluation of the differences between the proposed standards for the rule and the content of the ASTM E1527-2000 standard. EPA identified the technical differences between the proposed rule and the ASTM E1527-2000 standard and then

estimated the costs associated with conducting those regulatory activities that represent tasks over and above those conducted in implementing the ASTM standard.

To address public comments regarding the potential cost impacts of the final rule, EPA conducted a sensitivity analysis in the addendum to the EIA. The analysis shows that the final rule will not have annual impacts in excess of the $100 million threshold set for major rules even if the incremental costs per Phase I ESA increases, on average, by $200.

Commenter Organization Name: Dismukes, James
Comment Number: PM-0127-0012
Excerpt Number: 3
Excerpt Text:
The third issue, on cost, I think it's a little off base. The requirement of checking the environmental liens itself is about a $250 process on average, to hire someone qualified to go down to a court house to run the records and pull these liens out. That in itself would add in round numbers, $250 to the price of a Phase I report.

Response:
EPA thanks the commenter for his suggestion. Under the ASTM E 1527-2000, it is the prospective property owner's, or the user's, responsibility to check for environmental liens that are currently recorded against the subject property, and to report these to the environmental professional conducting the Phase I ESA. The final rule does not impose any different requirements than the current ASTM standard; therefore, there would be no incremental cost (labor or expenses) incurred under the final rule. Even if the cost of a title search is explicitly accounted for under the base case (the ASTM E1527-2000 standard) and under the final rule, the average incremental cost per transaction would stay unchanged.

Commenter Organization Name: Rose and Westra
Comment Number: 0320
Excerpt Number: 17
Other Sections: MODIFIED - 3.5.2.1 - Search distance for institutional and engineering controls
Excerpt Text:
The requirement of §312.26 to search registries or publicly available information for brownfield sites, engineering controls, and institutional controls is simply not feasible. Such records are typically kept in a property-by-property basis, e.g., recorded in title records for each property. Surely, Congress did not intend searching title records for every parcel of real estate within one-half mile for each proposed transaction. Similarly, the Economic Impact Analysis did not include any costs to address these requirements that are above the current E 1527-00 practice. Therefore, the Analysis understates the impact of this Proposed Rule.

Response:
EPA thanks the commenters for their concern regarding the cost burden associated with the proposed rule under §312.26. EPA agrees with the commenter that the EIA underestimated the

incremental labor hours required to conduct the search for institutional controls, as required under the proposed rule. EPA, however, revised the search requirement for institutional controls in the final rule by limiting the search for institutional controls to the subject property. The EIA, therefore, does not need to be revised.

4.2 The Volume of Phase I ESAs Performed Using the AAI Standard is Overestimated/Underestimated

Commenter Organization Name: Morris, Michael
Comment Number: 0114
Excerpt Number: 1
Excerpt Text:
Several assumptions were made regarding the frequency that the AAI protocol will be used. Although the AAI regulations will apply to most commercial property transactions, there will be a substantial number of assessments that will not fulfill all the criteria. Many of these incomplete assessments will be abbreviated at the request of the client to reduce the cost. Furthermore, because of the increased cost for an assessment, fewer assessments will be performed. This will be especially true in small brownfield type parcels where the assessment cost becomes a significant increase in the total cost of the transition.

Response:
EPA thanks the commenter on his concern regarding the number of affected properties. Because the final rule will increase the level of certainty regarding the criteria that must be met for a prospective property owner to obtaining protection from CERCLA liability, while imposing only minimal cost increases, we do not believe the rule will have a significant negative effect on the volume of Phase I ESAs conducted, as the commenter has indicated. We recognize, however, that there is a degree of uncertainty surrounding the number of prospective property owners who will be affected by the final rule. To the extent that the EIA overestimated the number of affected prospective property owners (or property transactions), as the commenter has suggested, the total cost of the final rule also is overestimated.

Commenter Organization Name: Worlund, John
Comment Number: 0256
Excerpt Number: 16
Excerpt Text:
The methodology used to estimate the cost and impacts of todays proposed rule, including the estimated incremental labor hours used to estimate the incremental cost of the proposed rule.

This estimate depends in large part upon assumptions about changes in practice from the Current ASTM 1527 and 1528. From my experience, while the stated purpose of conducting an ASTM Phase 1 or Transaction Screen is to satisfy one of the requirements for an innocent landowner defense, that is rarely the reason they are performed. This is important because the ASTM documents are primarily used as a screening document to identify environmental business risk. Individuals that were specifically concerned about ILD, especially on a complicated site would use a Phase 1 and not a Transaction Screen. I suppose one could argue that since the TS screen isn't commonly used for ILD there is no need to address it as a side by side comparison of cost. People are still free to use a Transaction Screen type document if they do not desire the LLP's. My guess is that industry will not adopt AAI as the only environmental due diligence process. This would reduce the estimated cost impacts.

Response:
EPA thanks the commenter on his suggestion on the volume of Phase I ESAs that may be conducted in compliance with the final rule. We agree with the commenter that there is a degree of uncertainty surrounding the number of affected parties or property transactions under the final rule. To the extent that the EIA overestimated the number of affected properties, as the commenter has suggested, the total cost of the final rule also is overestimated.

Commenter Organization Name: Tryon, Bill
Comment Number: 0418
Excerpt Number: 2
Excerpt Text:
Cost - While the cost of performing "phase I" investigations probably suffers little impact as a result of the proposed rule, the frequency of phase I investigations will likely increase as a result of elimination of transaction screens as a means of satisfying requirements for AAI. I do not believe that the increased frequency of phase I investigations was considered in evaluating the cost impact of this regulation. The economic analysis should be revised to reflect these additional costs. (Note that it is my understanding that elimination of the transaction screen stems from counsel's interpretation of the legislation, not conclusions of the FACA committee.)

Response:
The EIA did consider the increased frequency of Phase I ESAs and the potential decreased use of the transaction screen after promulgation of the final rule. Specifically, in the EIA, EPA assumed that properties transitioning from transaction screens to Phase I ESAs would account for three percent of the total Phase I ESAs performed annually.

4.3 The Impact of the Rule on State, Local, and Tribal Governments

Commenter Organization Name: Young,Richard
Comment Number: 0243
Excerpt Number: 10
Excerpt Text:
On a side note, this impact will also have a chilling effect on minority environmental business bids for government contracts. Government agencies will be forced to accept less minority environmental business and submit to engineering firm prices (reasonable or not).

These numbers are significant, and will receive negative impact from the regulation directly and indirectly. Using the calculation of total minorities in the non-engineering environmental profession, approximately $39,505,232,188 in wages will be lost or significantly impacted by the proposed regulation [Footnote: Average Hourly Earnings of Production and Non-Supervisory Workers, Database (Washington: Bureau of Labor Statistics, September 2004).]. The reason why these wages and jobs will be lost is the fact that engineers will receive a legalized monopoly by EPA for Brownfields assessments. Simply, put other non-engineering environmental professionals will either be absorbed into engineering firms for lower engineering technician wages or be driven to unemployment.

Ironically, the regulation will have a severe effect of non-engineering environmental professionals in states where USEPA has already piloted Brownfields programs such as Montana, Utah, and Colorado [Footnote: USEPA Region 8 Brownfields Assessment Pilots/Grants, Map (Washington: US Environmental Protection Agency, March 2004).]. Each of these states have moderate to high unemployment and have Brownfields programs [Footnote: US Unemployment Rates by State Map (Washington: Bureau of Labor Statistics, September 2004).].

It might be argued that this number is too high; however, it was calculated using minimum wage standards for all professions. In reality, this should be significantly higher based on average wages for environmental professionals and would probably enter the hundreds of billion of dollars in lost wages. Even at a fraction, the lost wages alone will indirectly have a significant impact on taxes and funding for future environmental programs.

Response:
In response to many comments EPA received on the proposed definition of environmental professional, EPA modified the definition in the final rule to provide for persons who have 10 years of full-time relevant experience in performing environmental site assessments, but do not have a Baccalaureate degree, to qualify as environmental professionals. The definition of environmental professional in the final rule is less stringent than the definition included in the proposed rule and allows for most people who currently are conducting environmental site investigations to qualify as environmental professionals.

Commenter Organization Name: Young,Richard
Comment Number: 0243
Excerpt Number: 11
Excerpt Text:
States Rights

The US Environmental Protection Agency has failed to recognize the other professional licenses offered by individual State departments of professional regulation. Licenses in California and Nevada have comparable programs that are endorsed and operated by regulatory bodies that offer the same types of services that a Brownfields professional can offer through the proposed regulation. If the proposed regulation is adopted, other environmental professionals will leave these licenses to pursue other types of employment or different licensure. Simply put, individual State governments will lose revenue at the expense of the proposed regulation. While this lost revenue at the State level may not be significant to Federal programs, it will impact State department of natural resource programs that are an indirect recipient of these lost revenues.

Response:
The definition of environmental professional in the final rule (as did the definition in the proposed rule) allows for individuals who are not P.E.s or P.G.s to qualify as environmental professionals. The final rule (as did the proposed rule) specifically recognizes within the definition of environmental professionals, individuals licensed or certified by a state or tribal agency to conduct environmental site assessments.

In addition, the final rule allows for persons who do not qualify as environmental professionals to contribute to the required investigations as long as their activities are conducted under the responsible charge of the environmental professional.

In response to many comments EPA received on the proposed definition of environmental professional, EPA modified the definition in the final rule to provide for persons who have 10 years of full-time relevant experience in performing environmental site assessments, but do not have a Baccalaureate degree, to qualify as environmental professionals. The definition of environmental professional in the final rule is less stringent than the definition included in the proposed rule and allows for most people who currently are conducting environmental site investigations to qualify as environmental professionals.

Commenter Organization Name: Montana DEQ
Comment Number: 0335
Excerpt Number: 10
Excerpt Text:
In addition, DEQ believes that the proposed AAI rule potentially imposes an enforceable duty on state, local and tribal governments. If an entity applies for a brownfields grant, AAI must be conducted on all sites where the money will be spent. In the case of brownfields cleanup grants, AAI must be conducted prior to applying for the brownfields funds; therefore, DEQ believes that

the statement "The proposed rule imposes no enforceable duty on any state, local, or tribal governments" is incorrect.

Response:
To establish eligibility, brownfields cleanup grant applicants must demonstrate that they own the property where the cleanup will be conducted and that the applicant is not a potentially responsible party. The most common way of making that demonstration is by establishing that the applicant is a bona fide prospective purchaser of the property. The requirements for qualifying as a bona fide prospective purchaser include conducting all appropriate inquiries prior to the date of acquisition of the property. This is not an enforceable duty under the Unfunded Mandates Act. No one is required to apply for a brownfields grant. In cases where EPA awards a brownfields assessment grant, the statute requires that the assessment be conducted in compliance with the all appropriate inquiries rule. However, the cost of the assessment is covered by the grant. In addition, Congress established the requirements for grant eligibility in the Small Business Liability Relief and Brownfields Revitalization Act. In the final rule setting federal standards for the conduct of all appropriate inquiries, EPA does not require any additional parties to conduct all appropriate inquiries. The applicability of the standards is established in CERCLA and includes only those parties wishing to obtain protection from CERCLA liability as bona fide prospective purchasers, innocent landowners, or contiguous property owners and those who receive brownfields grants to conduct property assessments.

SECTION 5: Comments on the Paperwork Reduction Act

Commenter Organization Name: Intertox
Comment Number: 0396
Excerpt Number: 20
Other Sections: NEW - 3.3 - Review of historical sources of information
Excerpt Text:
-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.

--While Intertox does not have any comment about U.S. EPA's burden estimates we do believe that the use of automated collection techniques represents information liability to the environmental professional. It is common practice for environmental consultants to use several national companies to conduct review of government records. When these services first became available in the late 1980s the quality was suspect, however, these searches are now reliable and accurate. What we are concerned with is the use of these companies by environmental professionals for reviewing historical sources of information. For instance, city directory research, recorded title searches, and interviews with local government officials are offered by these companies. It is our experience, especially with recorded title searches, that the effort expended by these companies is insufficient to adequately characterize a site's history. We have seen in particular, poorly conducted title searches and city directory searches that are incomplete. In addition, only the environmental professional should make contact with local government officials, as they know better than anyone else the questions that need to be asked relative to their subject property. Accordingly, we recommend that automated collection techniques not be utilized to acquire historical sources of information.

Response:
EPA appreciates the commenter’s concerns. When information is collected from secondary sources, the environmental professional and the prospective purchaser should make every effort to evaluate the quality of the information prior to accepting its accuracy. Given the time and cost burdens that could be associated with requiring every prospective property owner to collect all historical records information from primary sources, when excellent and accurate secondary sources are available, the Agency can not disallow the use of automated data collection techniques, as the commenter proposes.

SECTION 6: Miscellaneous

6.1 EPA Should Adopt ASTM Standard Rather than Develop Separate Regulations

Commenter Organization Name: Franz, Barry
Comment Number: 0068
Excerpt Number: 1
Other Sections: NEW - 1.1.1.2 - Support of the performance standard
Excerpt Text:
Some key points of the AAI rule that I like is the fact that the AAI rule encourages a performance-based approach rather than a "prescriptive/mandatory" application of a standard (e.g. ASTM El527-00). This approach allows an environmental professional to resolve data gaps based upon the professional's experience. Another critical aspect of the AAI rule that I like and appreciate, is the definition of what constitutes an environmental professional and what qualifications one should have.

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

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

Response:
EPA thanks the commenter for the stated support for the performance-based approach to the final rulemaking.

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

Commenter Organization Name: Wood, Larry
Comment Number: 0218
Excerpt Number: 1
Excerpt Text:
1. I am a user of the current ASTM Standard E1527 "Standard Practice for Environmental Site Assessments: Phase I Environmental Site Assessment Process". It is my understanding that USEPA is considering the creation of a document having the sole purpose of replacing the current ASTM E1527.

2. I feel the current E1527 Standard is useful, appropriate and valuable for the purpose intended. I would hope the USEPA ensures this Standard remains part of the Environmental Site Assessment process. I am not a member of ASTM and have no vested interest in the document but personally consider the work ASTM has put in to development and maintenance to be very valuable to the Environmental Assessment Process.

3. Any process can be improved, but I see no need for the EPA to spend money to develop a new standard to replace E 1527. The Federal Government has been mandated to reduce internal standards and incorporate Industry Documents where appropriate, and E1527 is one of the better examples of a valuable, coherent and useful Industry Document. I suggest that EPA adopt the document and issue only necessary additional guidance which may not be currently incorporated in it. Even then, ASTM has often added "Federal Government" Appendix sections to existing Standards, therefore EPA may find it more cost effective in pursuing one of these courses of action over development of a new Government Document.

Response:
EPA's purpose for developing the proposed and final rule was not to replace the ASTM standard. Congress directed EPA, in the Small Business Liability Relief and Brownfields Revitalization Act, to develop regulations setting federal standards for the conduct of all appropriate inquiries. Prior to developing the proposed rule, EPA considered adopting the ASTM E1527 standard as the federal regulatory standard. However, EPA determined that the ASTM E1527-2000 standard was inconsistent with applicable law.

Since publication of the proposed rule, ASTM International and its committee responsible for the development of the ASTM E1527 Phase I Environmental Site Assessment Process reviewed and updated the "2000" version of the E1527 standard to address the differences between the ASTM E1527 standard and the criteria established by Congress in the Brownfields Amendments to CERCLA. These activities were conducted within the normal review and updating process that ASTM International undertakes for each standard over a five-year cycle. EPA determined that the updated standard is compliant with the statutory criteria and consistent with the final rule. Therefore, in the final rule, EPA is referencing the standards and practices developed by ASTM International, known as Standard E1527-05 and entitled "Standard Practice for Environmental Site Assessments: Phase I Environmental Site Assessment Process." Persons conducting all appropriate inquiries may use the procedures included in the ASTM E1527-05 standard to conduct all appropriate inquiries in compliance with the final rule.

Commenter Organization Name: Worlund, John
Comment Number: 0256
Excerpt Number: 18
Excerpt Text:
The identification of voluntary consensus standards that are applicable to and compliant with today's proposed standards and practices for all appropriate inquiry.

I think EPA was in error concluding that the alternative of adopting ASTM 1527 would be inconsistent with applicable law. Even if you conclude that the 2000 version of the document is not in compliance, the ASTM process can easily adopt modifications to the current practice to make it fully compatible with AAI. It is far preferable to use an existing and widely adopted consensus standard than to embark on a rule making process that reinvents the wheel. I recommend adopting an appropriately modified standard by reference and making whatever minor clarifications (by federal rulemaking) that are required to address any items not fully covered by the ASTM standard. This would include the issues related to continuing responsibility, sale price, or controlled substances for example.
Specifically the reasoning EPA concluded that the existing standard did not comply with the ten specific criteria to be included in the AAI are discussed below:

The ASTM standards do not provide for interviews with past owners operators and occupants …
The current version of the standard does not specifically speak to past owners but clearly would imply that if the key site manager was a past owner or operator that they would be the preferred interviewee. The revised 1527 document currently in draft stage was modified to more specifically identify the role of the past owners, operators and occupants in the interview process. The basic principle is still to find the person that knows the most about the site.

Reviews of historical sources,…, to determine the previous uses and occupancies of the real property since the property was first developed.
The ASTM standard is more restrictive since it requires going back to at least 1940 or the earliest development. Under AAI you could stop in 1989 if that was the first development. The concern about the use of the term obvious in the ASTM standard is a semantic argument of dubious merit. Any fair reading of the ASTM standard leads to the conclusion that it is compliant with the intent of the legislation.

ASTM does not mandate visual inspection of adjoining properties.
This is another largely semantic argument. The current ASTM standard sections 8.4.1.3 and 8.1.4.4 speak to observations of the current and past uses of adjoining properties and section 8.1.4.5 goes on to speak about current and past uses in the surrounding area. All three sections state to the extent they are visually and physically observed. Clearly the intent is to visually observe not only the adjacent but also the surrounding properties.

The relationship of the purchase price to the value of the property
The ASTM limited this requirement to actual knowledge. The statute does not make this restriction. If the actual language is objectionable it could easily be dropped from the ASTM

standard. This is really a side bar issue to the Phase I, not unlike the new requirements for continuing obligations related to corrective action. It is probably better handled outside the Phase 1 process since it the EP does not participate by providing any input into representations regarding the purchase price. In fact the EP usually is not told the purchase price.

CERCLA states that standards for all appropriate inquiry shall include: cleanup liens against the facility that are filed under Federal, State or local laws.
The current ASTM version in Section 5.2 does speak only to liens recorded in the title records. The document as a whole could be read to imply that liens must be located in sources other than the titles. In Sections 9.8.1.9 there is broader language regarding helpful documents. The use of cleanup liens is a relatively new practice and, except for a few states that have started maintaining registries, they are most often found in title records or the owner's files.

Response:
Prior to the development of the proposed rule, EPA determined that the ASTM E1527-2000 standard was inconsistent with applicable law. Since publication of the proposed rule, and as the commenter points out, ASTM International and its committee responsible for the development of the ASTM E1527 Phase I Environmental Site Assessment Process reviewed and updated the "2000" version of the E1527 standard to address EPA's concerns regarding the differences between the ASTM E1527 standard and the criteria established by Congress in the Brownfields Amendments to CERCLA. These activities were conducted within the normal review and updating process that ASTM International undertakes for each standard over a five-year cycle.

EPA determined that the updated standard is compliant with the statutory criteria and consistent with the final rule. Therefore, in the final rule, EPA is referencing the standards and practices developed by ASTM International, known as Standard E1527-05 and entitled "Standard Practice for Environmental Site Assessment: Phase I Environmental Site Assessment Process." Persons conducting all appropriate inquiries may use the procedures included in the ASTM E1527-05 standard to conduct all appropriate inquiries in compliance with the final rule.

Commenter Organization Name: Rose and Westra
Comment Number: 0320
Excerpt Number: 1
Other Sections: NEW - 6.7 - Negotiated rulemaking committee/process
Excerpt Text:
ASTM E 1527-00 is a consensus Standard developed with input from the EPA, lenders, users and preparers of ESAs. The Pre-Amble states that the ASTM E 1527-00 is inconsistent with applicable law…. Without commenting on the accuracy of the EPA's contention, R&W notes that the EPA set out to create a duplicative standard through the NRA/FACA process instead of continuing more than ten years of cooperative effort with the ASTM Committee E-50. The FACA included several interest groups that do not directly use or participate in the Phase I ESA/AAI process. These include environmental interest groups, the environmental justice community, residential builders, solid waste officials, and the U.S. Conference of Mayors. While these parties have essentially no direct interest in the AAI process, they never-the-less exerted

significant influence on the Proposed Rules. Therefore, the evolution of the Proposed Rules was fundamentally flawed. A more reasonable solution would have been to work with the E-50 Committee to make adjustments to E-1527-00, as opposed to starting over with a flawed FACA. R&W requests the EPA to abandon this redundant effort and work with E-1527-00 to address the perceived deficiencies of E-1527-00.

Response:
EPA disagrees with the commenter's statement that members of the FACA Committee that negotiated the proposed rulemaking had no direct interest in the AAI process. Many of the interest groups cited by the commenter represent constituencies who often purchase potentially contaminated properties or live near contaminated properties and therefore will be directly affected by a federal rulemaking setting standards for the conduct of all appropriate inquiries. The Federal Advisory Committee Act and the Negotiated Rulemaking Act require that the membership of a negotiated rulemaking committee include a balanced membership of affected stakeholders. All members of the negotiated rulemaking committee that negotiated the proposed rulemaking provided valuable insight and input to the negotiations.

Prior to the development of the proposed rule, EPA evaluated the ASTM E1527-2000 standard against the criteria for the federal standard provided by Congress in the Small Business Liability Relief and Brownfields Revitalization Act and determined that the ASTM standard was inconsistent with applicable law. Since publication of the proposed rule, ASTM International and its committee responsible for the development of the ASTM E1527 Phase I Environmental Site Assessment Process reviewed and updated the "2000" version of the E1527 standard to address the differences between the ASTM E1527 standard and the criteria established by Congress in the Brownfields Amendments to CERCLA. These activities were conducted within the normal review and updating process that ASTM International undertakes for each standard over a five-year cycle. EPA determined that the updated standard is compliant with the statutory criteria and consistent with the final rule. Therefore, in the final rule, EPA is referencing the standards and practices developed by ASTM International and known as Standard E1527-05 (entitled "Standard Practice for Environmental Site Assessments: Phase I Environmental Site Assessment Process)." Persons conducting all appropriate inquiries may use the procedures included in the ASTM E1527-05 standard to conduct all appropriate inquiries in compliance with the final rule.

Commenter Organization Name: Rose and Westra
Comment Number: 0320
Excerpt Number: 22
Other Sections: NEW - 1.1.2 - General opposition to the proposed rule
Excerpt Text:
In summary, R&W believes that the NRA/FACA process has created redundant, expensive, and unworkable Proposed Rules. The EIA ignores increased requirements of the Proposed Rules and their associated costs. Therefore, R&W requests that the EPA withdraw the Proposed Rules and continue its historical cooperation with ASTM to tweak the E 1527-00 Standard Practice, if necessary, to comply with the legislative requirements.

Response:
EPA disagrees with the commenter's statement that the proposed rule is redundant, expensive and unworkable. The proposed rule was developed by a committee whose membership included representatives from 25 stakeholder groups, many of whom are familiar with the ASTM E1527 standard and have significant experience working with the ASTM E1527 Phase I Environmental Site Assessment Process. The economic analysis developed for the proposed rule included a task-by-task comparison of the ASTM standard activities and the activities required by the proposed rule. This analysis resulted in the identification of all incremental activities required as a result of the proposed rule (those that are over and above the activities required under the ASTM standard). The analysis also included an estimate of the incremental costs associated with the additional activities. The results of these analyses were included, in detail, in the Economic Impact Analysis Document included in the docket for the proposed rule and showed that the weighted average incremental cost for complying with the requirements of the proposed rule was relatively low.

Although EPA is not withdrawing the proposed rule, EPA supported ASTM International in its efforts to review and update its E1527 standard. These activities were conducted within the normal review and updating process that ASTM International undertakes for each standard over a five-year cycle. EPA determined that the updated standard is compliant with the statutory criteria and consistent with the final rule. Therefore, in the final rule, EPA is referencing the standards and practices developed by ASTM International and known as Standard E1527-05 (entitled "Standard Practice for Environmental Site Assessments: Phase I Environmental Site Assessment Process)." Persons conducting all appropriate inquiries may use the procedures included in the ASTM E1527-05 standard to conduct all appropriate inquiries in compliance with the final rule.

Commenter Organization Name: CBPA
Comment Number: 0344
Excerpt Number: 8
Excerpt Text:
Moreover, there appears to be no reason why the current standard, ASTM El 527, with relatively minor additions and changes, should not continue as the standard for All Appropriate Inquiries.

Response:
See response to comment number 0320, excerpt 22. Since publication of the proposed rule, ASTM International updated its E1527 Phase I Environmental Site Assessment Process. EPA determined that the updated standard is compliant with the statutory criteria and consistent with the final rule. Therefore, in the final rule, EPA is referencing the standards and practices developed by ASTM International and known as Standard E1527-05 (entitled "Standard Practice for Environmental Site Assessment: Phase I Environmental Site Assessment Process)." Persons conducting all appropriate inquiries may use the procedures included in the ASTM E1527-05 standard to conduct all appropriate inquiries in compliance with the final rule.

Commenter Organization Name: Grand Rapids C of C
Comment Number: 0345
Excerpt Number: 1
Excerpt Text:
For many years, environmental assessments conforming to the current ASTM standard have qualified as "all appropriate inquiry" under CERCLA. Businesses and environmental consultants have become familiar with the standard. There is no indication that the current ASTM standard is deficient in any way. Rather than tweaking the current ASTM standard in a way that would appear to increase costs to businesses and create uncertainty in real estate transactions, the Grand Rapids Area Chamber of Commerce requests that the EPA adopt the current ASTM standard as the "all appropriate inquiry" standard under CERCLA. At the very least, the Grand Rapids Area Chamber of Commerce requests that the EPA consider conforming the proposed rule to the current ASTM standard in the areas identified below.

Response:
As discussed in the preamble to the proposed rule, prior to the development of the proposed rule, EPA evaluated the ASTM E1527-2000 standard against the criteria for the federal standard provided by Congress in the Small Business Liability Relief and Brownfields Revitalization Act and determined that the ASTM standard was inconsistent with applicable law.

Since publication of the proposed rule, ASTM International updated its E1527 Phase I Environmental Site Assessment Process. EPA determined that the updated standard is compliant with the statutory criteria and consistent with the final rule. Therefore, in the final rule, EPA is referencing the standards and practices developed by ASTM International and known as Standard E1527-05 (entitled “Standard Practice for Environmental Site Assessments: Phase I Environmental Site Assessment Process).” Persons conducting all appropriate inquiries may use the procedures included in the ASTM E1527-05 standard to conduct all appropriate inquiries in compliance with the final rule.

Commenter Organization Name: Greenlining Institute
Comment Number: 0354
Excerpt Number: 9
Other Sections: NEW - 3.8 - Considering the relationship of the purchase price to the value of the property
Excerpt Text:
--b. Congress intended to continue the ASTM E1527, § 5.4 "actual knowledge" requirement, not impose a new market valuation requirement.

EPA states that the new market valuation requirement of § 312.29 is required by the Brownfields Revitalization Act of 2001, and the existing ASTM E1527 treatment of the relationship of purchase price to value cannot continue because "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." 69 Fed. Reg. at 52575.

We do not agree with EPA's construction of the statute. The "statute's criteria" that EPA refers to is "[t]he relationship of the purchase price to the value of the property, if the property was not contaminated." 42 U.S.C. § 9601(35)(B)(iii)(VIII). This statutory criteria has been a part of all appropriate inquiry since 1986. See Pub. L. No. 99-499, 100 Stat 1613 (SARA Amendments) (1986). ASTM E1527-00, § 5.4, the "actual knowledge" requirement regarding the relationship of the purchase price to the value of the property if the property was not contaminated, was developed in direct response to the statutory criteria cited by EPA. See ASTM E1527-93, § X1.2.4; See also ASTM E1527-93, § 5.4.

The Brownfield Revitalization Act's command is to promulgate a regulation "to carry out all appropriate inquiries" in accordance with "good commercial and customary standards and practices." 42 U.S.C. § 9601(B). All parties concerned with this rule, including EPA, have agreed that ASTM E1527-00 represents current good commercial and customary standards and practices. Therefore, by definition and as a matter of law, ASTM's limitation of the purchase price requirement to "actual knowledge" does satisfy the statutory criteria. Whereas the committee's new valuation requirement is not consistent with good commercial practice, increases uncertainty, and does not satisfy the statutory criteria.

Upon reconsideration, we hope you will agree with us and will retain the "actual knowledge" standard of ASTM E1527.

Response:
EPA disagrees with the commenter. The statute does not limit the requirement to consider the relationship of the purchase price to the value of the property, if not contaminated, to the prospective landowner's or the environmental professional's "actual knowledge" of differences between the purchase price and the value of the property. In addition, the ASTM E1527 standard could be read to limit the requirement to the environmental professional's actual knowledge. The statute places the burden of the requirement on the prospective landowner.

Notwithstanding any differences in the interpretation of the statutory requirement, EPA supports ASTM International's efforts to update the E1527 standard to ensure its compliance with the statute and the federal regulation. The ASTM committee tasked with updating the E1527 standard revised the standard's requirement to consider the relationship between the purchase price and the value of the property, assuming it is not contaminated. The committee's intent is to ensure that the standard is compliant with EPA's interpretation of the statute.

Since publication of the proposed rule, ASTM International and its committee responsible for the development of the ASTM E1527 Phase I Environmental Site Assessment Process reviewed and dated the "2000" version of the E1527 standard to address the differences between the ASTM E1527 standard and the criteria established by Congress in the Brownfields Amendments to CERCLA. These activities were conducted within the normal review and updating process that ASTM International undertakes for each standard over a five-year cycle. EPA determined that the updated standard is compliant with the statutory criteria and consistent with the final rule. Therefore, in the final rule, EPA is referencing the standards and practices developed by ASTM

International and known as Standard E1527-05 (entitled “Standard Practice for Environmental Site Assessments: Phase I Environmental Site Assessment Process).” Persons conducting all appropriate inquiries may use the procedures included in the ASTM E1527-05 standard to conduct all appropriate inquiries in compliance with the final rule.

Commenter Organization Name: Greenlining Institute
Comment Number: 0354
Excerpt Number: 13
Excerpt Text:
V. THE NATIONAL TECHNOLOGY TRANSFERAND ADVANCEMENT
ACT REQUIRES ADOPTION OF ASTM E1527-00

The National Technology Transfer and Advancement Act, 15 U.S.C. §272, requires EPA to use existing industry consensus standards in its regulatory activities unless to do so would be inconsistent with applicable law or otherwise impractical. EPA has recognized that it must show that ASTM E1527-00 is inconsistent with applicable law or must adopt it as the standard for All Appropriate Inquiry. 69 Fed. Reg. At 52574.
EPA provides five reasons that it believes make ASTM E1527 inconsistent with the Brownfields Revitalization Act:

1)ASTM E1527 does not provide for interviews of past owners, operators, and occupants of a facility.

2)ASTM E1527 limits identification of past uses and occupancies to "obvious" uses, and ASTM E1527 provides that a search must extend back at least to 1940 even if the first obvious use is after that date.

3)ASTM E1527 does not require visual inspections of adjoining properties.

4)ASTM E1527 limits the consideration of the relationship of the purchase price to the value of the property to "actual knowledge" that the price was significantly below market value.

5) ASTM E1527 limits the scope of searches for recorded environmental cleanup liens to recorded land title records.

See 69 Fed. Reg. At 52574-75.

We believe that we have demonstrated in section IV(D)(iv) supra that reason two does not disqualify ASTM E1527 and in section IV(D)(i) that reason four does not disqualify it either. We explain below why we believe that reasons one, three, and five do not disqualify ASTM E1527-00 and we therefore urge EPA to implement the National Technology Transfer Act by adopting ASTM E1527-00.
For the foregoing reasons we request that EPA withdraw the proposed rule, and instead propose ASTM E1527-00 as the standard for All Appropriate Inquiry.

Response:
EPA is not convinced by the commenter's arguments. We continue to assert that the ASTM E1527-2000 standard is not compliant with the statutory criteria for all appropriate inquiries. As discussed in the preamble to the proposed rule, prior to the development of the proposed rule, EPA evaluated the ASTM E1527-2000 standard against the criteria for the federal standard provided by Congress in the Small Business Liability Relief and Brownfields Revitalization Act and determined that the ASTM standard was inconsistent with applicable law.

Since publication of the proposed rule, ASTM International and its committee responsible for the development of the ASTM E1527 Phase I Environmental Site Assessment Process reviewed and dated the "2000" version of the E1527 standard to address the differences between the ASTM E1527 standard and the criteria established by Congress in the Brownfields Amendments to CERCLA. These activities were conducted within the normal review and updating process that ASTM International undertakes for each standard over a five-year cycle. EPA determined that the updated standard is compliant with the statutory criteria and consistent with the final rule. Therefore, in the final rule, EPA is referencing the standards and practices developed by ASTM International and known as Standard E1527-05 (entitled "Standard Practice for Environmental Site Assessments: Phase I Environmental Site Assessment Process)." Persons conducting all appropriate inquiries may use the procedures included in the ASTM E1527-05 standard to conduct all appropriate inquiries in compliance with the final rule.

EPA's activities with regard to reviewing and evaluating the ASTM International standard and working with the ASTM E50 subcommittee to update the E1527 standard are compliant with the NTTAA.

Commenter Organization Name: USWAG
Comment Number: 0367
Excerpt Number: 14
Excerpt Text:
To minimize disruption for the many users of the ASTM environmental assessment standards that predate the Brownfields law and this proposed rule, we strongly urge EPA to permit the use of ASTM El 527 and E 2247, once updated to conform to the Brownfields law, as acceptable alternatives to the AAI rule.

Response:
Since publication of the proposed rule, ASTM International and its committee responsible for the development of the ASTM E1527 Phase I Environmental Site Assessment Process reviewed and dated the "2000" version of the E1527 standard to address the differences between the ASTM E1527 standard and the criteria established by Congress in the Brownfields Amendments to CERCLA. These activities were conducted within the normal review and updating process that ASTM International undertakes for each standard over a five-year cycle. EPA determined that the updated standard is compliant with the statutory criteria and consistent with the final rule. Therefore, in the final rule, EPA is referencing the standards and practices developed by ASTM International and known as Standard E1527-05 (entitled "Standard Practice for Environmental

Site Assessments: Phase I Environmental Site Assessment Process).” Persons conducting all appropriate inquiries may use the procedures included in the ASTM E1527-05 standard to conduct all appropriate inquiries in compliance with the final rule.

EPA’s activities with regard to reviewing and evaluating the ASTM International standard and supporting the ASTM E50 subcommittee in its efforts to update the E1527 standard are compliant with the NTTAA.

EPA is aware that ASTM International plans to update the E2247 standard. If ASTM International updates this standard to comply with the statutory criteria of all appropriate inquiries and requests that EPA recognize the standard as compliant with the statute and the federal regulations for all appropriate inquiries, EPA will respond to such a request and will work with ASTM International as necessary and appropriate to facilitate any necessary revisions to the standard.

Commenter Organization Name: CCLR
Comment Number: 0415
Excerpt Number: 4
Excerpt Text:
The National Technology Transfer and Advancement Act, 15 U.S.C. §272, requires EPA to use existing industry consensus standards in its regulatory activities unless to do so would be inconsistent with applicable law or otherwise impractical. EPA has recognized that it must show that ASTM E1527-00 is inconsistent with applicable law or must adopt it as the standard for All Appropriate Inquiry. 69 Fed. Reg. At 52574.

EPA considered using ASTM E1527-00 but decided that five factors prevented its adoption. We suggest that upon closer consideration, these factors do not prevent adoption of ASTM E1527-00 and that ASTM E1527-00 is fully consistent with the Brownfields Amendments. These five factors are summarized and analyzed below in turn. See 69 Fed. Reg. At 52575.

1) ASTM E1527 limits identification of past uses and occupancies to "obvious" uses, and it provides that a search must extend back at least to 1940, even if the first obvious use is after that date. EPA concluded that the Brownfields Amendments do not permit these limitations.

--Limits for Identification of Past Uses and Occupancies

EPA concludes that ASTM E1527's treatment of historical sources does not comply with the Brownfields Revitalization Act because "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." 69 Fed. Reg. at 52575. EPA reasons that "Congress did not qualify the review to obvious uses, and did not give an alternate date regarding the review." Id. The preamble further explains that the environmental professional must "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." Id. at 52561.

We think that EPA puts the cart before the horse, and that its reading of the statute's requirement of historical research to include non-obvious uses centuries back in time is not workable.
The Brownfields Amendments include a historical source criteria that provides for review of historical sources "to determine previous uses and occupancies of the real property since the property was first developed." 42 U.S.C. § 9601(35)(B)(iii)(III). EPA's conclusion that the statutory "previous uses and occupancies" criteria cannot be interpreted to mean "obvious" uses and occupancies overlooks that this criteria is to be implemented by EPA in accordance with "customary standards and practices," 42 U.S.C. § 9601 (35)(B)(i)(I), and that by EPA's own reckoning, customary practices do limit the identification of previous uses to "obvious" uses. To require identification of all uses and occupancies (including the first agricultural use), all the way back in time as EPA's overly literal reading of the criteria would, would require a nearly unlimited resource for historical data that is frequently unavailable. There is no system in place designed to capture all of this information. Interpreting the Brownfields Revitalization Act to require prospective purchasers to spend an unlimited amount of time in research of possibly unavailable source material in order to obtain liability protection. The purpose of the legislation is to protect purchasers from liability, and this requirement would clearly produce a result that could not have been intended by Congress. ASTM's alternative date of 1940 only applies if it is earlier than the first developed use so it is more stringent than the criteria provided by Congress and thus no bar to adoption.

EPA apparently recognizes the problem of historical searches spanning centuries, because the proposed rule includes the qualification "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." Proposed § 312.24. This provision, however, contradicts EPA's reasoning for rejecting ASTM E1527 and contradicts the explanation of this section provided by the preamble. It also does not address the problem of being able to identify all uses (as opposed to obvious uses) and occupancies. This requirement, too, is "performance based," so any records of non-obvious uses earlier than the date actually searched to by the environmental professional may be used as a pretext for CERCLA plaintiffs seeking to pierce liability protection.

We urge EPA to reconsider, and we offer herein suggestions that provide, with minimal revision, a form of ASTM E1527-00 § 7.3 that does comply with the Brownfields Amendments. We also believe that a more workable, and yet responsible, interpretation of the "historical use" requirement of the statute considered in the administrative record of this rulemaking is ASTM E1527's provision for searches back to the property's "obvious first developed use." We also believe that the checklist approach of ASTM E1527-00 § 7.3, which provides a purchaser with clarity about when he has reached the end of his All Appropriate Inquiry task is a far more reasonable approach to historical use considered in this administrative record: "Whatever history of previous uses is derived from checking the standard historical sources specified [herein] shall be deemed sufficient historical use information to comply with this practice." Id. We believe that an open-ended "performance based" rule will inevitably lead to courtroom second guessing.

2) EPA concluded that ASTM E1527 does not require visual inspections of adjoining properties and therefore does not comply with the Brownfields Amendments.

--Visual Inspections of Adjoining Properties

The Criteria provided by Congress in the Brownfields Amendments include "Visual inspections of the facility and of adjoining properties." ASTM E1527-00 § 8 "Site Reconnaissance" provides that "To the extent that current uses of adjoining properties are visually and/or physically observed on the site visit. . . they shall be identified in the report, and current uses so identified shall be described." ASTM E1527-00 § 8.4.1.3. Visual inspections of adjoining properties are, therefore included in ASTM E1527. In the proposed rule, EPA allowed visual inspections of adjacent properties to be fulfilled by inspection of aerial photographs. Proposed § 312.27(a)(2). Review of aerial photographs showing the subject property and adjacent properties is already customary practice under ASTM E1527-00 § 7.3.4.1. EPA recognizes that on-site access to adjacent properties is not required and that visual inspection from the subject property or public right of way may not yield an entire view of the adjacent property. We hope that, upon reconsideration, EPA will agree that existing ASTM practice and the wording of ASTM section 8.4.1.3 fulfills the statutory criteria of including visual inspections of adjoining properties.

If EPA wishes to proceed with greater caution, it could change the word "that" to "practicable" and change the word "are" to the words "shall be" in the above quoted sentence from ASTM section 8.4.1.3. We believe this serves the intended purpose without imposing undue burden on the brownfield redeveloper.

3) EPA concluded that ASTM E1527 does not provide for interviews of past owners, operators, and occupants of a facility.

--Interviews with Past Owners, Operators, and Occupants

Proposed § 312.23 provides that the "inquiry of the environmental professional must include interviewing the current owner and occupant of the subject property, and further that "[t]he inquiry of the environmental professional should include, to the extent necessary to achieve the objectives and performance factors. . . interviewing one or more of the following [including past owners, occupants, or operators]." The new rule, then, makes a distinction between interviewing current owners, which is mandatory, and interviewing past owners, which is discretionary within the framework of the new rule. The environmental professional might consult sources other than past owners to obtain similar information to that which would be obtained if he interviewed them. Before moving on to show that ASTM E1527 also provides for interviewing past owners in a similar discretionary way within its framework, we would suggest that obtaining useful information through interviewing past owners is unlikely. Past owners have no incentive for disclosing that hazardous waste was handled, stored, or disposed of while they owned the property. To do so would expose them to CERCLA liability as a responsible party. Current owners, on the other hand, presumably are interested answering because they want to sell the property. Withholding information that could affect the value of the property in the context of a sale would expose them to contract and tort liability, so there is reason to believe that their

answers will be truthful. It should be noted that ASTM E1527 includes interviews with past owners within the meaning of the Brownfields Amendments.

ASTM E1527-00 § 3.3.25 defines "other historical sources" to include "any source or sources. . . that are credible to a reasonable person and that identify past uses of the property." "Any source" includes interviewing past owners. The purpose of consulting historical sources is to identify "recognized environmental conditions." ASTM E1527-00 § 7.3.1, and the environmental professional may consult "other historical sources" to satisfy this requirement. ASTM E1527-00 § 7.3.2.3. Such sources include "personal knowledge" of individuals. ASTM E1527-00 § 3.3.25. ASTM E1527 therefore already includes interviewing past owners as discretionary within its framework and complies with the statutory criteria to "include" interviews with "past and present owners." 42 U.S.C. § 9601 (35)(B)(iii).

If EPA's mandate was to "clarify the obligations" of prospective purchasers, we recommend adopting ASTM E1527-00 verbatim. Since Congress did specify past owners, EPA could add the clarifying words "past or present" before the words "property owner" in the last sentence of ASTM E1527 § 3.3.25 to provide sufficiently for this concern.

4) ASTM E1527 limits the consideration of the relationship of the purchase price to the value of the property to "actual knowledge" that the price was significantly below market value. EPA concluded that this does not comply with the Brownfield Amendments.

--Relationship of Purchase Price to Value of Property

Proposed § 312.29 requires that purchasers "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."
With this requirement in place, failure to commission a valuation analysis of the property would expose prospective purchasers to subsequent claims that the purchase price was below market and should have alerted the purchaser to the presence of contamination. Although the preamble states at page 52567 that a formal appraisal is not necessary, it states that the intent is to determine if the "price paid for the property is reflective of its market value," and may be accomplished by retaining a "real estate expert" to conduct a "comparability analysis." Given the potential exposure to second guessing, prudent purchasers will probably commission appraisals, and in any event, it is not likely that the non-appraisal market valuation envisioned by EPA will differ much in scope or cost from a formal appraisal. Therefore, the cost of an appraisal should be included in the additional costs associated with the rule if this section is to be retained.

Prices of commercial real estate fluctuate for any number of reasons and we think purchasers will be highly resistant to any requirement that forces them to explain why a particular price was appropriate in a particular transaction. It is also often difficult to explain significant inconsistencies in the sale prices of apparently comparable properties that have no environmental conditions of concern. Every source we have consulted to date has agreed that this valuation requirement is entirely new to environmental site assessment and is not consistent with existing generally accepted good commercial practice. We conducted dozens of conversations with

market participants and reviewed numerous published sources that have been disseminated in response to this proposed rule. See, e.g., Latham & Watkins, Client Alert All Appropriate Inquiry ("Client Alert"), October 4, 2004 at 3, available at http://www.lw.com (noting that the proposed AAI rule will force purchasers to conduct a "much more extensive investigation, including for the first time a property valuation analysis"). We hope you will reconsider the extent to which this new valuation requirement is inconsistent with customary practice, imposes substantial costs, and may cause substantial impediment to the successful completion of market transactions.

On the other hand, we think ASTM E1527-00 does comply with the Brownfields Amendments. The relevant statutory criteria is "[t]he relationship of the purchase price to the value of the property, if the property was not contaminated." 42 U.S.C. § 9601(iii)(VIII). This statutory criteria has been a part of All Appropriate Inquiry since 1986. See Pub. L. No. 99-499, 100 Stat 613 (SARA Amendments) (1986). ASTM E1527-00, § 5.4, the "actual knowledge" requirement regarding the relationship of the purchase price to the value of the property if the property was not contaminated, was developed in direct response to the statutory criteria cited by EPA. See ASTM E1527-00, § X.1.2.4.

The Brownfield Amendments' mandate is to promulgate a regulation "to carry out all appropriate inquiries" in accordance with "good commercial and customary standards and practices." 42 U.S.C. § 9601(B). All parties concerned with this rule, including EPA, have agreed that ASTM E1527-00 represents current good commercial and customary standards and practices. Therefore, by definition and as a matter of law, ASTM's limitation of the purchase price requirement to "actual knowledge" satisfies the statutory criteria. In light of the arguments presented here, we hope you will reconsider and agree with us that ASTM E1527 does satisfy the "relationship of the purchase price to the value" requirement.

5) ASTM E1527 limits the scope of searches for recorded environmental cleanup liens to recorded land title records. EPA concluded that this limitation does not comply with the Brownfields Amendments.

--Recorded Environmental Cleanup Liens

The Brownfields Amendments provide that "searches for recorded environmental cleanup liens" shall be one of the criteria used in promulgating the All Appropriate Inquiry regulation. 42 U.S.C. § 9601(35)(B)(iii)(IV). The language of the statute is very clear: recorded liens are to be searched. California and all other states have recording acts that specify a centralized location (usually one in each county the county recorder's office) where instruments may be validly recorded.

ASTM E1527-00 requires searches for liens recorded in the "place where land title records are, by law or custom, recorded for the local jurisdiction in which the property is located." ASTM E1527-00 §7.3.4. This makes sense because, under state law it is the only place where liens can be validly recorded.

EPA argues that ASTM E1527 may not be used because "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." 69 Fed. Reg. at 52575. However, this is not what the statue requires it says recorded liens. Congress would be unlikely to place the limiting term "recorded" in front of "liens" if it meant to specify liens that were not recorded but were somehow otherwise "filed."

What constitutes a recorded lien is a matter of state law. There is no indication that Congress meant to depart from the long established meaning of "recorded." It would also disrupt longstanding and well established industry practice: if you want your lien to achieve priority and provide record notice, it is required to record in the county recorders office. EPA's proposed new requirement would upset a centralized and very reliable system for notice of liens. We do not believe that Congress intended this result.

Upon consideration of the information presented here, we hope you will determine that in fact, ASTM E1527-00 satisfies the statutory criteria for cleanup liens and the proposed rule does not.

Response:
It is the Agency's intent to 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 compliant with the federal regulations. However, as explained in the preamble to the proposed rule, EPA determined that the 2000 version of ASTM International's E1527 Phase I Environmental Site Process is not compliant with the statutory criteria for all appropriate inquiries. Section 12(d) of the National Technology Transfer and Advancement Act of 1995 ("NTTAA"), Public Law No. 104-113, section 12(d) (15 U.S.C. 272 note) 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. Given that EPA determined that the ASTM E1527-2000 standard is inconsistent with applicable law, use of the ASTM standard in its current form is not required by the NTTAA.

EPA is not convinced by the commenter's arguments regarding the consistency of the ASTM standard with the statutory criteria. Particularly in the case of the need to consider the relationship of the purchase price to the value of the property, if it were not contaminated, the mere fact that the commenter believes that ASTM included a related activity in the E1527 standard in response to the 1986 amendments to CERCLA, does not render the standard compliant with the statute. Also, in the case of environmental cleanup liens, EPA disagrees with the commenter's statement that land title records are "under state law… the only place where liens can be validly recorded." Such liens may be included as part of the chain of title documents or may be recorded in some other manner or format by state or local government agencies. Recorded environmental cleanup liens may be recorded in different places, depending upon the particular state and particular locality in which the property is located.

Since publication of the proposed rule, ASTM International and its committee responsible for the development of the ASTM E1527 Phase I Environmental Site Assessment Process reviewed and

dated the “2000" version of the E1527 standard to address the differences between the ASTM E1527 standard and the criteria established by Congress in the Brownfields Amendments to CERCLA. These activities were conducted within the normal review and updating process that ASTM International undertakes for each standard over a five-year cycle. EPA determined that the updated standard is compliant with the statutory criteria and consistent with the final rule. Therefore, in the final rule, EPA is referencing the standards and practices developed by ASTM International and known as Standard E1527-05 (entitled “Standard Practice for Environmental Site Assessments: Phase I Environmental Site Assessment Process).” Persons conducting all appropriate inquiries may use the procedures included in the ASTM E1527-05 standard to conduct all appropriate inquiries in compliance with the final rule.

EPA’s activities with regard to reviewing and evaluating the ASTM standard and supporting the ASTM E50 subcommittee in its efforts to update the E1527 standard are compliant with the NTTAA.

With regard to the commenter’s suggestion that the final rule should adopt a “checklist approach,” (or an approach not based upon overall objectives and performance factors), the commenter may have misunderstood the statutory requirements that must be met to obtain protection from CERCLA liability. The commenter may have incorrectly assumed that the completion of the all appropriate inquiries investigation is all that is required to obtain liability protection. The conduct of all appropriate inquiries is only one requirement for obtaining the CERCLA liability protections. Prospective landowners must conduct all appropriate inquiries prior to acquiring a property to qualify for protection from CERCLA liability as an innocent landowner, bona fide prospective purchaser or contiguous landowner. However, once a property is acquired, the property owner must comply with all of the other statutory criteria necessary to qualify for the liability protections. In particular, landowners must undertake “reasonable steps” to address “on-going releases." Therefore, the final rule's objective of identifying conditions indicative of releases and threatened releases of hazardous substances on, at, in, or to a property links appropriately with the statutory criteria requiring the landowner to address such releases to qualify for the liability protections.

Commenter Organization Name: CCLR
Comment Number: 0415
Excerpt Number: 6
Excerpt Text:
We urge you to seriously reconsider the proposed rule. Fortunately, a solution is easily available, as we have demonstrated through proposing the minor revisions to the ASTM E1527. We hope you will conclude that ASTM E1527-00 should be adopted as the standard for All Appropriate Inquiry.

Response:
As stated above, although EPA determined that the ASTM E1527-2000 standard is not fully compliant with the statutory criteria for all appropriate inquiries, ASTM International is revising the standard to address EPA’s concerns. EPA supports the efforts of ASTM International’s E50

committee to revise the E1527 standard to ensure that it will be compliant with the statutory criteria and the final rule.

Since publication of the proposed rule, ASTM International and its committee responsible for the development of the ASTM E1527 Phase I Environmental Site Assessment Process reviewed and dated the “2000" version of the E1527 standard to address the differences between the ASTM E1527 standard and the criteria established by Congress in the Brownfields Amendments to CERCLA. These activities were conducted within the normal review and updating process that ASTM International undertakes for each standard over a five-year cycle. EPA determined that the updated standard is compliant with the statutory criteria and consistent with the final rule. Therefore, in the final rule, EPA is referencing the standards and practices developed by ASTM International and known as Standard E1527-05 (entitled “Standard Practice for Environmental Site Assessments: Phase I Environmental Site Assessment Process).” Persons conducting all appropriate inquiries may use the procedures included in the ASTM E1527-05 standard to conduct all appropriate inquiries in compliance with the final rule.

EPA’s activities with regard to reviewing and evaluating the ASTM standard and supporting the ASTM E50 subcommittee in its efforts to update the E1527 standard are compliant with the NTTAA.

Commenter Organization Name: Dismukes, James
Comment Number: 0416
Excerpt Number: 8
Excerpt Text:
The correct name of the ASTM Standard is E 1527-00, not 1527-2000.

9. Save for the definition of Environmental Professional, the ASTM Standard appears to meet or exceed the requirements of All Appropriate Inquiries. By stating 'the all appropriate inquiries regulation potentially will apply to most commercial property transactions', the proposed rule admits that the commercial real estate market will adopt the AAI. The ASTM Standard has been serving this market adequately since 1993 in providing the standard for good customary and commercial practice. To impart the AAI onto this market will result in an unnecessary cost increase and confusion in all areas of the market. I urge the EPA to work with the ASTM in adopting a modified ASTM Standard E 1527 and not to have two 'standards' in the market place.

Response:
EPA appreciates the commenter’s concerns regarding the widespread use of ASTM International’s E1527-2000 standard and the potential for confusion if a compliant ASTM standard is not available for use in conducting all appropriate inquiries once the federal standards are finalized. In fact, EPA supports the efforts of ASTM International and the ASTM E50 committee in their efforts to update the E1527 standard to ensure that the revised standard is compliant with the statutory criteria and the provisions of the final rule.

Since publication of the proposed rule, ASTM International and its committee responsible for the development of the ASTM E1527 Phase I Environmental Site Assessment Process reviewed and dated the “2000" version of the E1527 standard to address the differences between the ASTM E1527 standard and the criteria established by Congress in the Brownfields Amendments to CERCLA. These activities were conducted within the normal review and updating process that ASTM International undertakes for each standard over a five-year cycle. EPA determined that the updated standard is compliant with the statutory criteria and consistent with the final rule. Therefore, in the final rule, EPA is referencing the standards and practices developed by ASTM International and known as Standard E1527-05 (entitled “Standard Practice for Environmental Site Assessments: Phase I Environmental Site Assessment Process).” Persons conducting all appropriate inquiries may use the procedures included in the ASTM E1527-05 standard to conduct all appropriate inquiries in compliance with the final rule.

EPA’s activities with regard to reviewing and evaluating the ASTM standard and working with the ASTM E50 subcommittee to update the E1527 standard are compliant with the NTTAA.

Commenter Organization Name: Anonymous
Comment Number: 0427
Excerpt Number: 2
Excerpt Text:
I think there is nothing wrong with the ASTM 1527 Standard, perhaps obvious data like LEINS and CONTROLS could just be added to what has been the standard due diligence for years?

Response:
Since publication of the proposed rule, ASTM International and its committee responsible for the development of the ASTM E1527 Phase I Environmental Site Assessment Process reviewed and dated the “2000" version of the E1527 standard to address the differences between the ASTM E1527 standard and the criteria established by Congress in the Brownfields Amendments to CERCLA. These activities were conducted within the normal review and updating process that ASTM International undertakes for each standard over a five-year cycle. EPA determined that the updated standard is compliant with the statutory criteria and consistent with the final rule. Therefore, in the final rule, EPA is referencing the standards and practices developed by ASTM International and known as Standard E1527-05 (entitled “Standard Practice for Environmental Site Assessments: Phase I Environmental Site Assessment Process).” Persons conducting all appropriate inquiries may use the procedures included in the ASTM E1527-05 standard to conduct all appropriate inquiries in compliance with the final rule.

EPA’s activities with regard to reviewing and evaluating the ASTM standard and working with the ASTM E50 subcommittee to update the E1527 standard are compliant with the NTTAA.

Commenter Organization Name: Westward Environmental
Comment Number: 0429
Excerpt Number: 7

Excerpt Text:
Our concern is related to the ability and willingness of the client to absorb the additional fees necessary to comply with the requirements in the proposed rule and the need to adopt this rule in lieu of the ASTM E 1527 standard which we believe adequately addresses the client's needs to satisfy the All Appropriate Inquiries needed for the innocent owner defense.

Response:
The economic analysis developed for the proposed rule included a task-by-task comparison of the ASTM standard activities and the activities required by the proposed rule. This analysis resulted in the identification of all incremental activities required as a result of the proposed rule (those that are over and above the activities required under the ASTM standard). The analysis also included an estimate of the incremental costs associated with the additional activities. The results of these analyses were included, in detail, in the EIA Document included in the docket for the proposed rule and showed that the weighted average incremental cost for complying with the requirements of the proposed rule was relatively low.

Since publication of the proposed rule, ASTM International and its committee responsible for the development of the ASTM E1527 Phase I Environmental Site Assessment Process reviewed and dated the “2000" version of the E1527 standard to address the differences between the ASTM E1527 standard and the criteria established by Congress in the Brownfields Amendments to CERCLA. These activities were conducted within the normal review and updating process that ASTM International undertakes for each standard over a five-year cycle. EPA determined that the updated standard is compliant with the statutory criteria and consistent with the final rule. Therefore, in the final rule, EPA is referencing the standards and practices developed by ASTM International and known as Standard E1527-05 (entitled “Standard Practice for Environmental Site Assessments: Phase I Environmental Site Assessment Process).” Persons conducting all appropriate inquiries may use the procedures included in the ASTM E1527-05 standard to conduct all appropriate inquiries in compliance with the final rule.

Commenter Organization Name: West Berkeley Association
Comment Number: 0430
Excerpt Number: 4
Excerpt Text:
Our members, from time to time, will engage in commercial real estate transactions going forward. We would prefer that the standard for future transactions also remain as ASTM E1527-00. We find the new rule to be unclear and are uncertain whether it will provide liability protection in future transactions. We also believe it will impose several thousand dollars in additional costs for future transactions. As small entities, our members would very much like to avoid these additional costs as they affect small property owners engaging in small transactions in a disproportionate way.

Response:
The preambles to the proposed and final rule explain in detail the statutory requirements necessary to obtain protection from CERCLA liability. Prospective landowners must conduct all

appropriate inquiries prior to purchasing a property. Upon the effective date of the final rule, all appropriate inquiries must be conducted in compliance with the provisions of the final rule to obtain protection from CERCLA liability. 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 liability protections.

The economic analysis developed for the proposed rule included a task-by-task comparison of the ASTM standard activities and the activities required by the proposed rule. This analysis resulted in the identification of all incremental activities required as a result of the proposed rule (those that are over and above the activities required under the ASTM standard). The analysis also included an estimate of the incremental costs associated with the additional activities. The results of these analyses were included, in detail, in the Economic Impact Analysis Document included in the docket for the proposed rule and showed that the weighted average incremental cost for complying with the requirements of the proposed rule was relatively low.

Since publication of the proposed rule, ASTM International and its committee responsible for the development of the ASTM E1527 Phase I Environmental Site Assessment Process reviewed and dated the “2000" version of the E1527 standard to address the differences between the ASTM E1527 standard and the criteria established by Congress in the Brownfields Amendments to CERCLA. These activities were conducted within the normal review and updating process that ASTM International undertakes for each standard over a five-year cycle. EPA determined that the updated standard is compliant with the statutory criteria and consistent with the final rule. Therefore, in the final rule, EPA is referencing the standards and practices developed by ASTM International and known as Standard E1527-05 (entitled “Standard Practice for Environmental Site Assessments: Phase I Environmental Site Assessment Process).” Persons conducting all appropriate inquiries may use the procedures included in the ASTM E1527-05 standard to conduct all appropriate inquiries in compliance with the final rule.

6.2 The Agency Should Clarify How the Final AAI Rule Will Relate to the ASTM Standard

Commenter Organization Name: Goodman, J. Dwight
Comment Number: 0097
Excerpt Number: 12
Excerpt Text:
Once the AAI final rule is passed and is into effect....how does that relate to the ASTM standard...which has precedence? What bearing will ASTM have on ESA preparation? Will EPA's AAI be the referenced guidance document for proposals and preparation, or will ASTM revise their format to meet the AAI; and then the ASTM still remain the guidance document by which all ESAs are typically prepared?

4. What happened to the ASTM non-scope business risk items? What or how does the AAI require addressing those items such as archaeological finds, radon, indoor air quality(mold), wetlands, etc?

Response:
With regard to the use of the ASTM E1527-2000 standard, prior to the development of the proposed rule, EPA determined that the ASTM E1527-2000 standard was inconsistent with applicable law. Since publication of the proposed rule, ASTM International and its committee responsible for the development of the ASTM E1527 Phase I Environmental Site Assessment Process reviewed and dated the "2000" version of the E1527 standard to address the differences between the ASTM E1527 standard and the criteria established by Congress in the Brownfields Amendments to CERCLA. These activities were conducted within the normal review and updating process that ASTM International undertakes for each standard over a five-year cycle. EPA determined that the updated standard is compliant with the statutory criteria and consistent with the final rule. Therefore, in the final rule, EPA is referencing the standards and practices developed by ASTM International and known as Standard E1527-05 (entitled "Standard Practice for Environmental Site Assessments: Phase I Environmental Site Assessment Process)." Persons conducting all appropriate inquiries may use the procedures included in the ASTM E1527-05 standard to conduct all appropriate inquiries in compliance with the final rule.

EPA is not aware of the status of ASTM International's non-scope business risk guidance. The commenter should contact ASTM International directly or check ASTM International's website at www.astm.org.

Commenter Organization Name: Worlund, John
Comment Number: 0256
Excerpt Number: 1
Excerpt Text:
The proposed requirements for an all appropriate inquiry report, including the signature requirements for the all appropriate inquires report.

The proposed requirements are generally consistent with the current ASTM practice. I do not feel they are self implementing since they lack the detail contained in the ASTM 1527 Standard Practice. Making reference to the applicable industry standard, which is ASTM 1527, could easily solve this.

Response:
EPA can only reference an industry standard in the regulation, if the Agency determines that the standard is not inconsistent with the statute and the regulation. EPA determined previously that the ASTM E1527-2000 standard is not consistent with the statutory criteria for all appropriate inquiries.

However, since publication of the proposed rule, ASTM International and its committee responsible for the development of the ASTM E1527 Phase I Environmental Site Assessment Process reviewed and dated the “2000" version of the E1527 standard to address the differences between the ASTM E1527 standard and the criteria established by Congress in the Brownfields Amendments to CERCLA. These activities were conducted within the normal review and updating process that ASTM International undertakes for each standard over a five-year cycle. EPA determined that the updated standard is compliant with the statutory criteria and consistent with the final rule. Therefore, in the final rule, EPA is referencing the standards and practices developed by ASTM International and known as Standard E1527-05 (entitled “Standard Practice for Environmental Site Assessments: Phase I Environmental Site Assessment Process).” Persons conducting all appropriate inquiries may use the procedures included in the ASTM E1527-05 standard to conduct all appropriate inquiries in compliance with the final rule.

Commenter Organization Name: ASTM E50 Committee
Comment Number: 0261
Excerpt Number: 1
Excerpt Text:
In particular, we offer comments on appropriate references in the final rule to ASTM standards that we believe will satisfy EPA's criteria of being "applicable and compliant voluntary consensus standards." 69 Fed. Reg. 52542, 52555, Section E References.

As you know, the E50.02 Task Group on E1527, Standard Practice for Environmental Site Assessments: Phase I Environmental Site Assessment Process, has been working to update E1527-00 so that it is consistent with the Brownfields Amendments to CERCLA as well as seeking to conform the standard to the proposed EPA rule. The task group is expecting to initiate a revision ballot in the near future and is working toward having the new version approved once EPA has determined what changes, if any, to make to the proposed rule in light of public comments. ASTM and the E50 Executive Subcommittee strongly encourages the EPA to reference the updated E1527 standard following its approval as an acceptable alternative standard for conducting all appropriate inquiries.

As EPA has correctly noted, the National Technology Transfer and Advancement Act (NTTAA),

directs EPA to use voluntary consensus standards in its regulatory activities, unless to do so would be inconsistent with applicable law or otherwise impractical. See 69 Fed. Reg. at 52574. So long as the updated E1527 complies with the new statutory requirements and is generally consistent with the final All Appropriate Inquiry Rule, there would be no basis for EPA to conclude that referencing the E1527 standard "would be inconsistent with applicable law or otherwise impractical." We therefore urge the EPA to reference ASTM E1527 in the final rule.

In addition, the E50.02 Task Group responsible for E2247-02, Standard Practice for Environmental Site Assessments: Phase I Environmental Site Assessment Process for Forestland or Rural Property has closely monitored the activities of the E1527 Task Group and intends to incorporate the appropriate revisions into the E2247 standard so that it will comply with the new statutory requirements and be consistent with the final All Appropriate Inquiries Rule. We therefore urge the EPA to reference ASTM E2247 in the final rule.

Response:
As the commenter points out, since publication of the proposed rule, ASTM International and its committee responsible for the development of the ASTM E1527 Phase I Environmental Site Assessment Process reviewed and dated the “2000" version of the E1527 standard to address the differences between the ASTM E1527 standard and the criteria established by Congress in the Brownfields Amendments to CERCLA. These activities were conducted within the normal review and updating process that ASTM International undertakes for each standard over a five-year cycle. EPA determined that the updated standard is compliant with the statutory criteria and consistent with the final rule. Therefore, in the final rule, EPA is referencing the standards and practices developed by ASTM International and known as Standard E1527-05 (entitled “Standard Practice for Environmental Site Assessments: Phase I Environmental Site Assessment Process).” Persons conducting all appropriate inquiries may use the procedures included in the ASTM E1527-05 standard to conduct all appropriate inquiries in compliance with the final rule.

EPA welcomes ASTM International, as well as any other standards developing organization, to submit additional applicable voluntary consensus standards to the Agency for review, including ASTM’s E2247-02, Standard Practice for Environmental Site Assessments: Phase I Environmental Site Assessment Process for Forestland or Rural Property. EPA will review ASTM International’s revised standard against the statutory criteria and the requirements included in the final rule. If EPA determines that an updated ASTM E2247 standard is consistent with the statutory criteria (CERCLA §101(35)(B)(iii)) for all appropriate inquiries and not inconsistent with the provisions of the final rule (or otherwise impractical), then EPA will propose to amend the final rule and incorporate by reference the updated standard.

Commenter Organization Name: ENSR International
Comment Number: 0314
Excerpt Number: 12
Excerpt Text:
The proposed rule is silent as to how a promulgation date would be handled.

Comment: ENSR recommends that a promulgation date 90 days from rule publication be used to allow a grace period between publication of the final rule and its final implementation. Alternatively, a grace period of 90 days from final rule publication for reports meeting ASTM 1527-00 (the current default standard) could be allowed. Either would allow for studies that are underway under existing standards to be completed and considered to meet AAI, without having to revise them to meet the new standards in mid-course, resulting in project delays, and cost changes to the client.

Response:
The effective date of the final rule is one year following the date of publication of the rule in the Federal Register. This is much longer than the 90 days proposed by the commenter. EPA believes that allowing for a year between publication of the final rule and the effective date will provide adequate public notice and "would allow for studies that are underway under existing standards to be completed and considered to meet AAI, without having to revise them to meet the new standards in mid-course, resulting in project delays, and cost changes to the client."

Commenter Organization Name: FAA
Comment Number: 0334
Excerpt Number: 3
Excerpt Text:
ASTM E1527-2000 STANDARD VS. PROPOSED AAI STANDARDS1)

The proposed standards emphasize that the current ASTM E1527-2000 standard does not comply with the Brownfields Amendments. However, the rule preamble does not indicate why E1527-2000 doesn't meet the new requirements of the Brownfields Amendments or identify specific citations in the Amendments to explain why E1527-2000 would not comply. FAA would like EPA to include more discussion of why E1527-2000 was not adopted outright, to identify and discuss the clauses in the Brownfields Amendments that E1527-2000 does not meet, and to explain why it doesn't meet them.

Response:
The preamble to the proposed rule (at 69 FR 52574 – 75) explains the reasons for EPA's determination that the ASTM E1527-2000 standard is not consistent with the CERCLA statute, as amended by the Brownfields Amendments. As part of the explanation, EPA provides specific citations to CERCLA.

Commenter Organization Name: USWAG
Comment Number: 0367
Excerpt Number: 2
Excerpt Text:
As EPA knows, the prevalent environmental site assessment standard in use for the past decade is the ASTM Phase I standard known as E1527[Footnote: The standard is officially known as the

Standard Practice for Environmental Site Assessments: Phase I Environmental Site Assessment Process.

Congress recognized its wide acceptance in the marketplace by designating the 1997 version of this standard as the interim assessment standard to achieve CERCLA liability protections for property acquisitions from May 31, 1997, until EPA's AAI regulation becomes effective. CERCLA § 101(35)(B)(iv)(II); see 69 Fed. Reg. at 52545. Since the 1997 version of El 527 had been superseded by the 2000 version by the time Congress passed the Brownfields law, EPA wisely clarified what appeared to be a congressional scrivener's error by recognizing both versions of E1527 as acceptable interim standards. 68 Fed. Reg. 24888 (May 9, 2003).

US WAG members, like most of the regulated community segment that engages in site assessments for the purpose of achieving CERCLA liability protections, have successfully used ASTM El 527 for many years, are thoroughly familiar with its provisions, and in the spirit of "if it isn't broke, don't fix it", believe that EPA should promulgate an AAI rule that hews as closely to the El527 standards as is legally permissible. We acknowledge that the Brownfields law prescribes requirements that are not in the 2000 version of El 527. However, as we explain later in these comments, we believe EPA has overstated the extent to which the ASTM standard falls short of the new statutory requirements. See 69 Fed. Reg. at 52574-75.

Nevertheless, US WAG is pleased that EPA has actively participated in the ASTM task group process by which ASTM expects to update the El 527 standard and to bring it into conformity with the Brownfields law. Similarly, ASTM is in the process of updating its Phase I standard for forestland and rural property, known as ASTM E2247-02 [Footnote: This standard is officially known as Standard Practice for Environmental Site Assessment: Phase I Environmental Site Assessment Process for Forestland or Rural Property.]. We strongly urge EPA upon completion of this process to reference the amended El 527 and E2247 standards in the final AAI rule as acceptable alternatives to the EPA rule for conducting AAI to qualify for CERCLA liability protections [Footnote: A recent example of EPA regulations in which the Agency encouraged the regulated community to look to industry standards in implementing the Agency's program is found in the 2002 amendments to the Oil Pollution Prevention and Response Regulations, popularly known as the SPCC rules. See 67 Fed. Reg. 47042, 47057-58 (July 17, 2002).].

Response:
As the commenter points out, since publication of the proposed rule, ASTM International and its committee responsible for the development of the ASTM E1527 Phase I Environmental Site Assessment Process reviewed and dated the “2000" version of the E1527 standard to address the differences between the ASTM E1527 standard and the criteria established by Congress in the Brownfields Amendments to CERCLA. These activities were conducted within the normal review and updating process that ASTM International undertakes for each standard over a five-year cycle. EPA determined that the updated standard is compliant with the statutory criteria and consistent with the final rule. Therefore, in the final rule, EPA is referencing the standards and practices developed by ASTM International and known as Standard E1527-05 (entitled “Standard Practice for Environmental Site Assessments: Phase I Environmental Site Assessment Process).” Persons conducting all appropriate inquiries may use the procedures included in the

ASTM E1527-05 standard to conduct all appropriate inquiries in compliance with the final rule.

EPA welcomes ASTM International, as well as any other standards developing organization, to submit additional applicable voluntary consensus standards to the Agency for review, including ASTM International's E2247-02, Standard Practice for Environmental Site Assessments: Phase I Environmental Site Assessment Process for Forestland or Rural Property. EPA will review ASTM International's revised standard against the statutory criteria and the requirements included in the final rule. If EPA determines that an updated ASTM E2247 standard is compliant with the statutory criteria (CERCLA §101(35)(B)(iii)) for all appropriate inquiries and not inconsistent with the provisions of the final rule (or otherwise impractical), then EPA will propose to amend the final rule and incorporate by reference the updated standard.

Commenter Organization Name: Thornhill, James
Comment Number: 0414
Excerpt Number: 4
Excerpt Text:
The effective date of the regulations should not adversely impact binding contracts for the purchase of real property or with environmental consultants to perform ASTM Standard Phase I's during the period such Phase I's are valid. The implementation of the regulation could have an adverse impact on current transactions if the effective date of the regulations is not sufficiently delayed after the final regulations are published or a savings provision is not included. Currently purchasers used ASTM Standard Practice E-1527-97 or E 1527-00 to meet the all appropriate inquires requirement for defenses under CERCLA. Both of standards provide for a Phase I rendered following such standards to be valid for 180 days. Anyone who has contracted for or received an ASTM standard Phase I prior to the publication date of the final rule should be permitted to close on the purchase of a property during the time period that the Phase I remains valid in accordance with such standard. If EPA does not provide a savings provision in this manner, it could have a dramatic impact on ongoing transactions. For example, assume that the final rule has not yet been published and a purchaser enters into a contract for purchase of a property on February 1, 2005 with a 60 day due diligence and a closing date of September 1 to allow for rezoning. The purchaser may obtain an ASTM Standard Phase I dated April 1, 2005, which would still be valid following the standard for a September 1st closing. If the final rule is published on April 15, 2005 with an effective date of July 15th, it would be well before the scheduled closing date of September 1st and after the purchaser's due diligence period has passed under the contract. In such case, the purchaser would have paid for the ASTM standard Phase I and have no rights to perform the additional necessary due diligence to meet the all appropriate inquiries standard. There can also be circumstances where a purchaser has entered into a contract with a Consultant to complete an ASTM standard Phase I on one or more properties, but has not yet entered into a binding purchase contract for the property or properties. Many times purchases occur where the purchase contract is signed and the closing occurs at the same time, especially when real property is included in a larger corporate transaction. These types of transactions must also be considered in determining how the rule becomes effective.

Response:

The effective date of the final rule is one year following the date of publication of the rule in the Federal Register. EPA believes that allowing for a year between publication of the final rule and the effective date will provide adequate public notice and would allow for site assessments that are underway under the existing interim standards to be completed and considered to meet the provisions of the final rule without having to revise them to meet the new standards in mid-course.

Commenter Organization Name: Freeman & Giler
Comment Number: 0417
Excerpt Number: 9
Excerpt Text:
USEPA does not address in either the preamble or the AAI Rule how the new rule will be put into effect. To avoid gaps, it will be critical that the effective date for the AAI Rule allow adequate time for property transactions which commenced AAI using the ASTM standard prior to the new AAI Rule to close. Moreover, Users will have to become familiar with the new requirements. It will take time for institutional Users to confirm that their EPs' qualifications comply with the new AAI Rule and to qualify and retain additional EPs, if necessary. For all these reasons, we suggest that the AAI Rule go into effect at least one (1) year after the final rule is promulgated.

Response:
The effective date of the final rule is one year following the date of publication of the rule in the Federal Register. EPA believes that allowing for a year between publication of the final rule and the effective date will provide adequate public notice and would allow for site assessments that are underway under the existing interim standards to be completed and considered to meet the standards of the final rule, without having to revise them to meet the new standards in mid-course. This also will provide adequate time for property owners to familiarize themselves with the rule and confirm the qualifications of their environmental professionals.

Commenter Organization Name: Tryon, Bill
Comment Number: 0418
Excerpt Number: 8
Excerpt Text:
Despite EPA's development of a standard for AAI, ASTM's practice will continue to serve an important role in the industry. EPA's definition leaves much to the discretion of the EP. ASTM's practice will continue to provide a safe harbor to minimize consultant liability and avoid ground-up recreation of the scope of work for every assignment.

As a point of clarification, the examples cited in the AAI pre-amble outlining the areas where the 1527-97/1527-00 does not meet the intent of the legislation do not appear to be completely accurate:

The alternate date of 1940 required under the 1527-97 and 1527-00 is more stringent than the

proposed rule. The legislation, as well as the 1527, requires review of historical sources to determine first developed use. However, the 1527 exceeds AAI in that a property that is currently undeveloped, or was recently developed, must be researched back to at least 1940 even if the property has been undeveloped for that entire period.

The 1527 meets the intent of the legislation in mandating visual inspections of adjoining properties (Section 8.4.1.3), and exceeds the legislation by requiring the identification of property uses beyond adjoining properties if, in the judgment of the EP the uses are likely to indicate recognized environmental conditions on the subject site (section 8.1.5). Additionally, historical uses of adjoining properties "shall be described in the report if they are likely to indicate recognized environmental conditions in connection with the adjoining properties or the property."

Response:
It is the Agency's intent to 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. However, as explained in the preamble to the proposed rule, EPA determined that the 2000 version of ASTM's E1527 Phase I Environmental Site Assessment Process is not consistent with the statutory criteria for all appropriate inquiries. Section 12(d) of the National Technology Transfer and Advancement Act of 1995 ("NTTAA"), Public Law No. 104-113, section 12(d) (15 U.S.C. 272 note) 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. Given that EPA determined that the ASTM E1527-2000 standard is inconsistent with applicable law, use of the ASTM E1527-2000 standard is not consistent with statutory requirements.

EPA is not convinced by the commenter's arguments regarding the consistency of the ASTM standard with the statutory criteria. Particularly in the case of the need to consider the relationship of the purchase price to the value of the property, if it were not contaminated, the mere fact that the commenter believes that ASTM International included a related activity in the E1527 standard in response to the 1986 amends to CERCLA, does not render the standard compliant with the statute. Also, in the case of environmental cleanup liens, EPA disagrees with the commenter's statement that land title records are "under state law… the only place where liens can be validly recorded." Such liens may be included as part of the chain of title documents or may be recorded in some other manner or format by state or local government agencies. Recorded environmental cleanup liens may be recorded in different places, depending upon the particular state and particular locality in which the property is located.

Since publication of the proposed rule, ASTM International and its committee responsible for the development of the ASTM E1527 Phase I Environmental Site Assessment Process reviewed and dated the "2000" version of the E1527 standard to address the differences between the ASTM E1527 standard and the criteria established by Congress in the Brownfields Amendments to CERCLA. These activities were conducted within the normal review and updating process that ASTM International undertakes for each standard over a five-year cycle. EPA determined that

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

EPA is confident that in the near future, an updated ASTM E1527 standard will be available for use in complying with the federal regulations for all appropriate inquiries. EPA’s activities with regard to reviewing and evaluating the ASTM standard and working with the ASTM E50 subcommittee to update the E1527 standard are compliant with the NTTAA.

Commenter Organization Name: West Berkeley Association
Comment Number: 0430
Excerpt Number: 3
Excerpt Text:
At a minimum, we request that EPA amend the text of the proposed regulation as follows at § 312.21:

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

--(1) Only Ppersons who purchased property after the effective date of this part and are seeking to qualify for:

We think you will agree that EPA might clarify existing law as it applies to past transactions by restating good commercial practice as it has existed in the past, but it may not retroactively apply new requirements. If it is correct that EPA only intends the new rule to affect persons who purchase property after the effective date of the rule, we see no reason why you would not agree to make the change that we suggest.

We think this change is important because the Brownfield Amendments provide interim standards that are retroactive and state that these interim standards remain in effect "until the Administrator promulgates the regulations [for AAI]." This would lead the average reader to believe that the new AAI regulations will be retroactive. We are also concerned because in several places in the text of the new rule and in the explanatory passages provided by EPA it states that: "Today's proposed rule applies to any person who may seek the landowner liability protections of CERCLA as an innocent owner, contiguous property owner, or bona fide prospective purchaser." A plain reading of this passage would be that "any person" means any person, whether they bought property in the past or buy it in the future.

Response:
The point made by the commenter is addressed by establishing an effective date for the final rule. The effective date of the final rule is one year following the date of publication of the rule in the Federal Register. EPA believes that allowing for a year between publication of the final

rule and the effective date will provide adequate public notice and would allow for site assessments that are underway under the existing interim standards to be completed and considered to meet the provisions of the final rule, without having to revise them to meet the new standards in mid-course. Persons who bought property prior to the effective date of the final rule will not be affected by the final rule. The requirements of the final rule affect only future purchases in that a property owner must comply with the provisions prior to the date of acquiring the property.

6.3 The Agency Should Clarify whether the CERCLA Liability Protections Apply if the State Government Acquires the Property Amicably by Agreement in Lieu of Eminent Domain

Commenter Organization Name: Patel
Comment Number: 0115
Excerpt Number: 1
Excerpt Text:
As noted in the last paragraph of Section III.A. of the Supplementary information, the Proposed Rule does not affect the existing CERCLA liability protections for state governments that acquire ownership of property in their functions as sovereigns pursuant to eminent domain. However, it is unclear whether the liability protections pursuant to CERCLA Sections 101(2)(D) and 101(35){A)(ii) apply where a state government acquires property amicably by agreement in lieu of eminent domain.

It would be neither feasible nor cost effective for a state government to apply the standards in the proposed rule to every property acquired as part of a large scale project, such as a federally funded highway construction project. The standards would also be duplicative, in many instances, in light of other state and federal requirements such as the requirements of the National Environmental Policy Act of 1969, This could place state highway departments in the unfortunate position of having to choose between forgoing CERCLA liability protection or wasting public dollars by either acquiring all property for a highway construction project through unnecessary eminent domain proceedings or by conducting highly expensive and potentially duplicative environmental evaluations.

Accordingly, the Pennsylvania Department of Transportation respectfully requests that the EPA either clarify that the liability protections pursuant to CERCLA Sections 101(2)(D) and 101(35)(A)(ii) apply even where the state government acquires the property amicably by agreement in lieu of eminent domain or that the EPA amend the Proposed Rule to provide an exception that would allow state governments to meet the standards and practices for all appropriate inquiries for large scale projects by employing the existing ASTM standards and compliance with other state and Federal requirements.

Response:
The final rule setting federal standards for the conduct of all appropriate inquiries does not affect in any way the CERCLA liability provisions or liability protections. In fact, the statutory liability protections cited by the commenter are outside the scope of the final rule. The final rule merely sets forth requirements for complying with one condition for obtaining protection from CERCLA liability.

Although it may be burdensome or costly for state and local governments to comply with the provisions of the rule in cases where they are acquiring large parcels of land, nothing in the CERCLA statute authorizes EPA to exempt state and local governments from the requirements of the final rule.

With regard to the use of the ASTM E1527 standard, since publication of the proposed rule, ASTM International and its committee responsible for the development of the ASTM E1527 Phase I Environmental Site Assessment Process reviewed and dated the “2000" version of the E1527 standard to address the differences between the ASTM E1527 standard and the criteria established by Congress in the Brownfields Amendments to CERCLA. These activities were conducted within the normal review and updating process that ASTM International undertakes for each standard over a five-year cycle. EPA determined that the updated standard is compliant with the statutory criteria and consistent with the final rule. Therefore, in the final rule, EPA is referencing the standards and practices developed by ASTM International and known as Standard E1527-05 (entitled “Standard Practice for Environmental Site Assessments: Phase I Environmental Site Assessment Process).” Persons conducting all appropriate inquiries may use the procedures included in the ASTM E1527-05 standard to conduct all appropriate inquiries in compliance with the final rule.

Commenter Organization Name: ODOT
Comment Number: 0244
Excerpt Number: 1
Excerpt Text:
We are pleased to submit these comments on behalf of the Ohio Department of Transportation ("ODOT") on the U.S. Environmental Protection Agency's ("EPA") proposed rule for conducting "all appropriate inquiries" under Section 101(35)(B) of CERCLA. ODOT appreciates the transparent process EPA has used to create the proposed rule. The "negotiated rulemaking" will ensure that EPA's final rule reflects appropriately the concerns of the regulated communities and the general public.

ODOT recognizes the challenge EPA faces in drafting the rule in a way that sufficiently covers the interests of the regulated community and is consistent with the goals of CERCLA. The proposed rule, however, fails to address one major area of concern for ODOT. Specifically, the rule could result in inconsistent application of CERCLA exemptions to liability for states conducting property acquisitions. As written, it fails to adequately take into account differing interpretations and legal standards for a state's exercise of eminent domain authority which, in turn, could lead to inconsistent and unfair application of the protections intended to be afforded by the conduct of all appropriate inquiries. ODOT's comments address this one specific, but crucial, aspect of EPA's proposal.

POTENTIAL INCONSISTENCY IN APPLICATION OF THE PROPOSED RULE TO STATES ASSERTING INNOCENT LANDOWNER DEFENSE

In 1986, SARA created the "innocent landowner" defense to CERCLA liability, by which persons are not subject to CERCLA liability if they demonstrate they did not have "reason to know," prior to purchasing property, that such property had been the site of the disposal or release of hazardous waste. In order to claim protection under SARA, prior to, or at the time of

purchase, a person must have undertaken "all appropriate inquiries" into the previous ownership and usage of the property. The rule currently under consideration would apply to any and all potentially responsible parties hoping to avail themselves of the innocent landowner defense.

Under SARA, 42 U.S.C. § 9607(b), a property owner is immune to "owner" liability when it can prove, inter alia, it was not in a "contractual relationship" with the person who caused the contamination. This section reads in part:

There shall be no liability under subsection (a) of this section for a person otherwise liable who can establish by a preponderance of the evidence that the release or threat of release of a hazardous substance and the damages resulting there from were caused solely by...

(3) an act or omission of a third party other than an employee or agent of the defendant, or than one whose act or omission occurs in connection with a contractual relationship, existing directly or indirectly, with the defendant...

The definition of "contractual relationship" excludes situations where (1) the property at issue is acquired after the disposal or placement of the hazardous substance on the property, AND (2) the defendant can prove that he did not have actual/constructive knowledge of a release/threat OR the defendant is a governmental entity which acquired property by eminent domain [Footnote: The definition of "contractual relationship" actually sets out three mitigating circumstances that cut against such a finding. A defendant must establish that at least one of the three circumstances set out in the definition are met in order to qualify under the SARA exemption. The mitigating circumstances set out in 42 U.S.C. § 9601(35)(A)(i)-(iii) are as follows:(i) At the time the defendant acquired the facility the defendant did not know and had no reason to know that any hazardous substance which is the subject of the release or threatened release was disposed of on, in, or at the facility. (ii) The defendant is a government entity which acquired the facility by escheat, or through any other involuntary transfer or acquisition, or through the exercise of eminent domain authority by purchase or condemnation. (iii) The defendant acquired the facility by inheritance or bequest.].

Thus, the duty to conduct all appropriate inquiries is triggered only when a landowner proceeds under the knowledge theory set out at 42 U.S.C. § 9601(A)(35)(i). The statute clarifies that a governmental entity taking property for public purposes need not conduct all appropriate inquiries because the definition of contractual relationship referenced in Section 9601(35)(A)(ii) expressly excludes situations where the government entity exercises its eminent domain authority.

A problem arises in the application of the proposed rule because of competing interpretations of the term "eminent domain authority." In particular, a state interpreting the term to include any land acquisitions made on the threat of a state's eminent domain power, would be unaffected by the proposed rule. However, a state interpreting the term to include only situations where the state acquires property by eminent domain through adjudication, would need to proceed under Section 9601(35)(A)(i) with respect to voluntary property acquisitions and conduct all appropriate inquiries in order to avail themselves of the innocent landowner defense.

Some courts (notably in the Ninth Circuit) read the term "exercise of eminent domain authority" broadly to include property sold under the threat of the government's eminent domain power [Footnote: In Emeryville v. Elementis Pigments Inc., No. C 99-03719 (N.D. Cal. 2001), the court held that the "exercise of eminent domain" included land transfers where eminent domain actions were threatened and not filed..]. By contrast, the state of Ohio interprets the term strictly. O.R.C. 163.04 and 163.05 proscribe the method by which an agency in the state of Ohio may exercise its eminent domain power. Section 163.04 states, "appropriations shall be made only after the agency is unable to agree, for any reason, with the owner..."

In City of Toledo v. Beazer Materials & Services, 923 F. Supp. 1013 (N.D. Ohio 1996), the court interpreted this language to address the situation where a governmental entity coerced a private land owner into selling its land under the threat of eminent domain. The court held that since the parties were able to reach an agreement on the sale of the property, then the state had not "exercised" its eminent domain authority. The court concluded that "only if the parties had been unable to agree would the City have been empowered to exercise its power of eminent domain under O.R.C. Sec. 163.05[Footnote: Section 163.05 reads: An agency which has met the requirements of section 163.04 of the Revised Code, may commence proceedings in a proper court by filing a petition for appropriation of each parcel or contiguous parcels in a single common ownership, or interest or right therein.]." The court reasoned that since it was unnecessary for the City to takes steps to institute eminent domain proceedings in court, then it could not be held that the property was acquired through the City's "exercise of eminent domain authority." 923 F. Supp. at 1020.

The Beazer court's approach has been followed in other jurisdictions. In City of Wichita v. Aero Holdings, Inc., 177 F. Supp. 2d 1153 (D. Kan. 2000), a municipality sought to escape CERCLA liability by arguing that it had acquired title to contaminated property involuntarily by virtue of its function as sovereign [Footnote: CERCLA § 101(20)(D), 42 U.S.C. § 9601(20)(D), excludes from the definition of "owner or operator" any "unit of . . . local government which acquired ownership or control involuntarily through bankruptcy, tax delinquency, abandonment, or other circumstances in which the government involuntarily acquires title by virtue of its function as sovereign." The municipality argued that it was excluded from this definition and thereby not liable as a PRP under Section 107(a)(1).]. Citing Beazer, the court held that while the exercise of eminent domain was a function reserved to the sovereign, a municipality could not place itself beyond CERCLA's reach by "merely threatening the exercise of eminent domain." As in Beazer, the court commented that the municipality must actually institute court proceedings in order to exercise its eminent domain authority. 177 F. Supp. at 1169.

By way of contrast, we understand that the Washington Department of Transportation ("WDOT") subscribes to the notion that transportation departments generally do not need to establish innocent landowner defenses to CERCLA liability because they can avail themselves to a defense under eminent domain for all their takings, whether forced or voluntary. This approach is illustrated in Emeryville v. Elementis Pigments Inc., No. C 99-03719 (N.D. Cal. 2001). There, the court held that the "exercise of eminent domain" included land transfers where eminent domain actions were threatened and not filed. The California court reasoned that

CERCLA was intended to make environmental clean up actions more speedy and efficient, and that limiting the definition of "eminent domain authority" would serve to frustrate that purpose. Requiring the state to file eminent domain proceedings in court before acquiring property that may be contaminated, would ostensibly delay the sale and clean up of contaminated property.

In light of these competing interpretations, the gap in the proposed regulations has the potential to lead to perverse results among agencies in different states acquiring land for the public benefit in virtually the same way. The proposed rule may or may not forgive potential CERCLA liability to state agencies depending on differing interpretations of what constitutes an exercise of eminent domain authority. States subject to judicial interpretations of eminent domain authority like the Northern District of California could avoid undertaking the all appropriate inquiries analysis in making voluntary property acquisitions, while state agencies in jurisdictions like Ohio and Kansas would need to comply with the rule in order to obtain the same stated benefits of the exemption.

IMPLICATIONS OF THE PROPOSED RULE ON ODOT

The practical implications of the proposed rule for ODOT are real. ODOT conducts property acquisitions consistent with a careful environmental site assessment program. It clearly wishes to obtain the benefit of the innocent landowner defense. By way of example, however, two ODOT construction projects would face serious cost issues based on the interpretation of eminent domain authority described above.

The Appalachian Corridor D project is a collaborative effort between West Virginia and Ohio on the construction of a new bridge over the Ohio River. The project was initiated by the West Virginia Department of Transportation ("WVDOT"). ODOT's side of this project is dependant on WVDOT's ability to complete the applicable environmental documentation, project plans and to acquire funding. An environmental site assessment was completed in the year 2000 for the project area. Rights-of-Way ("ROW") could not be acquired for each property until the preferred alignment was chosen by WVDOT and the ROW plans were finalized. The ROW acquisition process was authorized to proceed July 2, 2003. At this time, the ROW acquisition has been completed for five of the seven properties. ODOT has been forced to file eminent domain actions to acquire rights to the two remaining properties.
Negotiations for the most recently acquired property (an industrial property undergoing RCRA cleanup) stalled during the acquisition process. ODOT began coordinating with the industrial owner, Ohio EPA and EPA to ensure that the RCRA cleanup was either completed prior to or incorporated into the transportation project. These negotiations began in 2000 as a result of the environmental site assessment findings. Unlike private land acquisitions, ODOT's negotiations are generally very complex because of the variety of issues that arise such as the loss of utility to adjacent parts of the seller's property, access rights, and fair market value. After negotiations stalled, ODOT began the process of initiating an appropriation through eminent domain. In this case, however, the landowner agreed to a last-minute settlement which kept the acquisition out of the appropriations process.

If the proposed rule had been used as a part of this acquisition, in order to obtain an exemption

under SARA, ODOT would have been required to conduct all appropriate inquiries for five of the properties but not for two of the last acquisitions, solely because the latter would be viewed as acquisitions under its eminent domain authority. Despite the fact that all of the acquired properties are part of a larger area that has already been subjected to an environmental site assessment under NEPA, ODOT would be required to comply with the proposed rule with respect to five of the seven parcels simply because it did not need to resort to court adjudication in order to acquire rights to these properties. Furthermore, analysis under the all appropriate inquiries rule would be far less comprehensive than the environmental site assessment and any information ODOT gathered through the collaborative effort with USEPA, Ohio EPA and the landowner. Those properties taken by eminent domain benefited from ODOT's approach. As ODOT's appropriation by eminent domain only occurs as a last resort, these properties were subject to the same environmental site assessment studies and cooperative fact gathering efforts as those properties acquired voluntarily.

Another project, the widening of Navarre Avenue (LUC-2-21.15 PID: 9159), would face significant costs concerns if compelled to meet the all appropriate inquiries standards. This project, the widening of approximately 6 miles of SR 2 within the City of Oregon, Ohio, required 465 property acquisitions. The environmental site assessment studies were completed in November of 1995 with property acquisition beginning in June 1998. Of these 465 parcels, 120 were appropriated through eminent domain proceedings. Under the proposed rule, an additional round of all appropriate inquiries assessments would be required for each of the remaining 345 voluntary acquisitions in order to obtain the benefit of the CERCLA exemption. This effort could add approximately $1,207,500 to the project's cost (assuming that each inquiry cost $3500 per property, this figure does not include the cost of the appraisal, title and other real estate information obtained during the acquisition process after the environmental site assessment studies were completed).

CONCLUSION

To place the concerns raised in these comments in prospective, only approximately 12% of ODOT's annual property acquisitions are made via eminent domain actions. Yet, ODOT's current approach insures that all of its property acquisitions, both voluntary and involuntary, include a rigorous environment site assessment process.

In recognition of the current inconsistency in application of the proposed rule, ODOT respectfully requests that EPA revise the rule to exclude both voluntary and involuntary property acquisitions from the all appropriate inquiries analysis for government entities. Application of the rule as written has the potential to significantly increase the costs of all transportation projects in Ohio. By amending the rule, EPA would promote consistency among states acquiring property under the SARA exemption. Such an amendment would substantially lower transportation project costs in these states, while not diluting the CERCLA's goals of environmental protection.

Response:
Although EPA sympathizes with the commenters concerns, the commenter’s request is beyond

the scope of the final rule. The statute does not provide an exemption from CERCLA liability for state and local governments that acquire property voluntarily.

6.4 Sections of the Rule Should Be Printed in Bold Letters

Commenter Organization Name: AZBTR
Comment Number: 0338
Excerpt Number: 1
Excerpt Text:
The AZBTR strongly agrees with the language of 312(d). It is the responsibility of any person conducting All Appropriate Inquiries to ensure that the work does not constitute the practice of any of the professions regulated by the Board unless that person is registered with the Board. Failure to comply with the regulations and rules of the Board is a violation of Arizona law and subjects the person to penalties and fines.

In order to minimize the potential for a violation of Arizona law the AZBTR suggests that the sentence 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). be printed in bold letters.

Response:
The Agency appreciates the commenter's concern. However, EPA does not share the commenter's opinion that any particular section of the regulatory language needs to be, or should be, highlighted through the use of bold font. It is important that persons to whom the rule applies comply with all of the requirements in the final rule.

6.5 Post-acquisition Statutory Requirements for Obtaining the CERCLA Liability Protections

Commenter Organization Name: Rose and Westra
Comment Number: 0320
Excerpt Number: 4
Excerpt Text:
The Pre-Amble indicates that failure to identify an environmental condition or identify a release or threatened release does not relieve landowners from requirements to comply with post-acquisition requirements. This does not make any practical sense. If a prospective purchaser follows AAI rules and does not identify these conditions, then how could the landowner be expected to have knowledge to comply with post-acquisition requirements? This is the EPA having its cake and eating it too! The EPA creates the AAI rules, but if the inquiry consistent with the rules does not identify conditions, the landowner is required to utilize facts not in their possession. R&W requests the EPA to recognize that people can only act on their knowledge and retract this legislation by rule proposition.

Response:
EPA notes that any person may be protected from CERCLA liability as an innocent landowner if that person can demonstrate to a court that the person did not know, "and had no reason to know" of the contamination for which the person may be accused of being liable. The discussion in the preamble to which the commenter is referring is meant to inform the public that failure to identify a release or threatened release during the conduct of all appropriate inquiries may not be an adequate defense to liability if a release or contamination is not addressed by the property owner and is later discovered by a third party, particularly if the property owner cannot demonstrate that all appropriate inquiries were conducted in compliance with the provisions of the regulatory requirements.

Commenter Organization Name: Anonymous
Comment Number: 0371
Excerpt Number: 1
Excerpt Text:
While I believe the intent of adding categories of protection is a good one, it appears that the bona fide prospective purchaser and contiguous property owner defenses have greater requirements than does the innocent landowner. One of the reasons developers are not developing brownfields is the fear of being held responsible for clean up of the site. I don't see where the bona fide prospective purchaser defense provides them with any relief from liability and appears to place a greater burden on them, due to the statutory requirements, than does the innocent landowner defense.

Each of the defenses requires the property owner to take reasonable steps to stop continuing releases, prevent any threatened releases and prevent or limit human,

environmental, or natural resource exposures to any hazardous substances released on or from the property. I can foresee circumstances where buried or subterranean contamination could exist, but not be detected during document reviews and interviews. This requirement would continue to limit purchaser/developer interest in brownfields sites as they can potentially be held liable for cleaning up contamination that they did not cause or have reason to know about. It would seem that once AAI has been completed for a given property, provided that the AAI did not identify any evidence suggestive of potential subsurface contamination or contain recommendations for Phase II sampling, that the purchaser not be held liable for clean up of the property.

Response:
The scope of the final rule is to set federal standards for the conduct of all appropriate inquiries. All appropriate inquiries is just one criteria established by Congress in CERCLA that is necessary for obtaining protection from CERCLA liability. The commenter's request to alter the criteria necessary for obtaining protection from CERCLA liability is beyond the scope of the final rulemaking. In addition, the commenter's request may be beyond EPA's authority, given the statutory requirements.

Commenter Organization Name: Rybak, John Thomas
Comment Number: 0412
Excerpt Number: 13
Excerpt Text:
Exercise Appropriate Care - what level do you need to go to, to halt the release

a)Page # 52546

b)View: The purchaser is required to halt a release, to preserve their AAI. The definition 'Halt the Release' should be further defined.

c) Assumptions: Halt the release should not be defined as remediate the source of release. If contaminated soils and groundwater are present onsite, then halt the source should not constitute remediation of the soils. However, if operations or above ground storage of chemicals are continuing to discharge chemicals and/or impact the property ('operational releases'), then the purchaser should take necessary steps to limit the ongoing release, contribution to the contamination and/or protect the environment. These actions should not make them liable for remediation of the whole contamination.

d) Burden: The purchaser will have a burden to demonstrate they have taken proper actions to halt operational releases, and not contributed to the known contamination onsite. They must be careful not to disturb or manage the known contamination. The extent they must exercise appropriate care may affect cash flow and loan repayments.

Response:
Continuing obligations required under the statute include: stopping on-going releases; 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 future 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 Quality 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 rule.

As explained in more detail in the "Common Elements" guidance, the requirement to stop on-going releases (or "halt" the release, to use the commenter's term) does not necessarily require that the property owner remediate the source of the release or undertake extensive corrective actions. Determining the nature and extent of "reasonable steps" necessary to ensure compliance with the continuing obligations imposed under the statute may entail an assessment of the site-specific circumstances at a particular property.

EPA notes that persons conducting all appropriate inquiries in compliance with the final rule are not entitled to the CERCLA liability protections provided for innocent landowners, bona fide prospective purchasers, and contiguous property owners, unless they also comply with all of the continuing obligations established under the statute. Compliance with the final rule is only one requirement necessary for obtaining CERCLA liability protection.

Commenter Organization Name: Thornhill, James
Comment Number: 0414
Excerpt Number: 2
Excerpt Text:
The underground storage tank example used in the data gap discussion on page 52,560 does not appear to be consistent with the available defenses under CERCLA . The discussion in the preamble provides: "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 land owner's ultimate ability to claim protection from CERCLA liability. For example, if a person does not identify, during all appropriate inquires prior to acquiring the 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 on-going release." The discussion and example appear to miss the fact that CERCLA has an innocent purchaser defense. If a landowner failed to learn of the leaking tank because he or she failed to perform all appropriate inquires, then he or

she would be unable to prove the bona fide prospective purchaser defense and the failure to stop an ongoing release would not be an issue. If, on the other hand, the landowner did conduct all appropriate inquiries and did not find the leaking tank, then he or she would attempt to prove the innocent purchaser defense which does not have a requirement to "stop a continuing release" as under 42 U.S.C. §9601(40)(D). The discussion and example should be deleted or modified for consistency with the two defenses.

Response:
EPA notes that any person may be protected from CERCLA liability as an innocent landowner if that person can demonstrate to a court that the person did not know, “and had no reason to know” of the contamination for which the person may be accused of being liable. The discussion in the preamble to which the commenter is referring is meant to inform the public that failure to identify a release or threatened release during the conduct of all appropriate inquiries may not be an adequate defense to liability if a release or contamination is not addressed by the property owner and is later discovered by a third party, particularly if the property owner cannot demonstrate that all appropriate inquiries were conducted in compliance with the provisions of the regulatory requirements.

EPA also notes for the commenter that the innocent landowner defense under CERCLA, as amended by the Brownfields Amendments (at Section 101(35)(B)(i)(II)(aa)) requires the property owner to take reasonable steps to stop any continuing releases.

6.6 Impact of the Rule on the Cost of Liability Insurance

Commenter Organization Name: Goodman, J. Dwight
Comment Number: 0097
Excerpt Number: 2
Other Sections: NEW - 3.13.2 - AAIs conducted by third parties
Excerpt Text:
Allowing (by regs) the transfer or reliance of the original ESA to any person besides the one it was originally prepared for creates an undue liability which will likely be reflected in some companies by increased prices and/or by the company ceasing to provide this ESA service because of the excessive liability versus revenue the reports generate. Most companies want to reduce liability, but by allowing anyone to use the original ESA....you increase that liability exposure. Perhaps a re-write of the proposed rule that would state it is "allowable under the judgment of the EP to provide reliance" would be more acceptable.

Response:
Nothing in the proposed or final rule restricts an environmental professional and a property owner from entering into a contract that includes provisions for restricting the transfer or distribution of information or products development under the terms of the contract. However, the final rule does not prohibit the use of previously conducted all appropriate inquiries investigations or reports or the information contained in such reports. The final rule does require that an all appropriate inquires investigation be conducted or updated with one year of the date of acquisition of the property. In addition, in the case of all appropriate inquiries conducted more than 180 days prior to the date of acquisition of a property, particular elements of the inquiries must be updated.

Commenter Organization Name: ENSR International
Comment Number: 0314
Excerpt Number: 11
Other Sections: NEW - 3.13.2 - AAIs conducted by third parties
Excerpt Text:
The proposed rule § 312.20 (c) states that all appropriate inquiries conducted by or for other persons can be used (which could be interpreted as relied on) in a report for a third party. The preamble (page 52557, first paragraph under (4)) also states that all appropriate inquiries can be conducted by one party and transferred to another.

Comment: While likely not the intent, this language implies that numerous parties can rely on a report prepared by a consultant for their client, without any need to obtain a release from the consultant. This would set an unfortunate precedent in the assessment industry, and increase the overall business risk to consultants as a whole. (Thereby reducing their willingness to perform this type of work or greatly increasing the price of an assessment to cover the added risk)

Response:
Nothing in the proposed or final rule restricts an environmental professional and a property owner from entering into a contract that includes provisions for restricting the transfer or distribution of information or products development under the terms of the contract. However, the final rule does not prohibit the use of previously conducted all appropriate inquiries investigations or reports or the information contained in such reports. The final rule does require that an all appropriate inquires investigation be conducted or updated with one year of the date of acquisition of the property. In addition, in the case of all appropriate inquiries conducted more than 180 days prior to the date of acquisition of a property, particular elements of the inquiries must be updated.

Commenter Organization Name: Rose and Westra
Comment Number: 0320
Excerpt Number: 5
Other Sections: NEW - 4.1 - The impact of the rule is underestimated
Excerpt Text:
The Pre-Amble further states that the EP's failure to identify an environmental condition or identify a release or threatened release may invalidate defenses to CERCLA liability. This essentially raises the standard of professional care for the EP to perfection. If any condition is not identified by the EP, the landowner might lose CERCLA defenses, even if the EP strictly followed the AAI Rules. Certainly, the EPA is far from perfect, so how can it expect the EP to be in every case? R&W recommends a specific statement addressing the EP's standard of care be included in the AAI rules. Failure to do so will increase the cost of the inquiries due to the increased cost of liability insurance, and will create a need for EPs to charge a risk premium relative to E-1527 Phase I ESAs due to inevitable increases in litigation. These costs were not addressed in the Economic Impact Analysis and, therefore, must be controlled in the Proposed Rules. R&W requests that the EPA remove this statement from the Pre-Amble and specifically address this vital issue in any future Proposed Rules.

Response:
EPA notes that any person may be protected from CERCLA liability as an innocent landowner if that person can demonstrate to a court that the person did not know, “and had no reason to know” of the contamination for which the person may be accused of being liable. The discussion in the preamble to which the commenter is referring is meant to inform the public that failure to identify a release or threatened release during the conduct of all appropriate inquiries may not be an adequate defense to liability if a release or contamination is not addressed by the property owner and is later discovered by a third party, particularly if the property owner cannot demonstrate that all appropriate inquiries were conducted in compliance with the provisions of the regulatory requirements.

EPA also notes for the commenter that the innocent landowner defense under CERCLA, as amended by the Brownfields Amendments (at Section 101(35)(B)(i)(II)(aa)) requires the property owner to take reasonable steps to stop any continuing releases. The

requirements for making the innocent landowner defense, as well as all of the statutory criteria for claiming the bona fide prospective purchaser and contiguous property owner liability protections are statutorily imposed and not within the scope of the final rule. Costs associated with complying with the continuing obligations imposed under the statute therefore are not considered when assessing the cost impacts of the rule.

Commenter Organization Name: Geomatrix Consultants
Comment Number: 0433
Excerpt Number: 5
Excerpt Text:
Although we support the need for ESA oversight by a professional engineer or geologist, the proposed AAI rules will result in significantly greater liability for EP's. The proposed AAI rules will entail expanded research requirements, less guidance on exercising professional judgment, and more scrutiny on data gaps during the ESA. The lack of detail in the proposed rules will require the EP to justify in writing his or her interpretation of the rules. Most importantly, the proposed AAI rules will be mandated by federal law instead of the current ASTM industry standard. Because the proposed AAI approach relies heavily on the judgment of the EP, EP's will be more exposed to errors and omissions claims until a new standard of care is established. Greater liability will result in increased costs by requiring significantly more time by experienced EP's and increased insurance premiums.

Response:
EPA agrees with the commenter that the final rule includes additional requirements for documenting data gaps. Costs associated with the incremental burden of documenting data gaps were including in the economic analysis conducted for the proposed and final rulemaking. A copy of the economic analysis conducted for the proposed and final rulemakings is included in the docket for the final rule.

EPA notes that nothing in the final rule precludes an environmental professional from using any previous guidance available on how best to use his or her judgment in conducting environmental assessments or the all appropriate inquiries investigations. The final rule includes many of the same aspects, with regard to the exercise of professional judgment, as the ASTM E1527 standard. EPA does not agree with the commenter that the final rule will result in environmental professionals having to exercise significantly more judgment than under the ASTM standard. In addition, the final rule requires that the all appropriate inquiries investigation be supervised by an individual who meets the definition of environmental professional, as defined in the final rule. The environmental professional must meet certain education and experience qualifications. Persons meeting the definition of an environmental professional should be capable of exercising the level of professional judgment necessary to perform the activities required by the final rule.

It is not clear that the insurance industry would react to the final rule as the commenter has indicated or that there will be any increase in insurance premiums as a result of the

final rule. It is possible, for example, that insurance companies will cut premiums for all policies that might be affected by potential CERCLA liability issues as a result of additional liability protections afforded under the statute as amended by the Brownfields Amendments for those parties who comply with the provisions of the final rule.

Commenter Organization Name: Hearn, J Clark
Comment Number: 0434
Excerpt Number: 4
Other Sections: NEW - 4.1 - The impact of the rule is underestimated
Excerpt Text:
In addition to the sections discussed above, the interviews, historical sources, and lien search provisions of the new rule all add substantial cost and uncertainty to the conduct of a Phase I site assessment.

The ASTM -1527-2000 protocol serves the private sector efficiently from both the performance and cost perspectives. The proposed AAI rules essentially forces a public sector approach to real estate transactions on a private sector marketplace that operates under strict time and cost constraints. Nonetheless, the overall time and cost ramifications on the private sector marketplace have not been been credibly addressed by ICF in the document issued for the EPA. The zero time and related cost allowances put forth by ICF not only ignore the obvious labor cost burdens but also the related abstract costs such as increased professional liability premiums, more conducted Phase II's to close data gaps, and fewer providers in the marketplace as a result of the proposed stringent Environmental Professional qualifications.

ICF's determinations are arbitrary in nature and may well be based on arbitrarily established foundations. Such arbitrary foundations were voiced by EPA representatives at an AAI workshop held as part of ASTM's meeting in Washington DC on October 5, 2004, "ICF's baseline was E 1527, but that's not being met right now by many poor-quality consultants. If the industry was truly following ASTM, the impact wouldn't be as great. Many are claiming their Phase Is are ASTM-compliant when in fact they are falling short of the bar." Seems to be a perception among committee members and EPA players here that if you're doing good work now, then there's not a whole lot that's changing.

The base line is, in fact, that the private sector market place is functioning well under E 1527 and that most consultants are doing their jobs in compliance with the protocol. The new rule simply adds a significant amount of work that is not required by current industry practice. The proposed AAI rules significantly expand consultant liability exposure, which will result in higher errors and omissions insurance premiums. The new rule will increase labor costs and associated time dynamics of the due diligence process. In many instances it may be impossible to comply with the new rule within the timeframe that the marketplace allows for closing commercial real estate
transactions.

Response:
With respect to the commenter's remark regarding the incremental burden, the Economic Impact Analysis (EIA) conducted for the proposed and final rulemaking estimated incremental burden hours for the new or incremental requirements imposed under the final rule that are not required under the ASTM E1527 standard. A copy of the EIA conducted for the proposed and final rules is included in the docket for the final rule.

With respect to the commenter's remark regarding liability insurance, it is not clear that the insurance industry would react to the final rule as the commenter has indicated. It is also possible, for example, that insurance companies will cut premiums for all policies that might be affected by CERCLA as a result of additional liability protection the final rule would offer to prospective landowners who follow the federal standards.

With respect to the commenter's concerns regarding the proposed definition of an environmental professional, EPA has modified the definition in the final rule to allow persons who have 10 years of full-time relevant experience, but do not have a Baccalaureate degree, to qualify as environmental professionals. The definition in the final rule is less stringent than the proposed definition, allowing for most people currently practicing as environmental professionals to qualify.

With regard to the commenter's concerns regarding the baseline used for assessing the incremental costs of the final rule, EPA compared the costs associated with the activities required under the final rule with those **required** under the interim standard, or the ASTM E1527. The Agency did not adjust the estimate of incremental costs based upon antidotal information that some environmental professionals are not complying with the requirements of the interim standard.

6.7 Negotiated Rulemaking Committee/Process

Commenter Organization Name: Crocetti, Charles
Comment Number: 0110
Excerpt Number: 3
Other Sections: NEW - 1.1.1.1 - Adopt the rule as proposed
Excerpt Text:
The proposed rule was developed based on the work of a Negotiated Rulemaking Committee represented by a wide spectrum of interests, including the. American Society of Civil Engineers, the National Groundwater Association, and ASFE. The latter groups represent, I believe, some of the premiere technical/trade organizations in the environmental industry, and each serves as a valuable resource for the dissemination of technical information and research relative to environmental work.

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

Response:
EPA thanks the commenter for his stated support of the proposed rule.

Commenter Organization Name: Academy of Certified Hazardous Materials Managers
Comment Number: 0140
Excerpt Number: 4
Excerpt Text:
In general the Academy agrees with and supports the process and the tenants of the "negotiated rule making process" but EPA must make assurances to the community that an impartial and equal representation of stakeholders are included in all future similar rule proceedings.

Response:
EPA thanks the commenter for its stated support of the proposed rule. EPA notes that the Federal Advisory Committee Act and the Negotiated Rulemaking Act require federal government agencies that use the negotiated rulemaking process for the development of proposed rules to assemble committees that have a balanced membership of affected stakeholders. In addition, federal agencies are required to provide public notice of their intent to negotiate a rulemaking and must give public notice of the proposed membership of the committee. The public can then comment on both the proposal to negotiate and the committee membership.

Commenter Organization Name: AIPG
Comment Number: 0253
Excerpt Number: 1

Excerpt Text:
It is not clear why the committee, which consisted of a wide range of stakeholders, did not include AIPG as an invited participant.

Response:
EPA notes that the Federal Advisory Committee Act and the Negotiated Rulemaking Act require federal government agencies that use the negotiated rulemaking process for the development of proposed rules to assemble committees that have a balanced membership of affected stakeholders. In addition, federal agencies are required to provide public notice of their intent to negotiate a rulemaking and must give public notice of the proposed membership of the committee. The public can then comment on both the proposal to negotiate and the committee membership. EPA provided public notice of its intent to negotiate the all appropriate inquiries proposed rulemaking in the Federal Register on March 6, 2003. On April 14, 2003 EPA held a public meeting and accepted comment on the Agency's decision to negotiate the proposed rule and on the Agency's proposed membership for the negotiated rulemaking committee.

The requirement to have a balanced committee membership does not require the Agency to invite all interest groups representing a stakeholder group to be members of the negotiated rulemaking committee. Although AIPG was not invited to be a member of the committee, several other organizations representing the environmental professional community were represented on the committee. In addition, at least one member of the negotiated rulemaking committee was a registered professional geologist.

Commenter Organization Name: OSBGE
Comment Number: 0291
Excerpt Number: 2
Excerpt Text:
Nationwide, many practicing geologists provide environmental services as a full-time career. Given that a significant amount of geologic work is conducted as part of environmental services, it is disappointing, and a significant oversight, that no national geology organization was represented, on the Committee that participated in this negotiated rulemaking process.

Response:
Several organizations representing the environmental professional community were represented on the negotiated rulemaking committee. In addition, at least one member of the negotiated rulemaking committee was a registered professional geologist.

EPA notes that the Federal Advisory Committee Act and the Negotiated Rulemaking Act require federal government agencies that use the negotiated rulemaking process for the development of proposed rules to assemble committees that have a balanced membership of affected stakeholders. In addition, federal agencies are required to provide public notice of their intent to negotiate a rulemaking and must give public notice of the proposed membership of the committee. The public can then comment on both the proposal to negotiate and the committee membership. EPA provided public notice of its

intent to negotiate the all appropriate inquiries proposed rulemaking in the Federal Register on March 6, 2003. On April 14, 2003 EPA held a public meeting and accepted comment on the Agency's decision to negotiate the proposed rule and on the Agency's proposed membership for the negotiated rulemaking committee. EPA also accepted public comment on the on-going negotiations of the committee at each meeting of the committee.

Commenter Organization Name: Rose and Westra
Comment Number: 0320
Excerpt Number: 1
Other Sections: NEW - 6.1 - EPA should adopt ASTM standard rather than develop separate regulations
Excerpt Text:
ASTM E 1527-00 is a consensus Standard developed with input from the EPA, lenders, users and preparers of ESAs. The Pre-Amble states that the ASTM E 1527-00 is inconsistent with applicable law…. Without commenting on the accuracy of the EPA's contention, R&W notes that the EPA set out to create a duplicative standard through the NRA/FACA process instead of continuing more than ten years of cooperative effort with the ASTM Committee E-50. The FACA included several interest groups that do not directly use or participate in the Phase I ESA/AAI process. These include environmental interest groups, the environmental justice community, residential builders, solid waste officials, and the U.S. Conference of Mayors. While these parties have essentially no direct interest in the AAI process, they never-the-less exerted significant influence on the Proposed Rules. Therefore, the evolution of the Proposed Rules was fundamentally flawed. A more reasonable solution would have been to work with the E-50 Committee to make adjustments to E-1527-00, as opposed to starting over with a flawed FACA. R&W requests the EPA to abandon this redundant effort and work with E-1527-00 to address the perceived deficiencies of E-1527-00.

Response:
The commenter confuses the goals of the ASTM International committee and the goals of EPA's rulemaking process. These goals are not the same. Stakeholder groups such as the U.S. Conference of Mayors, the National Association of Homebuilders, the Association of State and Territorial Solid Waste Management Officials, and environmental justice interest groups have a great interest, and an important role to play, in the development of federal regulations setting standards for the conduct of all appropriate inquiries, particularly given that the federal standards are one criteria that prospective landowners must follow to claim protection against Superfund liability. Although the requirements of the final rule are not greatly different than the requirements included in the ASTM E1527-2000 standard, it was not EPA's goal, or the goal of the Negotiated Rulemaking Committee tasked with developing the proposed rule to "create a duplicative standard." The role of the Negotiated Rulemaking Committee was to develop federal standards for all appropriate inquiries that meet the requirements of the CERCLA statute. Each of the stakeholder representatives mentioned by the commenter as having "essentially no direct interest" fully participated in the negotiated rulemaking

process, demonstrated that they were very interested in the outcome of the negotiations, and made significant contributions to the process.

EPA notes that the Federal Advisory Committee Act and the Negotiated Rulemaking Act require federal government agencies that use the negotiated rulemaking process for the development of proposed rules to assemble committees that have a balanced membership of affected stakeholders. In addition, federal agencies are required to provide public notice of their intent to negotiate a rulemaking and must give public notice of the proposed membership of the committee. The public can then comment on both the proposal to negotiate and the committee membership. EPA provided public notice of its intent to negotiate the all appropriate inquiries proposed rulemaking in the Federal Register on March 6, 2003. On April 14, 2003 EPA held a public meeting and accepted comment on the Agency's decision to negotiate the proposed rule and on the Agency's proposed membership for the negotiated rulemaking committee. EPA also accepted public comment on the on-going negotiations of the committee at each meeting of the committee.

Commenter Organization Name: Greenlining Institute
Comment Number: 0354
Excerpt Number: 1
Excerpt Text:
We also believe that we provide a perspective that was not adequately represented on the negotiated rulemaking committee. Our mission is to see development go forward. We want retail stores, office buildings, and other commercial establishments to rise in the place of fenced off and litter strewn vacant lots. We also believe that idle brownfield property must be used as the site of affordable housing. We understand that concerns about public health and environmental protection should be addressed as development goes forward. However, we believe that in addressing these interests, the drafting process lost sight of the goal of the Brownfields Revitalization Act of 2001, Pub. Law 107-118 (codified in scattered sections or 42 U.S.C.): encouraging redevelopment of idle or abandoned property. The process of "negotiating" the rule through a committee has also produced "compromise" language that is vague, overly complicated and confusing-adding to uncertainty about liability.

Response:
Several stakeholder organizations representing the redevelopment community were represented on the negotiated rulemaking committee. The committee membership included representatives from the National Brownfields Association, the National Association of Homebuilders, the International Council of Shopping Centers, the Real Estate Roundtable and the National Association of Industrial and Office Properties.

EPA notes that the Federal Advisory Committee Act and the Negotiated Rulemaking Act require federal government agencies that use the negotiated rulemaking process for the development of proposed rules to assemble committees that have a balanced membership of affected stakeholders. In addition, federal agencies are required to provide public

notice of their intent to negotiate a rulemaking and must give public notice of the proposed membership of the committee. The public can then comment on both the proposal to negotiate and the committee membership. EPA provided public notice of its intent to negotiate the all appropriate inquiries proposed rulemaking in the Federal Register on March 6, 2003. On April 14, 2003 EPA held a public meeting and accepted comment on the Agency's decision to negotiate the proposed rule and on the Agency's proposed membership for the negotiated rulemaking committee. EPA also accepted public comment on the on-going negotiations of the committee at each meeting of the committee. EPA notes that the commenter's organization did not provide comment on the issue of adequate representation on the Negotiated Rulemaking Committee or on any aspect of the rulemaking negotiations at any time during the process.

Commenter Organization Name: Greenlining Institute
Comment Number: 0354
Excerpt Number: 4
Excerpt Text:
III. EPA'S NEGOTIATED RULEMAKING PROCESS

In carrying out the Congressional mandate to promulgate clarifying regulations, EPA chose to use the process of negotiated rulemaking, rather than directly applying its own policy and technical expertise to the task of drafting regulations. In negotiated rulemaking, representatives of various non-governmental interest groups determine the content of federal regulations.

Negotiated rulemaking is devoted largely to insulating federal administrative agencies from legal challenges to proposed regulations. The theory is that if all those who have a sufficient interest and the means to file a legal challenge are sought out and appointed to a negotiated rulemaking committee, the negotiated rule will probably not be challenged in court. See, e.g., Administrative Conference of the United States, Negotiated Rulemaking Sourcebook 1 (1985) (noting that a negotiated rule reduces "the likelihood of subsequent litigation"); National Research Council, Understanding Risk: Informing Decisions in a Democratic Society 202 (Paul C. Stern & Harvey V. Fineberg eds., 1996) ("The purpose of regulatory negotiation is to reduce legal challenges to new rules by involving would-be adversaries directly in the rule-making process"); Patricia M. Wald, Negotiation of Environmental Disputes: A New Role for the Courts?, 10 Colum. J. Envtl. L. 1, 18 (1985) (noting that negotiated rulemaking is designed to "reduce the inevitability of legal challenges to adopted rules").

Negotiated rulemaking is conducted pursuant to the Negotiated Rulemaking Act, 5 U.S.C. § 561-570, however the constitutionality of this statute has never been tested. It may be that the authority exercised by negotiated rulemaking committees treads dangerously close to an unconstitutional delegation of lawmaking authority to private parties. See Schechter Poultry Corp. v. United States, 295 U.S. 495, 537 (1935) [Footnote: We understand that it is not EPA's role to judge the facial constitutionality of federal statutes. However, we know that EPA takes seriously its responsibility to ensure

that it in conducting rulemaking it does not violate the Constitution. Here, the process got out of hand and went beyond allowing the rulemaking committee to determine the content of the rule at the negotiated rulemaking stage. This rulemaking also allowed the committee to determine the content of the concise statement of the basis and purpose of the rule. We believe this violates the Administrative Procedure Act, 5 U.S.C. § 553 (c), which requires the agency to evaluate any proposed rule and state its basis and purpose. This requirement is not only statutory, but we believe that allowing committee members to determine the basis and purpose of an administrative rule would constitutes a delegation of lawmaking authority to private parties in violation of the non-delegation doctrine. See U.S. Const. Art. 1 §1; Schechter Poultry, 295 U.S. at 537. The Supreme Court has rarely struck down acts of Congress on non-delegation grounds. However, federal courts have more frequently placed limiting constructions on statutes to preserve their constitutionality. See e.g., Amalgamated Meatcutters v. Connally, 37 F. Supp. 737 (D.D.C. 1971); Fahey v. Mallonee, 332 U.S. 245 (1947). We believe that the Negotiated Rulemaking Act must, at a minimum, be limited to prevent committee members from participating in determining the basis and purpose of administrative rules. We submit with these comments audio recordings of public meetings conducted by EPA in St. Louis, Missouri on September 20 and 21, 2004 as a part of this rulemaking process in which EPA representatives acknowledge the role of committee members in determining the basis and purpose of the rule. The bulk of our comments focus on substantive concerns with the content of the rule in the hopes of eliciting major changes that will make for an effective rule. However, we are also deeply concerned that administrative agencies act in accordance with constitutional and statutory principles of public law. We believe the involvement of committee members crossed the constitutional limit for negotiated rulemaking and was "otherwise not in accordance with law," 5 U.S.C. § 706(2)(A). We believe that committee members should have no further involvement, unless EPA decides to publicly reconvene the committee to consider changes to the rule. If ex parte contacts are to continue, we request that EPA make public a log of all contacts with negotiated rulemaking committee members after the date of final consensus that provides the date and time of contact and the content of any communication. The ad hoc participation of members of the negotiated rulemaking committee in determining the basis and purpose of the rule runs contrary to the agency's orderly conduct of business. Further, this regulation involves hotly contested claims as to who will profit from the conduct of AAI. As such, it involves competing claims for a valuable privilege and the behind the scenes participation of committee members raises serious questions of fairness. See generally Action for Childrens Television v. FCC, 564 F.2d 458 (D.C. Cir. 1977).]. In any event, negotiated rulemaking has received significant criticism. See, e.g., William Funk, Bargaining Toward the New Millennium, 46 Duke L.J. 1351, 1356 (1997) (concluding that the practice of negotiated rulemaking elevates privately bargained interests and subverts "an agency's pursuit of the public interest through law and reasoned decisionmaking"); Cary Coglianese, Assessing Consensus: The Promise And Performance Of Negotiated Rulemaking, 46 Duke L.J. 1255, 1261(1997) (concluding that negotiated rulemaking has a "surprisingly weak track record"). Perhaps most significant among the critics of negotiated rulemaking conducted in a way that ties agencies to consensus drafts are the federal courts: "It sounds like an abdication of regulatory authority to the regulated, the full burgeoning of the interest-group state, and

the final confirmation of the "capture" theory of administrative regulation." U.S.A. Group Loan Services v. Riley, 82 F.3d 708, 714 (7th Cir. 1996) (Posner, J.). Although the outcome of Group Loan Services did not depend on Judge Posner's assessment of negotiated rulemaking, the views he expressed may ultimately prove important to the future of negotiated rulemaking.

Regardless of the ultimate conclusion that the courts may reach with regard to the fate of negotiated rulemaking, we believe that EPA's choice of negotiated rulemaking in this case has contributed to the use of vague language in the proposed rule. Negotiation of the terms of legal documents by competing interests often results in compromise language that is susceptible to competing interpretations. Crystal clear language, one way or the other, could not garner the agreement necessary to move forward so the parties settle for ambiguity and accept the fact that ultimate resolution of contested issues will be deferred until the terms of the agreement are litigated. This approach may be appropriate for private parties negotiating the terms of a contract when only their own private interests are at stake. Congress, too, may at times produce statutes that are less than a model of legislative clarity, but that is part of the political process inherent in the mechanisms of the elected branch of government vested by the constitution with "All legislative Powers." U.S. Const. art. I, § 1. Federal administrative agencies have neither the freedom of private parties disposing of privately held property to draft intentionally ambiguous documents nor the latitude of the people's elected representatives to make policy choices deemed wise, though perhaps tending toward generalities.

Where, as here, Congress has directed an agency to draft regulations that "increase certainty and provide clarity," S.Rep. 107-2 at 14, the agency may not punt to a negotiated rulemaking committee that produces intentionally vague compromise language that must ultimately be resolved by the courts. This is emphatically so because the point of the All Appropriate Inquiry rule is to "provide protection to persons who wish to purchase contaminated property without incurring liability" by removing uncertainty over potential litigation. Id. at 11. The agency "must give effect to the unambiguously expressed intent of Congress." Chevron U.S.A. v. Natural Resources Defense Council, 467 U.S. 837, 843 (1984). Here, the overriding command of Congress is that the rule provide clear and certain liability protection. We begin our detailed textual analysis with that command in mind, as well the baseline of relative certainty that was in place before EPA began this process.

Response:
The commenter is incorrect in asserting that members of the negotiated rulemaking committee determined the basis and purpose of the proposed rule. Congress determined the basis and purpose of the rule. EPA and the negotiated rulemaking committee developed the proposed rule around the criteria provided by Congress in the Small Business Liability Relief and Brownfields Revitalization Act. In fact, a review of the minutes of each of the meetings of the Negotiated Rulemaking Committee shows that the agenda and process for the Committee negotiations directly followed the criteria established by Congress. The commenter may be confused with regard to the statutory purpose for the all appropriate inquiries regulation. The commenter states that the

purpose of the rulemaking is "to provide protection to persons who wish to purchase contaminated property without incurring liability by removing uncertainty over potential litigation." The final rule on all appropriate inquiries is just one criteria established by Congress that property owners must meet to establish a potential defense against Superfund liability. The conduct of all appropriate inquiries alone does not provide protection from liability or certainty over potential litigation. In fact, nothing in the Small Business Liability Relief and Brownfields Revitalization Act provides protection against potential litigation. The liability protections provided under the statute for bona fide prospective purchasers, innocent landowners, and contiguous property owners establish a number of criteria that if met, may provide a landowner with a defense to liability under CERCLA if the landowner is sued by EPA or a third party to recover costs for clean up and damages associated with a release from a property owned or operated by the landowner.

EPA notes for the commenter that although EPA used the negotiated rulemaking process for the development of the proposed rule, EPA developed the final rule. In addition, EPA is the sole author of the preambles to the proposed and final rules. The final rule was developed by EPA after careful consideration of all public comments received in response to the proposed rule.

EPA notes that during the negotiated rulemaking process for the development of the proposed rule on all appropriate inquiries, EPA provided many opportunities for public comment and input on the content of the proposed rule and the Committee's negotiations. EPA placed all materials developed and used by the Committee in the public docket. EPA announced all meetings of the Committee in the Federal Register and invited the general public to attend each meeting. EPA accepted written public comment on all aspects of the proposed rule and the Committee's proceedings throughout the process. On every day of every Committee meeting, EPA set time aside for the general public to provide comment and input to the Committee members. Once the Committee reached consensus on the proposed rule and EPA developed the preamble to the proposed rule, the proposed rule was published in the Federal Register. EPA provided for a 90-day public comment period and held three public meetings to solicit public comment on the proposed rule. The proposed rule was negotiated by a Committee of 25 members who represented a balance of stakeholders with interest in the outcome of the regulation. However, at all points in the regulatory development process, EPA provided ample opportunity for the members of the general public to provide input and comment.

Commenter Organization Name: USWAG
Comment Number: 0367
Excerpt Number: 1
Excerpt Text:
Before addressing the substance of the proposed rule, US WAG would like to commend EPA for pursuing the regulatory negotiation ("reg-neg") process despite previously unsuccessful reg-negs. EPA's reluctance to attempt the reg-neg process for most of the past decade has been quite understandable. It therefore took considerable courage on

EPA's part to place the fate of this rulemaking in the hands of a diverse and often contentious Reg-Neg Committee and then to make unanimity or consensus among the 25 committee members the decision-making threshold for each issue under consideration. Without the hard work of the EPA staff from the Office of Brownfields Cleanup & Redevelopment - and in particular, the skill and patience of Patricia Overmeyer - in helping to mold a consensus, there would not have been as well thought-out a proposed rule as the one now before the public for comment.

Although most of the Reg-Neg Committee's recommendations are sound and merit support, the reg-neg process does not trump the provisions of the Administrative Procedure Act ("APA") that assign a crucial role in the rulemaking process to the regulated community and the general public through the notice and comment process. APA, 5 U.S.C. § 553(c). Whether the initial regulatory development occurs in a Reg-Neg Committee consisting of a diverse group of interested parties or in an EPA workgroup, once a proposed rule has been published in the Federal Register and public comment has been solicited, the rulemaking process is the same and EPA is obliged to consider serious comment on its proposal.

Response:
EPA thanks the commenter for the stated support of the negotiated rulemaking process. The commenter is correct that once a proposed rule is published in the Federal Register, the rulemaking process is governed in the same manner as all other proposed rules under the Administrative Procedures Act. EPA developed the final rule after careful consideration of all public comments received in response to the proposed rule. The Negotiated Rulemaking Committee had no involvement in the development of the final rule.

Commenter Organization Name: Ruffin, Shirley
Comment Number: 0372
Excerpt Number: 1
Excerpt Text:
We would like to commend the EPA for involving all stakeholders in the process of developing specific regulatory requirements for conducting all appropriate inquiries.

Response:
EPA thanks the commenter for the stated support of the negotiated rulemaking process.

Commenter Organization Name: MBA
Comment Number: 0401
Excerpt Number: 1
Excerpt Text:
The MBA expresses our full support and endorsement of the Environmental Protection Agency's ("EPA") decision to utilize the negotiated rulemaking process to develop AAI. MBA would also like to congratulate the entire advisory committee for reaching a

unanimous, consensus-based draft regulation.

MBA thanks the EPA for choosing them to participate in the negotiated rulemaking process and encourages EPA to utilize this effective practice in the future, where appropriate.

Response:
EPA thanks the commenter for the stated support of the negotiated rulemaking process.

Commenter Organization Name: Freeman & Giler
Comment Number: 0417
Excerpt Number: 1
Excerpt Text:
We commend the USEPA for its efforts to develop an AAI Rule using the negotiated rule-making process, and we believe that our limited number of comments and their narrow focus are a testament to the success of this negotiated process. That being said, we strongly suggest that USEPA consider the following comments:

Response:
EPA thanks the commenter for the stated support of the negotiated rulemaking process.

Commenter Organization Name: West Berkeley Association
Comment Number: 0430
Excerpt Number: 1
Excerpt Text:
We understand that the proposed rule was drafted in conformance with the consensus reached by a negotiated rulemaking committee convened by EPA to represent the various stakeholders that would be affected by the rule. However, not only were the interests of existing small property owners not represented on the committee, the convening report indicates that committee members did not feel that they were obligated to protect the interests of small existing owners: "They do not see the standard as providing a 'pass' to existing owners, but rather immunizing new owners."

At page 8, when discussing the categories of stakeholders who should be represented in the rulemaking process, the convening assessment does not consider the interest of small property owners. The following organizations were given seats on the rulemaking committee to represent private sector commercial development interests: The Real Estate Roundtable, National Association of Industrial and Office Properties, and the International Council of Shopping Centers. However, these organizations are all members of each other and to the extent that they represent the interests of existing owners they are heavily weighted toward large institutional entities.

Response:
The all appropriate inquiries regulation sets standards for prospective property owners in

assessing the potential environmental conditions at a property prior to purchasing a property. In that sense, the regulations do not affect "existing property owners" (small or otherwise). Therefore, EPA believes that the commenter may have taken the quoted passage from the convening report out of context. The quote corresponds to a statement regarding the effect of the all appropriate inquiries regulations upon existing property owners, not small businesses that may be purchasing property. None of the members of the Negotiated Rulemaking Committee negotiated with the intent of representing the interests of only large entities. In fact the potential cost impacts upon all business interests were a point of discussion throughout the negotiations. In addition, the Negotiated Rulemaking Committee included representatives from the National Association of Development Organizations and the Center for Public Environmental Oversight who often spoke to the interests and needs of small and rural businesses and organizations.

EPA notes that during the negotiated rulemaking process for the development of the proposed rule on all appropriate inquiries, EPA provided many opportunities for public comment and input on the content of the proposed rule and the Committee's negotiations. EPA placed all materials developed and used by the Committee in the public docket. EPA announced all meetings of the Committee in the Federal Register and invited the general public to attend each meeting. EPA accepted written public comment on all aspects of the proposed rule and the Committee's proceedings throughout the process. On every day of every Committee meeting, EPA set time aside for the general public to provide comment and input to the Committee members. Once the Committee reached consensus on the proposed rule and EPA developed the preamble to the proposed rule, the proposed rule was published in the Federal Register. EPA provided for a 90-day public comment period and held three public meetings to solicit public comment on the proposed rule. The proposed rule was negotiated by a Committee of 25 members who represented a balance of stakeholders with interest in the outcome of the regulation. However, at all points in the regulatory development process, EPA provided ample opportunity for the members of the general public to provide input and comment.

Commenter Organization Name: Fedunyszyn, Zoriana
Comment Number: 0443
Excerpt Number: 1
Excerpt Text:
First of all, as both a Realtor and an appraiser, I am concerned that the National Association of Realtors(r), REALTORS(r) Commercial Alliance, and the Appraisal Professions (Appraisal Institute, NAIFA, ASFRMA, ASA) were not included in the Negotiated Rulemaking Commit

Response:
EPA notes that the National Association of Realtors served as a resource member to the Negotiated Rulemaking Committee and provided valuable input to the Committee negotiations throughout the rulemaking development process.

EPA also notes that during the negotiated rulemaking process for the development of the proposed rule on all appropriate inquiries, EPA provided many opportunities for public comment and input on the content of the proposed rule and the Committee's negotiations. EPA placed all materials developed and used by the Committee in the public docket. EPA announced all meetings of the Committee in the Federal Register and invited the general public to attend each meeting. EPA accepted written public comment on all aspects of the proposed rule and the Committee's proceedings throughout the process. On every day of every Committee meeting, EPA set time aside for the general public to provide comment and input to the Committee members. Once the Committee reached consensus on the proposed rule and EPA developed the preamble to the proposed rule, the proposed rule was published in the Federal Register. EPA provided for a 90-day public comment period and held three public meetings to solicit public comment on the proposed rule. The proposed rule was negotiated by a Committee of 25 members who represented a balance of stakeholders with interest in the outcome of the regulation. However, at all points in the regulatory development process, EPA provided ample opportunity for the members of the general public to provide input and comment.

Commenter Organization Name: Brodsky, Michael
Comment Number: PM-0127-0004
Excerpt Number: 1
Excerpt Text:
Outside of a question about process and not about the substance of the rule, and if you can't answer that today, then perhaps this is just something to think about, this being a negotiated rule, which negotiated rule making is somewhat new, part of the purpose is to solicit input from as many people in the industry knowledgeable as is possible, and part of the purpose is to get the buy-in.

EPA, in its literature somewhere, I can't remember exactly where, says that you find that negotiated rules are challenged less often. So if you do, as someone does submit comments with changes that seem to be a good idea, I think you probably have kind of a fine line for them. So you want to keep the committee members who bought in on board, but on the other hand, you want to respond to public comment.

So I'm just wondering if you will reconvene the committee sometime after the comment period closes, or informally pole them, or recirculate, or how you intend to walk that line.

Response:
The Negotiated Rulemaking Committee only was involved in the development of the proposed rule. EPA developed the final rule after careful consideration of all public comments received in response to the proposed rule. After the Negotiated Rulemaking Committee reached consensus on recommended regulatory language for the proposed rule, EPA convened no additional meetings of the Committee members. The Committee was not involved in the rulemaking process after publication of the proposed rule.

Commenter Organization Name: Greenwood, Harriet
Comment Number: PM-0127-0008
Excerpt Number: 3
Excerpt Text:
In looking at the makeup of the negotiated rule making committee, it appeared to me that the life science disciplines and toxicology were perhaps under-represented. I'm sure it was difficult to represent every possible branch that might be involved, but also, the academic institutions involved in the education of environmental professionals, I think were not at the table, as far as I could see, and I hope that they'll be included in the comment period, because their input on this topic is very important.

Response:
Although educators of life science and toxicology disciplines were not identified as one of the stakeholders best representing those constituencies directly affected by the all appropriate inquiries rulemaking, four members of the Negotiated Rulemaking Committee represented the environmental professional business sector. Academic institutions may have a valuable role to play in educating individuals who may choose to become environmental professionals who conduct all appropriate inquiries investigations, however EPA did not identify academic institutions as a primary stakeholder in the regulatory development process.

EPA notes that the Federal Advisory Committee Act and the Negotiated Rulemaking Act require federal government agencies that use the negotiated rulemaking process for the development of proposed rules to assemble committees that have a balanced membership of affected stakeholders. In addition, federal agencies are required to provide public notice of their intent to negotiate a rulemaking and must give public notice of the proposed membership of the committee. The public can then comment on both the proposal to negotiate and the committee membership. EPA provided public notice of its intent to negotiated the all appropriate inquiries proposed rulemaking in the Federal Register on March 6, 2003. On April 14, 2003 EPA held a public meeting and accepted comment on the Agency's decision to negotiated the proposed rule and on the Agency's proposed membership for the negotiated rulemaking committee. EPA also accepted public comment on the on-going negotiations of the committee at each meeting of the committee. EPA notes that the commenter's organization did not provide comment on the issue of adequate representation on the Negotiated Rulemaking Committee or on any aspect of the rulemaking negotiations at any time during the process.

6.8 EPA Should Perform More Outreach and Education on AAI and the Proposed Rule

Commenter Organization Name: Herin
Comment Number: 0329
Excerpt Number: 4
Excerpt Text:
Most users of environmental due diligence services who I've spoken with in the last year have little to no idea that this AAI rule development process has been going on. In fact, as I review the comments posted on EPA's EDOCKET website, very few users seem to be represented. Given that this AAI rule will profoundly affect property transactions, I suggest the EPA invest more heavily in public outreach/education (ongoing, on an annual basis). The goal would be to help ensure that users are informed of the AAI rule and can easily learn more about it, including at a minimum: the protections afforded by AAI; the definition of an EP; and the basic elements of the AAI process.

Response:
EPA did announce and hold three public meetings on the proposed rule. In addition, EPA staff attended many conferences and publicly-attended meetings to speak about the proposed rule. EPA also announced the availability of the proposed rule on the EPA website and distributed fact sheets on the proposed standards. EPA will continue these public outreach efforts once the final rule is published in the Federal Register.

Commenter Organization Name: FAA
Comment Number: 0334
Excerpt Number: 1
Excerpt Text:
1) There is an incorrect citation on page 52545 of the proposed rule's preamble. In the left-hand column, EPA states "Today's proposed rule does not address the requirements of CERCLA Section 101(35)(B)(i)(I) for what constitutes 'reasonable steps.'" The citation should actually read "101(35)(B)(i)(II)." As it reads now, EPA is saying that the proposed rule does not address the statutory requirements for standards and practices to demonstrate that a person has performed "all appropriate inquiries," which in fact the rule does address. What the rule actually "does not address" is the continuing obligations of the property owner after purchase, as included in paragraph (II) of the statutory section.

2) The background section of the preamble to the proposed rule does not adequately or clearly state the difference between AAI and "reasonable steps." Please explain this difference in more detail.

Response:
EPA apologizes for the incorrect cite in the preamble to the proposed rule. The citation is corrected in the preamble for the final rule.

The preamble to the final rule addresses the differences between the requirement to perform all appropriate inquiries, or an environmental site assessment, prior to purchasing a property and the requirements to conduct reasonable steps to stop on-going releases, after purchasing a property, in section II.D. These requirements also were discussed in detail in section II.D. of the preamble to the proposed rule. Additional guidance on the "reasonable steps" and the continuing obligations (or post ownership requirements) for retaining protection from CERCLA liability is provided in the EPA document titled "*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).*" This document is included in the public docket for the final rule and is available on the EPA website.

Commenter Organization Name: FAA
Comment Number: 0334
Excerpt Number: 2
Excerpt Text:

1) Will EPA consider leasing a property for a set period of time to be the same as ownership for the purposes of this regulation and the innocent landowner defense? Please provide more information on how this rule will affect leasees in the future.

Response:
CERCLA does not afford persons who lease property the same level of defense against liability as it does property owners. In section 101(40) of CERCLA, a bona fide prospective purchaser is defined as "a person *(or tenant of a person)* that acquires ownership of a facility after the date of the enactment… ." [emphasis added]. To date, EPA has interpreted the definition to mean that a tenant's status with regard to the bona fide prospective purchaser provision is dependent upon the status of the property owner. EPA notes that there is little or no case law with regard to this aspect of the statute.

Commenter Organization Name: McKerr, Thomas
Comment Number: 0347
Excerpt Number: 1
Excerpt Text:
Section II (Background), D, 2. Contiguous Property Owner. Section states that "To qualify as a contiguous property owner, a landowner must have no knowledge of contamination (I assume that this refers to contamination on his contiguous property) prior to acquisition and meet all of the criteria set forth (in the cite). But what if he does have knowledge of contamination on his Property that originated on a site contiguous this property, i.e. from off site. An explanation of what category does he fit into would be appropriate. Would the landowner qualify as a BFPP? And what standard of "knowledge" is applied. This section will discourage a potential buyer of a contiguous property from performing a Phase II assessment if no liability protection is available for a contiguous

property owner that identifies a release. How does the identification of a "threatened release" on an adjoining site affect his status?

Response:
The CERCLA statute at section 107(q)(1)(C) clarifies that any person that does not qualify as a [contiguous property owner] because the person had, or had reason to have, knowledge at the time of acquisition of the property, that the property was or could be contaminated by a release or threatened release of one or more hazardous substances from other real property not owned or operated by the person, may qualify as a bona fide prospective purchaser under section 101(40) of CERCLA.

Commenter Organization Name: McLeod, Jeff
Comment Number: 0444
Excerpt Number: 1
Excerpt Text:
While I believe the intent of adding categories of protection is a good one, it appears that the bona fide prospective purchaser and contiguous property owner defenses have greater requirements than does the innocent landowner. One of the reasons developers are not developing brownfields is the fear of being held responsible for clean up of the site. I don't see where the bona fide prospective purchaser defense provides them with any relief from liability and appears to place a greater burden on them, due to the statutory requirements, than does the innocent landowner defense.

Each of the defenses requires the property owner to take reasonable steps to stop continuing releases, prevent any threatened releases and prevent or limit human, environmental, or natural resource exposures to any hazardous substances released on or from the property. I can foresee circumstances where buried or subterranean contamination could exist, but not be detected during document reviews and interviews. This requirement would continue to limit purchaser/developer interest in brownfields sites as they can potentially be held liable for cleaning up contamination that they did not cause or have reason to know about. It would seem that once AAI has been completed for a given property, provided that the AAI did not identify any evidence suggestive of potential subsurface contamination or contain recommendations for Phase II sampling, that the purchaser not be held liable for clean up of the property.

Response:
It will be up to a court to decide whether or not a party is entitled to a defense to CERCLA liability as an innocent landowner, a bona fide prospective purchaser, or a contiguous landowner. EPA notes that any person may be protected from CERCLA liability as an innocent landowner if that person can demonstrate to a court that the person did not know, “and had no reason to know” of the contamination for which the person may be accused of being liable. Failure to identify a release or threatened release during the conduct of all appropriate inquiries may not be an adequate defense to liability if a release or contamination is not addressed by the property owner and is later discovered by a third party, particularly if the property owner cannot demonstrate that all

appropriate inquiries were conducted in compliance with the provisions of the regulatory requirements.

EPA also notes for the commenter that the innocent landowner defense under CERCLA, as amended by the Brownfields Amendments (at Section 101(35)(B)(i)(II)(aa)) requires the property owner to take reasonable steps to stop any continuing releases. The requirements for making the innocent landowner defense, as well as all of the statutory criteria for claiming the bona fide prospective purchaser and contiguous property owner liability protections are statutorily imposed and not within the scope of the final rule.

6.9 Tribes May Not Have Capacity/Resources to Meet the AAI Requirements

Commenter Organization Name: Cloud, Sharon L. Fire
Comment Number: 0108
Excerpt Number: 1
Excerpt Text:
On the surface this may seem like a good idea, requiring Tribes to have an "Environmental Professional", however it's unfair. There is only a small percentage of our people who are fortunate enough to attend an institute of higher learning, at that an even smaller percentage who graduate with an Associates Degree, an even smaller percentage who graduate with a Bachelor's Degree. Now, after that imagine the percentage of Native Americans who have graduated with a Bachelor's Degree in the specific fields you would like to require in this amendment. We may not have Degree's, but by no means are we uneducated or incapable of taking inventory of, assessing and clean-up of Brownfield sites on our land. I feel this is amendment is not only unfair, it's also discriminating against the people who taught your people land stewardship. We are fully capable of doing the job necessary to complete the projects, without going outside of our tribe for an "Environmental Professional".

Response:
In the final rule, the definition of an environmental professional, for the purposes of overseeing the conduct of all appropriate inquiries investigations includes individuals who have ten years of relevant full time experience in carrying out all appropriate inquiries and related activities. Individuals do not have to have a college degree to qualify as an environmental professional if they have ten years of full time relevant experience. In addition, the proposed rule provides that individuals who are trained and certified by the Bureau of Indian Affairs to conduct environmental site assessments and who have three years of relevant full time experience meet the definition of an environmental professional in the final rule.

Commenter Organization Name: Warner, Todd
Comment Number: 0312
Excerpt Number: 1
Excerpt Text:
Currently KBIC has three environmental staff in the natural resource department. The Realty Department consists of one person. Of these four people, one person will have the qualifications of an Environmental Professional (EP) as outlined in the proposed rule. Other Tribes I am acquainted with have both fewer staff and/or staff without the education and/or experience to qualify as an EP. This situation is different than that of a consulting firm or State government where "teams" of environmental staff with a range of qualification levels are present.

Given the fact that re-acquisition of Tribal lands is important to KBIC (and other Tribal Governments), and, given that purchase agreements that depend upon the results of an

environmental assessment often have a 30-60 day time period associated with them, it becomes critical that KBIC be able to complete an AAI with existing staff. Consultants are not reliably available on short notice, and, if available, can add significant cost to a potential land purchase. I have estimated the additional cost to Keweenaw Bay Indian Community for having to hire a consultant to meet the requirements of the proposed AAI rule as approximately $2,000 - $4,000 per property. This is a significant cost for the Community.

Given the above, I would strongly encourage the U.S. EPA to provide assistance to Tribes with no capacity, or limited capacity for meeting AAI requirements. I would like to see some outreach by regional EPA offices to Tribal Governments regarding this issue, and discussions of potential mechanisms for EPA assistance to Tribes to ensure that Tribal Governments are able to fulfill the requirements contained in this proposed rule, and fulfill their own goals of re-acquisition of ancestral lands.

Response:
In the final rule, the definition of an environmental professional, for the purposes of overseeing the conduct of all appropriate inquiries investigations includes individuals who have ten years of relevant full time experience in carrying out all appropriate inquiries and related activities. Individuals do not have to have a college degree to qualify as an environmental professional if they have ten years of experience. In addition, the proposed rule provides that individuals who are trained and certified by the Bureau of Indian Affairs to conduct environmental site assessments and who have three years of relevant full time experience meet the definition of environmental professional in the final rule.

Commenter Organization Name: Kane Environmental
Comment Number: 0317
Excerpt Number: 4
Excerpt Text:
We understand that tribal records must be reviewed, but are the tribes being given additional federal funding to establish records centers and staff?

Response:
Tribal records must be reviewed if the property being purchased is located on tribal or near tribal-owned lands. Under the authorities of section 128 of CERCLA, EPA does provide some funding to recognized Indian tribes to establish or enhance a tribal response program.

If a prospective landowner and the environmental professional acting on behalf of the prospective landowner cannot obtain tribal records even after good faith efforts are made to obtain the records, the missing information should be noted in the all appropriate inquiries report as a data gap. The significance of the missing information on the environmental professional's ability to render an opinion regarding the environmental conditions at a property also must be documented.

6.10 Other

Commenter Organization Name: Johnson, Robert L
Comment Number: 0094
Excerpt Number: 1
Excerpt Text:
Some of the premises in the article concerning 'Environmental Professional' (CE, Oct. 2004) are wrong. The current ATSM Standard on Environmental Site Assessment does not force anyone to "conduct sampling unnecessarily ... simply because the standard calls for them." The Standard does not involved sampling. In fact, Section 11.9 of the Standard specifically states "recommendation for Phase II testing, remediation techniques, etc. are beyond the scope of this practice."

By removing standard practice, the assessment process would literally place the livelihood of the environmental professional responsible for assessment on the line (in jeopardy). Environmental companies view themselves as "deep pockets" and would be forced to characterize as many properties as possible as being contaminated. Very few environmental companies have been sued for characterizing "clean" properties as "contaminated." Many have been sued for characterizing a site as being clean when later perceived contamination is indicated at the site. PCBs have been detected in the polar ice caps. A single piece of (petroleum-based) asphalt in a sample can give the perception of an entire site being contaminated. Virtually every property can be perceived as being "contaminated."

"More flexible" assessments will not lead environmental companies to generate more professional and higher quality assessments. Assessors are in conflict because any they themselves are in line to implement the additional sampling or remediation to address potential contamination at the site. Even highly regarded professionals can easily rationalize the need for additional sampling, investigation, remediation, etc., so as to err on the side of caution. Rather, in order to protect against potential liability (and realize increased remediation revenue), the companies will increase effort to find as many properties as possible to be perceived as being contaminated, the very definition of a "brownfield."

A solution might be for the findings of an environmental assessment to be reviewed by a third-party Licensed Professional Engineer for compliance to a Standard. (There is much more to an environmental assessment than geology.) This would relieve the assessor of assuming the liability of possible contamination on the site, accepting only the liability that Standard practice was met. Similarly, the Licensed Professional Engineer would not be held liable for the performance of the assessment or any undetected contamination, only that the assessment was in compliance with the Standard.

Response:
EPA agrees with the commenter that the existing ASTM E1527-2000 standard does not require sampling and analysis. The final rule setting federal standards for all appropriate

inquiries also does not require sampling and analysis to be conducted as part of the all appropriate inquiries investigation. The final rule does note that sampling and analysis may be helpful in addressing data gaps under certain circumstances. The decision of whether or not to undertake sampling and analysis is up to the prospective property owner and may be based on the advice provided by an environmental professional.

The issue of third party evaluations of property assessments is beyond the scope of the final rule. Property owners should determine their need for additional advice and consultation regarding sampling and analyses or other appropriate investigations in light of the statutory requirements for retaining the CERCLA liability protections after a property is acquired.