

SECTION 3: Requirements for Conducting All Appropriate Inquiries

Commenter Organization Name: Baker Petrolite

Comment Number: 0352

Excerpt Number: 6

Excerpt Text:

4. The proposed performance factors listed in Section 312.20(e) state that the Environmental Professional should obtain information "from its source within reasonable time & cost constraints." BPC requests that the agency provide some clarification in the rule on what it considers "reasonable time and cost constraints."

Response:

The primary objective of all appropriate inquiries is to identify conditions indicative of releases or threatened releases of hazardous substances. Prospective property owners should keep in mind that they may be held liable for releases of hazardous substances after acquiring a property if they do not comply with the statutorily-imposed continuing obligations. The performance factors included in the final rule are meant to provide guidelines for the conduct of the inquiry activities, not to draw absolute boundaries around the performance of the data collection activities. It is in the prospective property owner's best interest to conduct the inquiries as thoroughly as possible to ensure his or her ability to comply with all of the statutory criteria for the CERCLA liability protections. The Agency has embraced the performance standard approach to the final rule because it allows flexibility for a variety of circumstances and unique properties. This standard does not lend itself to bright-line interpretation. Rather, the Agency is comfortable allowing for judicial interpretation of this standard.

Commenter Organization Name: CONNOR

Comment Number: 0398

Excerpt Number: 3

Excerpt Text:

-Subpart C - Standards and Practices, Part 312.20 (All Appropriate Inquiries), Subpart d (Objectives)

--"...threatened releases ..." - please define "threatened releases".

--"...of hazardous substances..." - please define "hazardous substances".

Specifically address the inclusion/exclusion of lead-based paint, asbestos containing materials, and radon gas in the definition.

--"...on, at, in, or to the subject property" - please clarify/further define "subject property" to identify if this term includes structures or other improvements, or if it is limited to the land only.

Response:

The term “threatened release” is included in the definition of “release” in the National Contingency Plan (NCP) at 40 CFR 300.5. For the purposes of the NCP, “release also means threat of release.” Under CERCLA, owners and operators of vessels and facilities may be found liable for both releases (also defined in Section 101(22) of CERCLA) of hazardous substances and threatened releases of hazardous substances.

The term “hazardous substance” is defined in CERCLA Section 101(22).

Although the term “subject property” is not defined, the term is used in the final rule and the preamble to distinguish between the property that is the subject of the all appropriate inquiries investigation, or the property that the prospective landowner who is undertaking the all appropriate inquiries is potentially acquiring and surrounding or adjoining properties. When undertaking an all appropriate inquiries investigation, the prospective purchaser and the environmental professional should investigate all portions of the property where there potentially could be a release or threatened release of a hazardous substance, including structures and improvements.

Commenter Organization Name: FAA

Comment Number: 0334

Excerpt Number: 17

Excerpt Text:

SEQUENCE OF AAI ACTIVITIES

- 1) FAA believes that it should be left up to the EP to determine the correct sequence to conduct the AAI activities. Although EPA does not require the EP or purchaser to conduct the AAI activities in a specific sequence, EPA does recommend that certain activities take place before others. This recommendation could hold the strength of a requirement if examined in a court of law. Therefore, FAA believes that EPA should remove references to a preferred AAI activity sequence from the preamble to the proposed rule.

Response:

The final rule includes no requirements with regard to the sequence in which the all appropriate inquiries activities must be conducted. The few instances in the preamble to the proposed rule where EPA made recommendations regarding the sequence of activities were provided as guidance and because the Agency believes the sequence may be important in many instances. For instance, a visual inspection of the property may be much more effective if it is informed by other aspects of all appropriate inquiries such as interviews with past and present owners and operators. Nothing in the final rule precludes the environmental professional from choosing to conduct the all appropriate inquiries activities in whatever order that he or she determines is best.

3.1 Interview Requirements for Non-Abandoned Properties

Commenter Organization Name: Prevatte, Chad M

Comment Number: 0093

Excerpt Number: 5

Excerpt Text:

The wording of §312.23(a) requires the environmental professional to interview the past and present owner, operator, and occupant of the subject property. I believe the intent of §312.23(a) is to identify potential people to interview not required people to interview. In addition, §312.23(c) states that one or more of the following people (manager, past or present owner/occupant employees) should be interviewed to the extent necessary to achieve the AAI objectives This contradicts the requirements in §312.23(a).

Response:

The intent of §312.23(a) is to conduct interviews of past and present owners and occupants of a property. The requirement assumes that the persons to be interviewed will be identified prior to the conduct of interviews. The rule does not specify the number of owners and occupants to be interviewed. The environmental professional must perform this function in the manner that best fulfills the objectives and performance factors for the inquiries in §312.20(e) and (f). Environmental professionals may use their professional judgment to determine the specific occupants to be interviewed and the total number of occupants to be interviewed in seeking to comply with the objectives and performance factors for the inquiries. Interviews must be conducted with individuals most likely to be knowledgeable about the current and past uses of the property, particularly with regard to current and past uses of hazardous substances on the property. The Agency sees no contradiction between the requirements of §312.23(b) and §312.23(c). They are separate requirements and build on the general requirement of §312.23(a), to interview past and present owners and occupants, a restating of the statutory criteria. Interviews must be conducted with the current owners and occupants of a property. In addition, to the extent necessary to meet the objectives and performance standards of the rule, interviews must be conducted with past owners and occupants of the property.

Commenter Organization Name: Goodman, J. Dwight

Comment Number: 0097

Excerpt Number: 5

Excerpt Text:

Regarding interviews with occupants or adjoining property owners, performing those interviews can sometimes be against the owner's or purchaser's wishes during a business transaction involving the ESA preparation....not because of the hiding of environmental issues, but due to sales/purchases of property which need to be kept confidential. Under criteria which "requires" occupant or neighbor interviews, the preparer may be ask by the client to "not be totally frank" who they are or for what purpose they are collecting data. This creates a position that the EP does not need to be legally placed. The only recourse for the EP is to state it is a requirement on the proposal to the client, and if disallowed by that client, documented in the ESA.

Response:

In response to issues raised by commenters, we point out that the statutory criteria in CERCLA 101(35)(B)(iii) include “interviews with past and present owners, operators, and occupants of the facility for the purpose of gathering information regarding the potential for contamination at the facility.” EPA asserts that it was clearly congressional intent that the all appropriate inquiries investigation include the conduct of interviews with current and past owners and occupants. We also assert that current and past owners and occupants of a property may be excellent sources of information regarding past and on-going uses of the property as well as the types of waste management activities that were undertaken at the property. Given that the ASTM E1527 Phase I Environmental Site Assessment Standard, the interim standard for the conduct of all appropriate inquiries, includes requirements for conducting interviews with the current owners and occupants of a property and provides that other owners and occupants are good additional sources of information about property uses and potential contamination at a property, we disagree with commenters who asserted that the proposed and final requirements for conducting interviews will be overly burdensome.

With regard to the requirement to interview owners or occupants of neighboring properties if the subject property is abandoned, EPA believes that the benefit of obtaining information with regard to previous ownerships and uses of the subject property from these individuals outweighs the potential burdens of disclosing that the subject property may be purchased. The primary objective of all appropriate inquiries is to identify conditions indicative of releases or threatened releases of hazardous substances. Prospective property owners should keep in mind that they may be held liable for releases of hazardous substances after acquiring a property if they do not comply with the statutorily-imposed continuing obligations. Therefore, prospective property owners and environmental professionals should conduct the inquiries with the goal of obtaining as much information as possible regarding the past uses and ownerships of a property. In the case of abandoned properties, owners and occupants of neighboring properties may be valuable sources of information.

Commenter Organization Name: Scalise, Frederick W, et al

Comment Number: 0105

Excerpt Number: 2

Excerpt Text:

Language should be included in the section pertaining to conducting interviews with current and past owners, operators, and/or occupants that such interviews must be conducted only to the extent that past owners, operators, and/or occupants are available, reasonably accessible, and cooperative.

REASON: In some cases owners, operators, and/or occupants (current and past) are not available for interview, or refuse to cooperate.

Response:

All of the all appropriate inquiries activities included in the final rule are subject to the objectives

and performances standards of §312.20(e) and (f).

Commenter Organization Name: Anthony, Tony, et.al.

Comment Number: 0292

Excerpt Number: 7

Other Sections: NEW - 3.2 - Interview requirements for abandoned properties

Excerpt Text:

We suggest the following text revision:

- "Interviews should be conducted with an appropriate knowledgeable party."

Response:

All of the all appropriate inquiries activities included in the final rule are subject to the objectives and performances standards of §312.20(e) and (f). In addition, the regulatory language in §312.23(b) clearly indicates that interviews should be conducted with individuals "likely to use, store, treat, handle or dispose of hazardous substances...or those who have likely done so in the past."

Commenter Organization Name: Intertox

Comment Number: 0396

Excerpt Number: 8

Excerpt Text:

-The proposed standards for conducting interviews of past and present owners and occupants of a property.

--Intertox supports the proposed requirements to interview the current owner and occupant of the subject property as well as other parties with relevant property knowledge. However, the requirement should state that interviews with additional individuals be conducted to the extent that these additional individuals can be reasonably contacted and interview dates established within reasonable timeframes.

Response:

All of the all appropriate inquiries activities included in the final rule are subject to the objectives and performances standards of §312.20(e) and (f).

Commenter Organization Name: CONNOR

Comment Number: 0398

Excerpt Number: 4

Excerpt Text:

--Use of written interview format (i.e. questionnaire) should be specifically allowed. Interviewee should be required to sign and date upon completion. This provision would allow for completion of interviews where time/distance/schedules might normally make it difficult or even impossible to conduct oral interviews.

Response:

All of the all appropriate inquiries activities included in the final rule are subject to the objectives and performances standards of §312.20(e) and (f). Nothing in the final rule precludes the use of written questionnaires in fulfilling the requirements to interview current and past owners and operators.

Commenter Organization Name: Freeman & Giler

Comment Number: 0417

Excerpt Number: 2

Excerpt Text:

Proposed Rule §312.23(a-c) requires that the Environmental Professional (EP) interview past and present owners, operators and occupants of the subject property. However, it does not specifically address the effects of uncooperative current operators/occupants or prior owners/operators/occupants of the subject property. Particularly in the case of long-term leases, current owners may not be able to provide prospective purchasers the access required to satisfy the Proposed Rule without the cooperation of the current occupants. It is unclear under the Proposed Rule how a User faced with such circumstances could ever avail itself of the CERCLA-liability defenses. One would assume that such lack of cooperation could be simply labeled a "data gap" and that the EP could seek out other means to fill that gap; however, this issue should be clarified in the final Rule.

Response:

If the prospective property owner, grantee or environmental professional is unsuccessful in obtaining interviews with current or past owners, the inability to obtain the required information should be noted as a data gap and the significance of the data gap noted in the written report.

Commenter Organization Name: Sierra Club & NET

Comment Number: 0419

Excerpt Number: 5

Excerpt Text:

In addition, the proposed AAI rule eliminates the requirements that are included in the interim 97 ASTM Standard that establish objective requirements on how the interview process should be conducted, including how interviews should be pursued and documented, making it likely that there will be wide variation in the adequacy of the interview process. Interviews are required by the Brownfields Law and a potentially weak and subjective interview process undermines a key tool in the effort to uncover environmental problems in the environmental inquiry.

Response:

The final rule does not prescribe particular questions that must be asked during the interview. The type and content of any questions asked during interviews will depend upon the site-specific conditions and circumstances and the extent of the environmental professional's (or other individuals under the supervision or responsible charge of the environmental professional) knowledge of the property prior to conducting the interviews. Therefore, the final rule does not

include specific questions for the interviews, but requires that the interviews be conducted in a manner that achieves the objectives and performance factors. Persons conducting the interviews of current and past owners and occupants may want to spend some time during the interviews requesting information on the locations of operations or units used to store or manage hazardous substances on the property. It would be inconsistent with the performance standards to require a certain process and content to be used in each interview.

Commenter Organization Name: Georgia Power

Comment Number: 0423

Excerpt Number: 6

Excerpt Text:

§312.23 Interviews with past and present owners, operators, and occupants (a)

In §312.23 Interviews with past and present owners, operators, and occupants (a), it is unclear exactly who must be interviewed. A suggested modification is:

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

Rationale:

-The way the language of the Proposed AAI Rule is written, it was unclear if past and present modifies owners, occupants, and operators.

-If past was intended to modify owner, operator, and occupant in this paragraph, then it is inconsistent with paragraph (c) (2) which suggests that the EP should include, to the extent necessary to achieve the objective and performance factors, an interview with one or more of three categories of persons including past owners, occupants, or operators. Whereas, paragraph (a) stated that the EP must interview these individuals.

-The concept of being required to interview past owners, operators, and occupants is a significant departure from current ASTM standards and will certainly increase the time and cost to complete an assessment.

-At a minimum, the preamble should clarify that it is within the EP's judgment who to interview within these categories and that it may not be necessary to interview a person or persons from each of these categories.

Response:

The intent of §312.23(a) is to conduct interviews of the present owner and occupants of the property and, as necessary, past owners and occupants of the subject property. The rule does not specify the number of owners and occupants to be interviewed. The environmental professional must perform this function in the manner that best fulfills the objectives and performance factors

for the inquiries in §312.20(e) and (f). Environmental professionals may use their professional judgment to determine the specific occupants to be interviewed and the total number of occupants to be interviewed in seeking to comply with the objectives and performance factors for the inquiries. Interviews must be conducted with individuals most likely to be knowledgeable about the current and past uses of the property, particularly with regard to current and past uses of hazardous substances on the property. The Agency sees no contradiction between the requirements of §312.23(b) and §312.23(c). They are separate requirements and build on the general requirement of §312.23(a), to interview past and present owners and occupants, a restating of the statutory criteria. Interviews must be conducted with the current owners and occupants of a property. In addition, to the extent necessary to meet the objectives and performance standards of the rule, interviews must be conducted with past owners and occupants of the property.

Commenter Organization Name: Georgia Power

Comment Number: 0423

Excerpt Number: 8

Excerpt Text:

§312.23 Interviews with past and present owners, operators, and occupants (preamble comment)

On page 52561 of the Proposed AAI Rule, the preamble points out that data gathered during the interviews may provide valuable information for the on-site visual inspection. While this may certainly be the case, the preamble should also clarify that the AAI Rule is not requiring that the interviews must be conducted before the on-site inspection.

Response:

In the preamble to the proposed rule the Agency merely suggests that the interviews should be conducted before the on-site visual inspection to maximize the benefit of such an inspection. The final rule includes no requirements with regard to the sequence in which the all appropriate inquiries activities must be conducted. The few instances in the preamble to the proposed rule where EPA made recommendations regarding the sequence of activities were provided as guidance and because the Agency believes the sequence may be important in many instances. For instance, a visual inspection of the property may be much more effective if it is informed by other aspects of all appropriate inquiries such as interviews with past and present owners and operators. Nothing in the final rule precludes the environmental professional from choosing to conduct the all appropriate inquiries activities in whatever order that he or she determines is best.

3.1.1 Interview of the Current Owners, Occupants, Employees, and/or Managers of the Subject Property

Commenter Organization Name: Rose and Westra

Comment Number: 0320

Excerpt Number: 13

Other Sections: NEW - 3.11.1 - De minimis conditions or releases of hazardous substances

Excerpt Text:

The proposed § 312.23(b) requires that the EP's inquiry include interviews with "major occupants" and "occupants likely to use, store, treat, handle or dispose of hazardous substances." Under this proposed rule, an environmental professional must interview all occupants of a property who are likely to "use, store, treat, handle or dispose hazardous substances ..." This could be interpreted to include any residence, as they typically have ammonia, chlorine bleach, various pesticides, etc. This requirement would create additional cost and difficulty in conducting inquiries, while providing only a minimal benefit, if any at all. For example, if a property contains an apartment complex, the EP could be required to interview every tenant in the building. R&W requests that the EPA clarify this requirement to specifically exclude de minimis use, storage, and disposal of hazardous substances that are typically associated with residential dwellings and commercial offices.

Response:

The intent of §312.23 is to conduct interviews of past and present owners and occupants of a property "for the purposes of achieving the objectives and performance factors." The rule does not specify the number of owners and occupants to be interviewed, nor does it require that all owners and occupants be interviewed. The environmental professional must perform this function in the manner that best fulfills the objectives and performance factors for the inquiries in §312.20(e) and (f). Environmental professionals may use their professional judgment to determine the specific occupants to be interviewed and the total number of occupants to be interviewed in seeking to comply with the objectives and performance factors for the inquiries. Interviews should include individuals most likely to be knowledgeable about the current and past uses of the property, particularly with regard to current and past uses of hazardous substances on the property.

Commenter Organization Name: Grand Rapids C of C

Comment Number: 0345

Excerpt Number: 4

Excerpt Text:

The proposed § 312.23(b) requires that the Environmental Professional's inquiry include interviews with "major occupants" and "occupants likely to use, store, treat, handle or dispose of hazardous substances." Under the proposed rule, an environmental professional must interview all occupants of a property. This requirement would create additional cost and difficulty in conducting inquiries while providing only a minimal benefit if any at all. For example, if a

property contains an apartment complex, the environment professional would be required to interview every tenant in the building. The Grand Rapids Area Chamber of Commerce recommends that the EPA strike the word "shall" in the second sentence of § 312.23(b) and replace it with the word "may." The Grand Rapids Area Chamber of Commerce believes that limiting the interview requirements to the current owner and operating manager of the property in question would be a reasonable requirement.

Response:

Please see response to comment 0320, excerpt 13.

Commenter Organization Name: Geomatrix Consultants

Comment Number: 0433

Excerpt Number: 2

Excerpt Text:

Commonly, the owner of a property does not want employees or tenants to know that they are interested in selling and will not allow interviews with anyone else. This can limit the numbers of interviews the EP is able to conduct, and could thereby create a data gap. In such a case, the EP must be allowed to acknowledge that limitation in the report without the report's entire credibility called into question. Clarification on the wording that the EP should use in such a case, particularly in the final two statements above the signature, should be included in the preamble.

Response:

If the prospective property owner, grantee or environmental professional is unsuccessful in obtaining interviews with current or past owners, the inability to obtain the required information should be noted as a data gap and the significance of the data gap noted in the written report. The specific language included in the written report will depend upon whether the information that could have been collected during the interviews was available from other sources, the exact nature of the missing information, and the significance of the missing information to the environmental professional's ability to render an opinion with regard to the environmental conditions of the property.

3.1.2 Interview of the Past Owners, Occupants, Employees, and/or Managers of the Subject Property

Commenter Organization Name: Worlund, John

Comment Number: 0256

Excerpt Number: 8

Excerpt Text:

As a practical matter it is usually difficult and frequently impossible to locate former owners and occupants. Any such requirement would greatly increase the cost of preparing a report. Similar to the data gaps issue, the discussion needs to be framed in the context of the principles incorporated in current commercial practice. As currently worded it would seem to offer the flexibility to the EP to decide if there was any need to contact former owners or occupants.

Response:

The final rule does not specify the number of owners and occupants to be interviewed. The environmental professional must perform this function in the manner that best fulfills the objectives and performance factors for the inquiries in §312.20(e) and (f). Environmental professionals may use their professional judgment to determine the specific owners and occupants (both current and past) to be interviewed in seeking to comply with the objectives and performance factors for the inquiries. Interviews are to be conducted with individuals most likely to be knowledgeable about the current and past uses of the property, particularly with regard to current and past uses of hazardous substances on the property. In addition, to the extent necessary to meet the objectives and performance standards of the rule, interviews must be conducted with past owners and occupants of the property.

Commenter Organization Name: Anthony, Tony, et.al.

Comment Number: 0292

Excerpt Number: 6

Excerpt Text:

Some qualifying language is necessary for (c) (1) through (3) since interviews with former occupants are required. It would be unreasonable to obtain contact information from former occupants of a property and even more unreasonable to expect the former occupants to speak with a consultant. Again, either a qualifier for information provided by municipal offices would replace interview requirements for former occupants or qualifying language about "when available" or "when contact information is reasonable ascertainable" or "when previous site investigations do not provide interviews or adequate historical operations information"

Response:

Please see response to comment 0256, excerpt 8.

Commenter Organization Name: ENSR International

Comment Number: 0314

Excerpt Number: 3

Excerpt Text:

§ 312.23 (a) and (c) require the interview of one or more of the following people: past facility managers; past owners, occupants, or operators; or employees of past owners (in addition to current use interview targets).

Comment: As in the case of interviews of abutters, ENSR has strong reservations about the practicality of this requirement, particularly when the proposed transaction is confidential, as is often the case.

If you are going to have this requirement, we recommend modifying the language such that these interviews are required only if needed to fill data gaps regarding past site use, and that past site use is reasonably likely to include processes or activities which could have contributed to a release. If this is not the case, much time (and money) would be needlessly spent attempting to track down and interview prior residential property owners, past farmers, office tenants, etc.

Response:

Please see response to comment 0256, excerpt 8.

Commenter Organization Name: Rose and Westra

Comment Number: 0320

Excerpt Number: 12

Excerpt Text:

The proposed § 312.23(c), conditional requirement to interview past owners, occupants, employees, and/or managers of the subject property creates a significant concern if any data gaps exist without such interviews. While interviews with these parties may well provide useful information, conducting such interviews could disclose confidential business information. If, for example, the seller of the property is a publicly traded company, the de facto disclosure of the potential sale is disclosure of inside information and would constitute a securities law violation. The EP cannot be placed into a situation in which he/she may be in the position of such a violation. R&W requests the EPA to specifically acknowledge such situations. The EP may then use professional judgement to assess if other mechanisms are more appropriate to address the data gap.

Response:

Please see response to comment 0256, excerpt 8. The commenter appears to be overstating the consequences of disclosing the mere fact that a property will potentially be purchased. Interviews with past owners and occupants must only be conducted as necessary to meet the objectives and performance standards of the final rule. If information that could be gained from past owners and occupants can be obtained from other sources, then interviews with these parties need not be conducted. The primary objective of all appropriate inquiries is to identify conditions indicative of releases or threatened releases of hazardous substances. Prospective property owners should keep in mind that they may be held liable for releases of hazardous substances after acquiring a property if they do not comply with the statutorily-imposed

continuing obligations. It is in the prospective property owner's best interest to conduct the inquiries as thoroughly as possible to ensure his or her ability to comply with all of the statutory criteria for the CERCLA liability protections.

Commenter Organization Name: Baker Petrolite

Comment Number: 0352

Excerpt Number: 5

Excerpt Text:

3. Some properties may have had multiple leasing tenants prior to the performance of an All Appropriate Inquiry. BPC respectfully requests that EPA clarify in the rule the extent to which environmental professionals must pursue former occupants of a property for the purpose of obtaining historical information and that EPA specify the legal standard of due care and case law that may be relied upon for interpreting achievement of the performance standard.

Response:

Please see response to comment 0256, excerpt 8.

Commenter Organization Name: Greenlining Institute

Comment Number: 0354

Excerpt Number: 14

Excerpt Text:

-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 schema of the new rule. The environmental professional might consult sources other than past owners to obtain information that 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 schema, we would like to note that obtaining useful information through interviewing past owners is likely to prove a chimerical exercise. What possible incentive would a past owner have for disclosing that hazardous waste was handled, stored or disposed of while she owned the property? It is the rare individual indeed who volunteers to be a CERCLA responsible party. Current owners, on the other hand, presumably are interested in answering because they want to sell the property (at least in many cases) and have an interest in being truthful because withholding information that could affect the value of the property in the context of a sale would expose them to contract and tort liability. However, we, like the committee, recognize that Congress applied the adjective "past" to the noun "owner" in reciting the criteria for All Appropriate Inquiry.

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" no doubt 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. Other sources also include "personal knowledge" of individuals. ASTM E1527-00 § 3.3.25. ASTM E1527 therefore includes interviewing past owners as discretionary within its schema and complies with the statutory criteria to "include" interviews with "past and present owners." 42 U.S.C. § 9601 (35)(B)(iii)(II).

We see no bar here to adopting ASTM E1527-00 verbatim. EPA's mandate was to "clarify the obligations" of prospective purchasers. Since Congress explicitly used the word "past" in connection with owner, EPA could, if it desires extra comfort, add the clarifying words "past or present" before the words "property owner" in the last sentence of ASTM E1527 § 3.3.25.

Response:

EPA maintains that although the ASTM E1527-2000 standard states that "other sources" of information may include "personal knowledge" of individuals, the ASTM standard does not require or advise environmental professionals to interview past owners or occupants of the subject property. Interviews with past owners and occupants must only be conducted as necessary to meet the objectives and performance standards of the final rule. If information that could be gained from past owners and occupants can be obtained from other sources, then interviews with these parties need not be conducted. The primary objective of all appropriate inquiries is to identify conditions indicative of releases or threatened releases of hazardous substances. Prospective property owners should keep in mind that they may be held liable for releases of hazardous substances after acquiring a property if they do not comply with the statutorily-imposed continuing obligations. It is in the prospective property owner's best interest to conduct the inquiries as thoroughly as possible to ensure his or her ability to comply with all of the statutory criteria for the CERCLA liability protections.

Commenter Organization Name: CONNOR

Comment Number: 0398

Excerpt Number: 5

Excerpt Text:

--The difficulty of contacting past facility managers, owners, occupants, operators and employees should be addressed. Entities seeking "Innocent Landowner" status should be responsible for provision of these contacts to the Environmental Professional.

Response:

Interviews with past owners and occupants must only be conducted as necessary to meet the objectives and performance standards of the final rule. If information that could be gained from past owners and occupants can be obtained from other sources, then interviews with these parties need not be conducted. Environmental professionals may request that the prospective landowner or grantee assist with identifying and locating past owners and occupants. The primary objective

of all appropriate inquiries is to identify conditions indicative of releases or threatened releases of hazardous substances. Prospective property owners should keep in mind that they may be held liable for releases of hazardous substances after acquiring a property if they do not comply with the statutorily-imposed continuing obligations. It is in the prospective property owner's best interest to conduct the inquiries as thoroughly as possible to ensure his or her ability to comply with all of the statutory criteria for the CERCLA liability protections.

Commenter Organization Name: NPCA

Comment Number: 0403

Excerpt Number: 4

Other Sections: NEW - 3.6.3 - Visual inspection of adjoining properties

Excerpt Text:

The Proposed Rule notably increases the content requirements under Phase I ESAs. An environmental professional (EP) must interview past owners, operators and occupants of the property, not just the current owner, and if the property is abandoned, the EP must interview owners or occupants of adjacent properties. What if the adjacent property is abandoned? How far must the EP go to track down past owners, operators and occupants? How far back in a line of owners, operators and occupants must the EP go?

Response:

In response to issues raised by commenters, we point out that the statutory criteria in CERCLA 101(35)(B)(iii) include "interviews with past and present owners, operators, and occupants of the facility for the purpose of gathering information regarding the potential for contamination at the facility." EPA asserts that it was clearly congressional intent that the all appropriate inquiries investigation include the conduct of interviews with current and past owners and occupants. We also assert that current and past owners and occupants of a property may be excellent sources of information regarding past and on-going uses of the property as well as the types of waste management activities that were undertaken at the property. Given that the ASTM E1527 Phase I Environmental Site Assessment Standard, the interim standard for the conduct of all appropriate inquiries, includes requirements for conducting interviews with the current owners and occupants of a property and provides that other owners and occupants are good additional sources of information about property uses and potential contamination at a property, we disagree with commenters who asserted that the proposed and final requirements for conducting interviews will be overly burdensome.

With regard to the requirement to interview owners or occupants of neighboring properties if the subject property is abandoned, EPA believes that the benefit of obtaining information with regard to previous ownerships and uses of the subject property from these individuals outweighs the potential burdens of disclosing that the subject property may be purchased. The primary objective of all appropriate inquiries is to identify conditions indicative of releases or threatened releases of hazardous substances. Prospective property owners should keep in mind that they may be held liable for releases of hazardous substances after acquiring a property if they do not comply with the statutorily-imposed continuing obligations. Therefore, prospective property owners and environmental professionals should conduct the inquiries with the goal of obtaining

as much information as possible regarding the past uses and ownerships of a property. In the case of abandoned properties, owners and occupants of neighboring properties may be valuable sources of information. If all neighboring properties also are abandoned, then it will be impossible to conduct the interviews. If information necessary to meet the objectives and performance standards cannot be obtained, the lack of information and inability to interview owners and occupants should be noted in the written report as a data gap. In addition, the significance of the data gaps to the environmental professional's ability to render an opinion with regard to the environmental conditions of a property must be noted.

Commenter Organization Name: FAA

Comment Number: 0334

Excerpt Number: 21

Excerpt Text:

WHAT COMPELS COOPERATION?

1) Assuming that the EP can identify and contact the past owners and operators and past facility managers of a subject property, what would compel them to discuss potential past environmental regulations violations that may have resulted from their past actions?

Response:

Interviews must be conducted with the current owners and occupants of a property. In addition, to the extent necessary to meet the objectives and performance standards of the rule, interviews must be conducted with past owners and occupants of the property. EPA recognizes that some individuals may not be willing or able to provide necessary information to assist the environmental professional in meeting the objectives and performance standards of the final rule. If necessary information to meet the objectives and performance standards can not be obtained during the conduct of interviews, the lack of information and inability to interview owners and occupants should be noted in the written report as a data gap. In addition, the significance of the data gaps to the environmental professional's ability to render an opinion with regard to the environmental conditions of a property must be noted.

3.2 Interview Requirements for Abandoned Properties

Commenter Organization Name: Myers, Steve

Comment Number: 0242

Excerpt Number: 6

Excerpt Text:

6 Steve Myers What Compels Cooperation? 312.20(b)(2)(i) and 312.23(a), (c)(2)-(3) and 52560-61 Assuming that past owners or operators of a subject property can be identified and contacted, what is there that will compel them to discuss potential past environmental regulation violations which could have been the result of those activities discussed in 312.20 (d)(1)(i-iv) with an Environmental Professional?

Response:

See response to comment 0334, excerpt 21.

Commenter Organization Name: Myers, Steve

Comment Number: 0242

Excerpt Number: 11

Excerpt Text:

11 Steve Myers What Compels Cooperation? 312.23(c)(1) Assuming that past facility managers of a subject property can be identified and contacted, what is there that would compel them to discuss potential past environmental regulation violations which could have been the result of those activities discussed in 312.20(d)(1)(i-iv) with an Environmental Professional?

Response:

See response to comment 0334, excerpt 21.

Commenter Organization Name: Anthony, Tony, et.al.

Comment Number: 0292

Excerpt Number: 7

Other Sections: NEW - 3.1 - Interview requirements for non-abandoned properties

Excerpt Text:

We suggest the following text revision:

-"Interviews should be conducted with an appropriate knowledgeable party."

Response:

The final rule at 312.23 (b) requires that interviews be conducted with individuals most likely to be knowledgeable about the current and past uses of the property, particularly with regard to current and past uses of hazardous substances on the property.

Commenter Organization Name: McKerr, Thomas

Comment Number: 0347

Excerpt Number: 15

Excerpt Text:

312.10(b) -Abandoned property: A better indicator that a property is abandoned would seem to be if taxes have been paid. This information is easy to obtain and is commonly included in title reports (not chains of title).

Response:

The final rule defines an abandoned property as a “property that can be presumed to be deserted, or an intent to relinquish possession or control can be inferred from the general disrepair or lack of activity thereon such that a reasonable person could believe that there was an intent on the part of the current owner to surrender rights to the property.” EPA contends that a rightful and legitimate owner of a property may be delinquent in paying property taxes.

Commenter Organization Name: USWAG

Comment Number: 0367

Excerpt Number: 12

Excerpt Text:

We also believe that the proposed definition of "abandoned property" in proposed section 312.10(b) will result in unnecessary confusion due to the reference to "general disrepair or lack of activity", two phenomena that are not necessarily indicative of an abandoned property. What is critical to identifying a parcel of property as abandoned is the absence of an identifiable owner. It is not uncommon to find property in a state of general disrepair or lack of activity due to an identified owner's inability or disinterest in maintaining the property. We would not describe such a property as abandoned. We suggest that the definition of "abandoned property" be modified to read:

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

Response:

Please see response to comment 0347, excerpt 15. “The general lack of disrepair or lack of activity” must be indicative of an intent to relinquish possession or control as viewed by a reasonable person.

Commenter Organization Name: Rybak, John Thomas

Comment Number: 0412

Excerpt Number: 6

Excerpt Text:

Proposed requirements to interview owners or occupants of neighboring properties in the case of

abandoned properties.

a) Page # 52579

b) View: This proposal is supported. Too often no persons are available to interview and provide information on the Subject. Neighbors often have a plethora of information about the Subject Property. Specifically, neighbors will historically observe exterior operations such as waste storage, disposal, dumping, and/or remediation projects.

c) Assumptions: The interview process is critical to gathering information about the Subject Property that would not be available from Regulatory Files and/or onsite inspection.

d) Burden: The EP would need to expand interview inquiries to surrounding properties. However the additional time involved is immaterial.

Response:

EPA thanks the commenter for the stated support of the proposed requirements.

Commenter Organization Name: Georgia Power

Comment Number: 0423

Excerpt Number: 1

Excerpt Text:

In §312.10 Definitions, the Abandoned property definition needs clarification. The definition should be revised to reflect the intent of the requirement to interview one or more neighboring or nearby property owners when the property is abandoned. A suggested modification is:

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

Rationale:

-Properties that appear to be in general disrepair or have a lack of activity are not strong indicators that the property is abandoned. The way the definition is worded literally requires the EP to interview neighbors at every site that is in a state of general disrepair or lack of activity. Rather, the definition of abandoned property should include the concept of the missing or truant property owner either through the inability to identify the property owner or through a denial of ownership.

Response:

Please see response to comment 0367, excerpt 12.

Commenter Organization Name: Geomatrix Consultants

Comment Number: 0433

Excerpt Number: 3

Excerpt Text:

We also believe that the time (and costs) for interviewing under an AAI-compliant ESA will increase due to challenges with tracking down neighboring property owners.

Response:

EPA disagrees with commenters who stated that it will be difficult to locate and contact neighboring property owners and occupants. The final rule, as did the proposed rule, requires that the environmental professional only locate and interview one neighboring property owner or occupant and only in those cases where no owner or occupant of the subject property can be identified. An environmental professional should be able to locate one owner or occupant of a neighboring property when conducting the on-site visual inspection of the property. If the environmental professional cannot easily locate an owner and occupant of a neighboring property owner, he or she may enlist the assistance of local government officials in identifying a neighboring property owner or occupant.

3.2.1 Interviewing Owners of Neighboring Properties Should Be Optional

Commenter Organization Name: Fischer, Greg

Comment Number: 0062

Excerpt Number: 1

Excerpt Text:

Hypothetical: While doing the site reconnaissance of an abandoned property an attempt is made to interview a neighbor(s) and no one is home. Is the environmental professional required to revisit the site until someone answers the door? In a related instance what should the professional do if he or she senses that the neighborhood is not safe i.e. apparent drug or gang related activity.

Response:

Please see response to comment 0433, excerpt 3.

Commenter Organization Name: Beaver, Christine

Comment Number: 0074

Excerpt Number: 3

Excerpt Text:

With regard to the proposed requirement to interview owners or occupants of neighboring properties in the case of abandoned properties, it is my opinion that it presents a conflict of interest. I believe there would be difficulty with obtaining either cooperation or credible information from neighboring property owners. Neighboring property owners may either be unmotivated to provide any information or conversely could provide information to further their own interests or those of community groups. It is not known what the historical relationship between the neighboring property owners has been and how this might affect the information they provide. Information on the neighboring properties from visual inspection and records review would also be included in the report to assess impacts to the subject property from off-site sources and that may affect the information neighboring property owners provide by trying to place blame for environmental liabilities elsewhere. Also, the source of information being consulted is one who has an opportunity to claim protection from CERCLA liability as a contiguous property owner and this may affect the information they are willing to provide.

Response:

As is the case with information ascertained from any interview, the environmental professional must apply his or her judgment when drawing conclusions based on the information provided in interviews with neighboring property owners and occupants and should attempt to verify any information provided by reviewing other available sources of information. The primary objective of all appropriate inquiries is to identify conditions indicative of releases or threatened releases of hazardous substances. Prospective property owners should keep in mind that they may be held liable for releases of hazardous substances after acquiring a property if they do not comply with the statutorily-imposed continuing obligations. Therefore, prospective property owners and environmental professionals should conduct the inquiries with the goal of obtaining as much information as possible regarding the past uses and ownerships of a property. In the

case of abandoned properties, owners and occupants of neighboring properties may be valuable sources of information.

Commenter Organization Name: Roark, Michael

Comment Number: 0081

Excerpt Number: 2

Excerpt Text:

One concern I have is the proposed requirement that states that owners of adjacent properties should be interviewed if assessing an abandoned property. This requirement may cause confidentiality conflicts with several clients. Based on the delicate nature of commercial redevelopment transactions, I would request that EPA make the neighboring landowner interview requirement an optional item, depending on the confidentiality of the project.

Response:

With regard to the requirement to interview owners or occupants of neighboring properties if the subject property is abandoned, EPA believes that the benefit of obtaining information with regard to previous ownerships and uses of the subject property from these individuals outweighs the potential burdens of disclosing that the subject property may be purchased. The primary objective of all appropriate inquiries is to identify conditions indicative of releases or threatened releases of hazardous substances. Prospective property owners should keep in mind that they may be held liable for releases of hazardous substances after acquiring a property if they do not comply with the statutorily-imposed continuing obligations. Therefore, prospective property owners and environmental professionals should conduct the inquiries with the goal of obtaining as much information as possible regarding the past uses and ownerships of a property. In the case of abandoned properties, owners and occupants of neighboring properties may be valuable sources of information.

Commenter Organization Name: City of Jacksonville, Florida

Comment Number: 0095

Excerpt Number: 11

Excerpt Text:

Sec. 312.23(d), in the case of abandoned properties, EPA requires the EP to interview "one or more (as necessary) owners or occupants of neighboring or nearby properties from which it appears possible to have observed uses of, or releases at, such abandoned properties...." What if the present owners or occupants did not own or occupy their property at the time the abandoned parcel was operational? Is the EP supposed to hunt down owners/occupiers from the time the abandoned parcel was in use? This wide-ranging hunt for site specific information will make brownfield redevelopment very costly.

Response:

EPA recognizes that some individuals may not be willing or able to provide necessary information to assist the environmental professional in meeting the objectives and performance standards of the final rule. If necessary information to meet the objectives and performance

standards cannot be obtained during the conduct of interviews, the lack of information and inability to interview owners and occupants should be noted in the written report as a data gap. In addition, the significance of the missing information to the environmental professional's ability to render an opinion with regard to the environmental conditions of a property must be noted.

Commenter Organization Name: Worlund, John

Comment Number: 0256

Excerpt Number: 9

Excerpt Text:

This limited exception requiring interviews with neighboring properties will occur so rarely it is not a significant issue in the context of standard commercial practice. It needs to remain clear that this is an exception.

Response:

The rarity or prevalence of any particular situation does not change the requirements. Abandoned properties are often the focus of Phase I environmental assessments.

Commenter Organization Name: PBS & J

Comment Number: 0270

Excerpt Number: 1

Excerpt Text:

One should try to interview past and current owners, occupants and may be even operators of subject tract, but I don't believe it should be mandatory to interview adjacent property owners. Adjacent property owners are sometimes helpful, but some times can be misleading, too.

Response:

The final rule only requires that neighboring property owners be interviewed in those cases where the subject property is abandoned. The primary objective of all appropriate inquiries is to identify conditions indicative of releases or threatened releases of hazardous substances. Prospective property owners should keep in mind that they may be held liable for releases of hazardous substances after acquiring a property if they do not comply with the statutorily-imposed continuing obligations. Therefore, prospective property owners and environmental professionals should conduct the inquiries with the goal of obtaining as much information as possible regarding the past uses and ownerships of a property. In the case of abandoned properties, owners and occupants of neighboring properties may be valuable sources of information.

Commenter Organization Name: Anthony, Tony, et.al.

Comment Number: 0292

Excerpt Number: 5

Excerpt Text:

It is unreasonable to require consultants to interview neighboring property owners to determine whether uncontrolled access to an abandoned property has lead to contamination. The neighboring owners may be unwilling to discuss the property or unable to provide useful or reliable knowledge. Further, the neighbor may be hostile towards the subject property owner and provide false accusations. Information from a neighboring owner may be "hear-say", and as such, should be considered unreliable. This section should include interviews with municipal officials to obtain information about abandoned properties. Municipal officials would be a viable source of information and constitute a far more reliable source.

Response:

The final rule only requires that neighboring property owners be interviewed in those cases where the subject property is abandoned. The primary objective of all appropriate inquiries is to identify conditions indicative of releases or threatened releases of hazardous substances. Prospective property owners should keep in mind that they may be held liable for releases of hazardous substances after acquiring a property if they do not comply with the statutorily-imposed continuing obligations. Therefore, prospective property owners and environmental professionals should conduct the inquiries with the goal of obtaining as much information as possible regarding the past uses and ownerships of a property. In the case of abandoned properties, owners and occupants of neighboring properties may be valuable sources of information.

EPA recognizes that some individuals may not be willing or able to provide necessary information to assist the environmental professional in meeting the objectives and performance standards of the final rule. If necessary information to meet the objectives and performance standards can not be obtained during the conduct of interviews, the lack of information and inability to interview owners and occupants should be noted in the written report as a data gap. In addition, the significance of the missing information to the environmental professional's ability to render an opinion with regard to the environmental conditions of a property must be noted.

Commenter Organization Name: Anonymous

Comment Number: 0294

Excerpt Number: 1

Excerpt Text:

312.23 (d) The requirement to interview nearby occupants/property owners may conflict with confidentiality agreements that environmental professionals have with clients, particularly financial institutions.

Response:

With regard to the requirement to interview owners or occupants of neighboring properties if the subject property is abandoned, EPA believes that the benefit of obtaining information with regard to previous ownerships and uses of the subject property from these individuals outweighs the potential burdens of disclosing that the subject property may be purchased. The primary objective of all appropriate inquiries is to identify conditions indicative of releases or threatened

releases of hazardous substances. Prospective property owners should keep in mind that they may be held liable for releases of hazardous substances after acquiring a property if they do not comply with the statutorily-imposed continuing obligations. Therefore, prospective property owners and environmental professionals should conduct the inquiries with the goal of obtaining as much information as possible regarding the past uses and ownerships of a property. In the case of abandoned properties, owners and occupants of neighboring properties may be valuable sources of information.

Commenter Organization Name: ENSR International

Comment Number: 0314

Excerpt Number: 1

Excerpt Text:

§ 312.23 (d) requires the interview of one or more (as necessary) neighbors or abutters in the case of the subject property's being abandoned and there is evidence of potential unauthorized uses of or uncontrolled access to the abandoned subject property.

Comment: ENSR has strong reservations about the practicality of this requirement, particularly when the proposed transaction is confidential, as is often the case. Additionally, there are potential safety issues that may be involved in approaching abutters.

Response:

The final rule only requires that neighboring property owners be interviewed in those cases where the subject property is abandoned. The primary objective of all appropriate inquiries is to identify conditions indicative of releases or threatened releases of hazardous substances. Prospective property owners should keep in mind that they may be held liable for releases of hazardous substances after acquiring a property if they do not comply with the statutorily-imposed continuing obligations. Therefore, prospective property owners and environmental professionals should conduct the inquiries with the goal of obtaining as much information as possible regarding the past uses and ownerships of a property. In the case of abandoned properties, owners and occupants of neighboring properties may be valuable sources of information.

EPA recognizes that some individuals may not be willing or able to provide necessary information to assist the environmental professional in meeting the objectives and performance standards of the final rule. If necessary information to meet the objectives and performance standards can not be obtained during the conduct of interviews, the lack of information and inability to interview owners and occupants should be noted in the written report as a data gap. In addition, the significance of the missing information to the environmental professional's ability to render an opinion with regard to the environmental conditions of a property must be noted.

EPA believes that the benefit of obtaining information with regard to previous ownerships and uses of the subject property from these individuals outweighs the potential burdens of disclosing that the subject property may be purchased. The primary objective of all appropriate inquiries is to identify conditions indicative of releases or threatened releases of hazardous substances.

Prospective property owners should keep in mind that they may be held liable for releases of hazardous substances after acquiring a property if they do not comply with the statutorily-imposed continuing obligations. Therefore, prospective property owners and environmental professionals should conduct the inquiries with the goal of obtaining as much information as possible regarding the past uses and ownerships of a property. In the case of abandoned properties, owners and occupants of neighboring properties may be valuable sources of information.

Commenter Organization Name: Kane Environmental

Comment Number: 0317

Excerpt Number: 2

Excerpt Text:

It is unclear why an abandoned property requires interviews with neighbors. As a practical matter, many times clients do not want neighbors to know of their interest in a property, due to financing relationships, competition with other prospective purchasers and other proprietary considerations. You are also assuming that neighbors will provide accurate historical information

Response:

Please see response to comment 0314, excerpt 1.

Commenter Organization Name: USWAG

Comment Number: 0367

Excerpt Number: 11

Excerpt Text:

Interviews with Neighbors of Abandoned Properties. We appreciate the fact that proposed section 312.23(d), providing for interviews with owners or occupants of neighboring or nearby properties when conducting AAI for an abandoned property, is a compromise agreed to after long and contentious debate by the Reg-Neg Committee. As EPA certainly has come to appreciate, early disclosure of a proposed property transaction will often be the death knell to a transaction and inhibit Congress' goal of encouraging redevelopment of impaired property under the Brownfields law. For these reasons, interviews with neighboring property owners or occupants should not be mandatory but should be an option available to the environmental professional where such interviews are the only way to achieve the objective and performance factors of AAI as outlined in proposed sections 312.20(d) and (e). It appears that this is EPA's intent in section 312.23(d), but instead of drafting that section to track the language and structure of section 312.23(c), which unambiguously expresses that intent, EPA changed the structure of section 312.23(d) so that a court passing on a claim of CERCLA liability protection might infer that the lack of parallel structure in the two subsections was intended by EPA to prescribe different criteria for determining when interviews with neighbors of abandoned properties was required. To avoid possible misunderstanding, US WAG urges EPA to track the language and structure of section 312.23(c) by revising section 312.23(d) to read:

In the case of inquiries conducted at "abandoned properties," as defined in § 312.10, where there is evidence of potential unauthorized uses of the subject property or evidence of uncontrolled

access to the subject property, the environmental professional's inquiry should include, to the extent necessary to achieve the objectives and performance factors of § 312.20(d) and (e), interviewing one or more owners or occupants of neighboring or nearby properties from which it appears possible to have observed uses of, or releases at, such abandoned properties.

Response:

In the final rule, as in the proposed rule, the requirement to interview one or more neighboring property owners in those instances where the subject property is determined to be abandoned, is not subject to the condition proposed by the commenter (to the extent necessary to achieve the objectives and performance factors). The rule provides that in all instances of abandoned properties, an attempt must be made to locate and interview a neighboring property owner. The primary objective of all appropriate inquiries is to identify conditions indicative of releases or threatened releases of hazardous substances. Prospective property owners should keep in mind that they may be held liable for releases of hazardous substances after acquiring a property if they do not comply with the statutorily-imposed continuing obligations. Therefore, prospective property owners and environmental professionals should conduct the inquiries with the goal of obtaining as much information as possible regarding the past uses and ownerships of a property. In the case of abandoned properties, owners and occupants of neighboring properties may be valuable sources of information.

EPA recognizes that some individuals may not be willing or able to provide necessary information to assist the environmental professional in meeting the objectives and performance standards of the final rule. If necessary information to meet the objectives and performance standards can not be obtained during the conduct of interviews, the lack of information and inability to interview owners and occupants should be noted in the written report as a data gap. In addition, the significance of the missing information to the environmental professional's ability to render an opinion with regard to the environmental conditions of a property must be noted.

Commenter Organization Name: SCANA

Comment Number: 0373

Excerpt Number: 9

Excerpt Text:

We suggest the Agency consider revising the language in §312.23(d). The current wording mandates that an interview must be performed in the case of abandoned properties. We present the following scenarios for consideration:

There may be no owners/occupants in a position to have observed the property's past and present uses

Interviewees may decline to participate in the process or fail to respond in a manner within the time constraints for the inquiry

The interviewee may not be credible for a multitude of reasons or the information provided may not be reliable in the opinion of the environmental professional.

In a related matter, please note that energy providers have the authority to take private property

to provide electric and gas services to the public. There is a similar nature of conflict with the proposed rule as applied to both abandoned properties and private properties acquired to continue reliable electric and gas service to the public. The Agency is urged to take these points into consideration and make appropriate revisions in the language of the regulation.

Response:

The final rule only requires that neighboring property owners be interviewed in those cases where the subject property is abandoned. The primary objective of all appropriate inquiries is to identify conditions indicative of releases or threatened releases of hazardous substances. Prospective property owners should keep in mind that they may be held liable for releases of hazardous substances after acquiring a property if they do not comply with the statutorily-imposed continuing obligations. Therefore, prospective property owners and environmental professionals should conduct the inquiries with the goal of obtaining as much information as possible regarding the past uses and ownerships of a property. In the case of abandoned properties, owners and occupants of neighboring properties may be valuable sources of information.

EPA recognizes that some individuals may not be willing or able to provide necessary information to assist the environmental professional in meeting the objectives and performance standards of the final rule. If necessary information to meet the objectives and performance standards can not be obtained during the conduct of interviews, the lack of information and inability to interview owners and occupants should be noted in the written report as a data gap. In addition, the significance of the missing information to the environmental professional's ability to render an opinion with regard to the environmental conditions of a property must be noted.

EPA believes that the benefit of obtaining information with regard to previous ownerships and uses of the subject property from these individuals outweighs the potential burdens of disclosing that the subject property may be purchased. The primary objective of all appropriate inquiries is to identify conditions indicative of releases or threatened releases of hazardous substances. Prospective property owners should keep in mind that they may be held liable for releases of hazardous substances after acquiring a property if they do not comply with the statutorily-imposed continuing obligations. Therefore, prospective property owners and environmental professionals should conduct the inquiries with the goal of obtaining as much information as possible regarding the past uses and ownerships of a property. In the case of abandoned properties, owners and occupants of neighboring properties may be valuable sources of information.

Commenter Organization Name: Intertox

Comment Number: 0396

Excerpt Number: 9

Excerpt Text:

-The proposed requirements to interview owners or occupants of neighboring properties in the case of abandoned properties.

--Abandoned properties represent a valid issue in accounting for environmental liabilities.

However, requiring assessors to interview one or more owners or occupants of neighboring or nearby properties is unreasonable. These owners or occupants are under no obligation to provide information to the assessor and it is our experience that the availability of adjacent owners or occupants varies depending on the type of property. While it is likely that an abandoned property in a city or town will have adjacent owners or operators that can be reasonably contacted, such is not the case in rural and agricultural communities. Therefore, this proposed requirement represents an unreasonable burden to the assessor.

Response:

Please see response to comment 0373, excerpt 9.

Commenter Organization Name: Freeman & Giler

Comment Number: 0417

Excerpt Number: 3

Excerpt Text:

Where the subject property is abandoned, Proposed Rule §312.23(d) requires at least one interview with a past or present owner, operator or major occupant of a neighboring property who may have observed the operations of the subject property. Neighbors may also have to be interviewed "to the extent practicable" to determine the potential for a release at the subject property, the ownership or use of the subject property and/or the remedial activities to address past or on-going releases at the subject property.

Neighbor interviews should be optional at the discretion of the EP as determined by the EP's need for additional data to adequately assess the subject site. For instance, where governmental agency records or other reliable sources document contamination, investigation and/or remediation at the subject site, the EP should not be obligated to interview neighbors just to satisfy the AAI Rule. This is especially true when prospective owners have legitimate business concerns that such neighbor interviews may impede the property transfer, inflate property costs, draw unwanted publicity or complicate subsequent development or redevelopment plans.

Response:

Please see response to comment 0373, excerpt 9.

Commenter Organization Name: Mittelholzer, Michael

Comment Number: PM-0207-0002

Excerpt Number: 3

Excerpt Text:

Under Section 312.23, "Interviews with past and present owners, operators and occupants," NAHB fully supports and recognizes the need to accurately assess the use of a property. NAHB is concerned that the additional requirements found under this section, specifically 312.23(d), entitled "Additional Requirements for Abandoned Properties," which is specifically an obligation to locate and interview neighbors of abandoned properties in addition to all the other requirements found under 312.23, such as reviewing all historical sources, reviewing all

environmental means on the property, and reviewing all state and local records on the property.

Our concern specifically, though, is just with 312.23(d) in that we feel it is an additional administrative burden for perspective purchasers that could have the unintended impact of discouraging redevelopment of abandoned properties that, frankly, are already challenging properties to redevelop.

Response:

Please see response to comment 0373, excerpt 9.

3.2.2 The Agency Should Clarify/Modify the Language Pertaining to "Unauthorized Use" and "Uncontrolled Access" of the Subject Property

Commenter Organization Name: ENSR International

Comment Number: 0314

Excerpt Number: 2

Excerpt Text:

Lastly, further definition should be provided with respect to the terms, "evidence of potential unauthorized uses of the subject property," or "evidence of uncontrolled access to the subject property." [emphasis added]. Does evidence of "homeless people" occupying the site constitute evidence of potential unauthorized use? If so, what environmental harm would result from such evidence? Indications that some neighboring kids have thrown soda bottles or even beer bottles onto the subject property-does this constitute evidence of uncontrolled access and thus triggering a requirement to talk to abutters? If you are going to have this requirement, we recommend modifying the language such that evidence of unauthorized use or uncontrolled access must also be tied to observable evidence of a release or threat of a release of a regulated substance. Without the latter, there should not be an obligation to talk to abutters or neighbors.

Response:

The final rule defines an abandoned property as a "property that can be presumed to be deserted, or an intent to relinquish possession or control can be inferred from the general disrepair or lack of activity thereon such that a reasonable person could believe that there was an intent on the part of the current owner to surrender rights to the property." Evidence of homeless people occupying a property would not in itself be a good indication that the property is abandoned. An inability to identify or locate a current owner for the property would be a better indication that the property is abandoned.

Commenter Organization Name: Georgia Power

Comment Number: 0423

Excerpt Number: 7

Excerpt Text:

In §312.23 "Interview with past and present owners, operators, and occupants" (d), the terms used to define abandoned properties, "unauthorized uses" and "uncontrolled access," are vague and are open to a broad range of interpretation. The terms should be explained in the preamble or qualified as represented in this suggested change:

-(d) "In the case of inquiries conducted at "abandoned properties," as defined in §312.10, where there is evidence of potential unauthorized uses of the subject property that reflect conditions indicative of a release or threatened release of hazardous substances on, at, in, or to the subject property or evidence of uncontrolled access to the subject property, the EP's inquiry must include interviewing one or more (as necessary) owners or occupants of neighboring or nearby properties from which it appears possible to have observed uses of or releases at such abandoned properties for the purpose of gathering information necessary to achieve the objectives and performance

factors of §§312.20(d) and (e)."

Rationale:

-Unauthorized uses could be interpreted as loosely as burning trash and uncontrolled access could be applicable to every property without a fence. At a minimum, the preamble should clarify or give examples of "unauthorized uses" and "uncontrolled access."

-Interviewing neighbors at great frequencies, as this current language would require, would unnecessarily increase the cost of the assessments, alarm neighbors, and prematurely expose a user's interest in the subject property.

Response:

The final rule defines an abandoned property as a "property that can be presumed to be deserted, or an intent to relinquish possession or control can be inferred from the general disrepair or lack of activity thereon such that a reasonable person could believe that there was an intent on the part of the current owner to surrender rights to the property." EPA disagrees with the commenter's suggestion to qualify the definition of abandoned property as a property that reflects "conditions indicative of a release or threatened release of hazardous substances." Including such a condition in the definition would require an environmental professional to determine the potential environmental conditions of a property before he or she finished conducting the inquiries. Evidence of potential releases at a property would not in itself be a good indication that the property is abandoned. An inability to identify or locate a current owner for the property would be a better indication that the property is abandoned.

3.3 Review of Historical Sources of Information

Commenter Organization Name: Goodman, J. Dwight

Comment Number: 0097

Excerpt Number: 6

Excerpt Text:

The criteria regarding historical data review seems to be appropriate.

Response:

EPA thanks the commenter for the stated support of the requirement.

Commenter Organization Name: Anthony, Tony, et.al.

Comment Number: 0292

Excerpt Number: 8

Excerpt Text:

312.24 Reviews of historical sources of information

We support this section.

Response:

EPA thanks the commenter for the stated support of the requirement.

Commenter Organization Name: Holm, Wright, Hyde, & Hays

Comment Number: 0323

Excerpt Number: 2

Excerpt Text:

Comment 2: Irrespective of the above, to accomplish the expanded review of historical sources of information, there will be an increase in the time required for the proposed activity. For instance, agricultural use of land becomes important for the historical time periods where it was likely that pesticides were used.

The federal National Resource Conservation Service (NRCS) provides historical information on crops typically grown in most counties in the country. It would be very useful if a compendium of pesticide use by crop over time could be provided. This would provide valuable input to the environmental professional and allow him or her (or designee) to spend 0.75 hour versus 1.5 hour to interview the NRCS and former property owners or other knowledgeable people in the cases where agricultural activities of concern preceded other development over the last century or so.

Recommendation: Develop a compendium of historic pesticide availability, typical usage on crops over time, half life of the active ingredient and other pertinent information.

Response:

The development of a compendium of historic pesticide availability, typical usage on crops over time, half life of the active ingredient and other pertinent information for all properties across the country is beyond the scope of the current rule. Interviews with current and past occupants of the subject property and interviews with local government officials may be good sources of information regarding the types of pesticides that were previously used at the property.

Commenter Organization Name: FAA**Comment Number:** 0334**Excerpt Number:** 11**Other Sections:** NEW - 3.4 - Recorded environmental cleanup liens searches
NEW - 3.5 - Review of federal, state, tribal, and local government records**Excerpt Text:**

- 1) FAA believes that EPA should allow the EP flexibility to determine whether title history, fire insurance maps, institutional controls, environmental liens, and other requirements are applicable at the subject property. For many FAA site assessments, these sources are not applicable, especially to remote properties in Alaska and other low population areas. Potential contamination from adjoining properties in such instances is non-existent. FAA suggests that EPA should allow more flexibility in the contents of an AAI for properties in remote, undeveloped, and unpopulated areas.

Response:

The final rule does not require that any specific type of historic information be collected or consulted when reviewing historical information about a property. The rule allows for the environmental professional to use professional judgment when determining what types of historical documentation may provide the most useful information about a property's ownership, uses, and potential environmental conditions when seeking to comply with the objectives and performance factors for the inquiries.

Commenter Organization Name: Montana DEQ**Comment Number:** 0335**Excerpt Number:** 7**Excerpt Text:**

Proposed Section 312.24: DEQ believes that relying on historical reports from a site may be problematic. A document may state that no historical information is known about the site but with a little more investigation, additional information can be found. If a person solely relies on the information found in the previous report, this could perpetuate errors or misunderstandings. DEQ believes that for AAIs, a person must conduct independent historical research investigation and not rely on past documents.

Response:

The final requirements for reviewing historical documents allow the prospective landowner, grantee, and environmental professional to use their judgment, in accordance with generally

accepted good commercial and customary standards and practices, in locating the best available sources of historical information and reviewing such sources for information necessary to comply with the rule's objectives and performance factors. EPA agrees with the commenter that there will be situations where previously conducted AAI reports are not the best source of historical information about a property. When reviewing and using previously prepared AAI reports, the environmental professional should use his or her best judgment in determining the quality and reliability of the information provided in the report. In addition, the final rule requires that information used from previous reports be updated if it was collected more than one year or 180 days prior to the date of acquisition of the property (depending upon what type of information is being used).

Commenter Organization Name: McKerr, Thomas

Comment Number: 0347

Excerpt Number: 23

Excerpt Text:

312.24(a): Street (aka criss-cross or reverse) directories are a very valuable source of information and should be included in the list of historical documents.

Response:

EPA thanks the commenter for the input. It is not possible for EPA to list in the regulation every type of information that may potentially useful for complying with the requirements of the final rule.

Commenter Organization Name: McKerr, Thomas

Comment Number: 0347

Excerpt Number: 24

Excerpt Text:

312.24(b): What is a "governmental purpose?" Park? Forest? Wilderness area?

Response:

By "government purpose" the Agency means a property that is owned or operated by a government entity for use by the government entity or for a use that serves the needs or purpose of the government entity.

Commenter Organization Name: Intertox

Comment Number: 0396

Excerpt Number: 10

Excerpt Text:

-The proposed standards for reviews of historical sources of information.

--The review of historical sources of information is the key component of the all appropriate inquiry process. Without an adequate characterization of site history, accurate assumptions about

environmental liability are not feasible. However, Intertox is opposed to a rule that would not require any specific type of historic information be collected. Without at least some guidance, future environmental site assessments will suffer from a lack of data. We recommend that some suggested sources of information be included in the final rule. For instance, Sanborn fire insurance maps, R.L. Polk or similar city directories (beginning with reverse directories 1930-onward), aerial photographs (at least one from each decade from the 1940s onward), and topographic maps are historic resources that have proven since 1986 to be beneficial sources of information in characterizing a site's history:

The reason we believe at least some guidance be provided is because the majority of professionals conducting environmental site assessments have no historical research training and to leave this important task to an engineer or geologist without some level of recommendation will likely result in poorly researched site histories and, correspondingly, assumptions of environmental liability that are potentially unfounded.

Response:

The final rule at 312.24(a) provides several examples of historical sources of information that may be consulted. These include aerial photographs, fire insurance maps, building department records, chain of title documents, and land use records.

Commenter Organization Name: Intertox

Comment Number: 0396

Excerpt Number: 20

Other Sections: NEW - 5 - Comments on the Paperwork Reduction Act

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:

The final requirements for reviewing historical documents allow the prospective landowner, grantee, and environmental professional to use their judgment, in accordance with generally accepted good commercial and customary standards and practices, in locating the best available sources of historical information and reviewing such sources for information necessary to comply with the rule's objectives and performance factors. EPA agrees with the commenter that there will be situations where data base search results provided by independent consultants or companies are not the best source of historical information about a property. When reviewing and using such information, the environmental professional should use his or her best judgment in determining the quality and reliability of the information provided.

Commenter Organization Name: RT Environmental Services

Comment Number: 0406

Excerpt Number: 2

Excerpt Text:

There is also little guidance provided on availability from the Agency of historical information that preparers should rely on to determine the nature and extent of historical manufacturing activity which is or could have been conducted on subject properties.

Response:

Historical documents and records, among others, may include chain of title documents, land use records, aerial photographs of the property, fire insurance maps, and records held at local historical societies. Local government officials also may be valuable sources of information on historical uses of properties.

Commenter Organization Name: Dismukes, James

Comment Number: 0416

Excerpt Number: 6

Other Sections: NEW - 3.4 - Recorded environmental cleanup liens searches

Excerpt Text:

The need for a chain of title search and a property lien search, although not specifically called for the proposed rule, will be necessary to establish the past ownership and use to the degree called for under AAI. The average cost for a chain of title is between \$250 to \$500. This is a tremendous cost addition on a percentage basis for a Phase I and typically yields no useful information as to potential environmental issues to a property.

Response:

The final rule does not require that any particular type of historical document be found or used for any particular property. Although a chain of title search may provide valuable information on previous ownership and uses of a property, the prospective landowner, grantee, and environmental professional may be able to find this information from other sources (e.g.,

interviews with current and past owners, other government records).

Commenter Organization Name: MPCA

Comment Number: 0437

Excerpt Number: 1

Excerpt Text:

The Minnesota Pollution Control Agency staff has reviewed the proposed All Appropriate Inquiry (40CFR Part 312) and would like to comment on §3.12.24 which would require the environmental professional to include a review of historical documents and records for the subject property that document the ownership and use of the property for a period of time as far back in the history of the property as it can be shown that the property contained structures or from the time the property was first used for residential, agricultural, commercial, industrial or government purpose.

The MPCA staff is concerned that this statute, as written, would not be inclusive of unpermitted disposal sites where no other activity besides disposal was historically conducted on the property. The MPCA staff suggests that disposal sites be added to this statute since disposal does not seem to be included or fit into any of the categories (ie., residential, agricultural, commercial, industrial or government) listed in the proposed statute.

An alternative might be to require the review of aerial maps of the subject property and areas in close proximity. It is likely that a review of these aerial photos will not only show developed areas and public roads but also disposal sites

Response:

EPA disagrees with the commenter. The use of a property for the purpose of waste disposal could be included in several of the mentioned areas, including commercial, industrial and government use, depending on the particular circumstances. In addition, the final rule, at 312.25(b)(2) requires reviews of government records of activities, conditions, or incidents likely to cause or contribute to releases or threaten releases of hazardous substances, including landfill and other disposal unit location records and permits.

Commenter Organization Name: McKerr, Thomas

Comment Number: 0347

Excerpt Number: 2

Excerpt Text:

Section II, E, 3. Innocent Landowner. Reviews of historical sources lists "chain of title documents" first, from which I infer that this is an important source. In fact a chain of title seldom includes relevant information such as tenancy or tenant activities. Even identifying past owners may be of little value. Identifying Acme, Inc. in the chain is of little value (unless you are after Wiley Coyote). I recognize the "chain of title documents" is listed in the Act, but place it last in the preamble and add better sources as examples, e.g., street (criss-cross) directories.

Response:

The final rule does not require that any particular type of historical document be found or used for any particular property. Although a chain of title search may provide valuable information on previous ownership and uses of a property, the prospective landowner, grantee, and environmental professional may be able to find this information from other sources (e.g., interviews with current and past owners, other government records). In the final rule language at 312.24(a) chain of title documents are not listed first in the list of suggested historical documents.

3.3.1 Scope of the Review - How far Back in Time/History Historical Records Must Be Reviewed

Commenter Organization Name: City of Jacksonville, Florida

Comment Number: 0095

Excerpt Number: 6

Excerpt Text:

Sec. 312.24(b) requires a review of historic records "cover[ing] a period of time as far back in the history of the subject property as it can be shown that the property contained structures or from the time the property was first used for residential, agricultural, commercial, industrial or governmental purposes." Even title searches are considered reliable if they go back 50 years. In the hunt to determine the environmental condition of a property, EPA is requiring prospective purchasers to hire historians. An historic records search reaching back no more than 50 years is reasonable; to the dawn of civilization on the property is not.

Response:

The statutory criteria in the Brownfields Amendments require that reviews of historical sources of information be conducted to "determine previous uses and occupancies of the real property **since the property was first developed.**" Despite the concerns raised by some commenters regarding the scope of the historical records review, we assert that the scope of the requirements in the final rule (as did the scope of the proposed requirements) reflect congressional intent as provided in CERCLA §101(35)(B)(iii). The statutory criterion provides that all appropriate inquiries include "reviews of historical sources...to determine previous uses and occupancies of the real property since the property was first developed." We point out that the final rule does allow the environmental professional to exercise his or her 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" to ensure that the inquiries are done in compliance with the objectives and performance factors. We believe that this provides sufficient flexibility to allow for any circumstances where due to the availability of other information about a property an environmental professional may conclude that a comprehensive search of historical records is not necessary to meet the objectives and performance factors.

Commenter Organization Name: Zutz

Comment Number: 0104

Excerpt Number: 5

Excerpt Text:

This section requires that historical documents and records be reviewed "from the time the property was first used for residential, agricultural, commercial, industrial, or governmental purposes".

We take exception to this requirement. Consider these examples: the first residential use of the property for many parcels would be Indian settlement; the first agricultural use of the land may have been prior to European settlement in the 1600s (1860s or later for the upper midwest); and

for US land within the Louisiana Purchase, the first governmental use of the land would begin in 18 02. There would be a significant lack of documents of these uses.

The historical source review requirements should be broadened to a review of reasonably available documents.

Response:

Please see response to comment 0095, excerpt 6.

Commenter Organization Name: PBS & J

Comment Number: 0270

Excerpt Number: 3

Excerpt Text:

How far back should one research should be left up to the site situation, the available data, and the judgment of the environmental professional. As a guide the ASTM standard is adequate.

Response:

The statutory criteria in the Brownfields Amendments require that reviews of historical sources of information be conducted to “determine previous uses and occupancies of the real property **since the property was first developed.**” We point out that the final rule does allow the environmental professional to exercise his or her 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” to ensure that the inquiries are done in compliance with the objectives and performance factors. We believe that this provides sufficient flexibility to allow for any circumstances where due to the availability of other information about a property an environmental professional may conclude that a comprehensive search of historical records is not necessary to meet the objectives and performance factors.

Commenter Organization Name: Kane Environmental

Comment Number: 0317

Excerpt Number: 3

Excerpt Text:

The new proposed standards should adopt the same requirements for historical research as the current ASTM requirements. For example, if the EP only looks at historic aerial photographs, does that mean that the remaining historical documents are considered as "data gaps" and need to be addressed as such in the Phase I ESA? Keeping it the same as the current ASTM standard reduces potential confusion as to what is enough historical research

Response:

The final rule does not require that any particular type of historical document be found or used for any particular property. The environmental professional may use his or her judgment in determining what particular documents may provide the best information on historical ownerships and uses of a property. The types of documents listed in the regulations are only

suggestions of the types of documents that may provide useful information.

Commenter Organization Name: Rose and Westra

Comment Number: 0320

Excerpt Number: 3

Excerpt Text:

R&W requests that any promulgated rules contain more specific guidance or requirements for historical research, that is, if the EPA continues with this rule making process.

Response:

The final rule does not require that any particular type of historical document be found or used for any particular property. The final rule allows the environmental professional to use his or her judgment in determining what particular documents may provide the best information on historical ownerships and uses of a property. The final rule does provide a list of suggested documents that may provide useful information.

Commenter Organization Name: Rose and Westra

Comment Number: 0320

Excerpt Number: 14

Excerpt Text:

The proposed § 312.24(b) requires that "historical documents and records reviewed must cover a period of time as far back in the history of the subject property as it can be shown that the property contained structures or from the time the property was first used for residential, agricultural, commercial, industrial, or governmental purposes." It then states that the EP "...may exercise professional judgement 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." Without a provision for the likelihood that individual records will yield materially useful information, this proposed rule is not workable. For instance, chain of title documents may identify the owner of a property for well over 100 years, but these documents do not typically document the use of the property. Obviously, the historical use of the property is much more important to the AAI and Phase I ESA process. R&W requests that the EPA include a likelihood of usefulness condition for the historical source information gathering process. This has made the E 1527-00 process much more efficient.

Response:

The usefulness of any one particular document is dependent upon many circumstances including the quality of the information included in the document and how dependent the user is upon that particular source of information as the primary or only source of historical information. The final rule does not require that any particular type of historical document be found or used for any particular property. The final rule allows the environmental professional to use his or her judgment in determining what particular documents may provide the best information on historical ownerships and uses of a property. The final rule does provide a list of suggested documents that may provide useful information.

Commenter Organization Name: Rose and Westra

Comment Number: 0320

Excerpt Number: 15

Other Sections: NEW - 4.1 - The impact of the rule is underestimated

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:

The statutory criteria in the Brownfields Amendments require that reviews of historical sources of information be conducted to “determine previous uses and occupancies of the real property **since the property was first developed.**” We point out that the final rule does allow the environmental professional to exercise his or her 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” to ensure that the inquiries are done in compliance with the objectives and performance factors. We believe that this provides sufficient flexibility to allow for any circumstances where due to the availability of other information about a property an environmental professional may conclude that a comprehensive search of historical records is not necessary to meet the objectives and performance factors.

In the case of properties that show evidence of never having structures or improvements, the environmental professional should use his or her judgment as to how far back in time records need to be searched to be reasonably certain that no structures or improvements were placed on the property or there is no evidence of an ownership or use that would have potentially caused a release of hazardous substances at the property. The historical records search requirements of the final rule are very similar to the requirements of the ASTM E1527-2000 standard at 7.3.2 that require all obvious uses of the property to be identified from the present, back to the property’s obvious first use, or back to 1940, *whichever is earlier*. Given the similarities of the requirements, EPA believes that the incremental cost for conducting the search of historical records will be the same for the final rule as it was under the ASTM standard.

Commenter Organization Name: Holm, Wright, Hyde, & Hays

Comment Number: 0323

Excerpt Number: 1

Excerpt Text:

Comment 1: The proposed regulation says "Historical documents and records reviewed **MUST**

(emphasis added) cover a period of time as far back in the history of the subject project as it can be shown that the property contained structures..." but then goes on to place on the environmental professional the responsibility to "exercise professional judgment" as to how far back to go. We believe that using the more stringent approach "MUST" will either become an unnecessary point of contention often leading to litigation or create a slavish (and more expensive) protocol.

Recommendation: Change "MUST" to "are expected to", thereby supporting the environmental professional's ability to exercise judgment.

Response:

The statutory criteria in the Brownfields Amendments require that reviews of historical sources of information be conducted to "determine previous uses and occupancies of the real property **since the property was first developed.**" The historical records search requirements of the final rule are very similar to the requirements of the ASTM E1527-2000 standard at 7.3.2 that require all obvious uses of the property to be identified from the present, back to the property's obvious first use, or back to 1940, *whichever is earlier*.

We point out that the final rule does allow the environmental professional to exercise his or her 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" to ensure that the inquiries are done in compliance with the objectives and performance factors. We believe that this provides sufficient flexibility to allow for any circumstances where due to the availability of other information about a property an environmental professional may conclude that a comprehensive search of historical records is not necessary to meet the objectives and performance factors.

Commenter Organization Name: Mille Lacs Ojibwe

Comment Number: 0330

Excerpt Number: 14

Excerpt Text:

The Band concurs with the proposed language that an Environmental Professional may exercise his or her professional judgment in the determination of how far back to research historical documents and records given the availability of facts at the time of the inquiry.

Response:

Please note that the comment slightly misstates the meaning of the rule language. The final requirements for reviewing historical documents allow the purchaser and environmental professional to use their judgment, in accordance with generally accepted good commercial and customary standards and practices, in locating the best available sources of historical information and reviewing such sources for information necessary to comply with the rule's objectives and performance factors. The availability of facts at the time of the inquiry is not the determinative factor. Rather, compliance with the rule's objectives and performance factors should be paramount.

Commenter Organization Name: Grand Rapids C of C

Comment Number: 0345

Excerpt Number: 3

Excerpt Text:

Section 312.24(b) requires that "historical documents and records reviewed must cover a period of time as far back in the history of the subject property as it can be shown that the property contained structures or from the time the property was first used for residential, agricultural, commercial, industrial, or governmental purposes." The Grand Rapids Area Chamber of Commerce recommends that a specific time period be included in § 312.24(b) for review of historical sources of information. Specifically, the Chamber recommends that the period of review be equal to the period of review under the current ASTM E 1527 standard. The period described in the proposed § 312.24(b) would increase the time and effort, and therefore the cost, associated with historical document review without providing any real benefit. There is simply no indication that the period of time currently set forth in the ASTM E 1527 for historical document review is in any way inadequate for purposes of "all appropriate inquiry."

Response:

The statutory criteria in the Brownfields Amendments require that reviews of historical sources of information be conducted to "determine previous uses and occupancies of the real property **since the property was first developed.**" The historical records search requirements of the final rule are very similar to the requirements of the ASTM E1527-2000 standard at 7.3.2 that require all obvious uses of the property to be identified from the present, back to the property's obvious first use, or back to 1940, *whichever is earlier.*

We point out that the final rule does allow the environmental professional to exercise his or her 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" to ensure that the inquiries are done in compliance with the objectives and performance factors. We believe that this provides sufficient flexibility to allow for any circumstances where due to the availability of other information about a property an environmental professional may conclude that a comprehensive search of historical records is not necessary to meet the objectives and performance factors.

Commenter Organization Name: Potter and Adams

Comment Number: 0351

Excerpt Number: 5

Excerpt Text:

This proposed section requires "historical documents and records reviewed must cover a period of time as far back in the history of the subject property as it can be shown that the property contained structures or from the time the property was first used for residential, agricultural, commercial, industrial, or governmental purposes."

This requirement is unreasonable as it will require the prospective purchasers to review the

property history back to its original, undeveloped condition. In certain parts of the country, this may require researchers to sort through several hundred years of historical documents to reach the first development. In addition, the majority of solvents and pesticides that are usually the chemicals of concern at these properties were not developed and/or widely used until the 20th century.

A suggested alternative to this language is "historical documents and records reviewed must cover a period of time as far back in the history of the subject property as it can be shown that the property contained structures or from the time the property was first used for residential, agricultural, commercial, industrial, or governmental purposes. The documents and records must be reasonably ascertainable and the historical period reviewed should not exceed the year 1900 unless the environmental professional determines that additional review is required to achieving the objectives and performance factors of Section 312.20(d) and (e)."

An additional suggestion is to add the ASTM E 1527-00 definitions of reasonably ascertainable, publicly available, and practically reviewable to the definitions section of 312.10. These definitions will support the professional judgment of the EP.

Response:

The statutory criteria in the Brownfields Amendments require that reviews of historical sources of information be conducted to "determine previous uses and occupancies of the real property **since the property was first developed.**" The historical records search requirements of the final rule are very similar to the requirements of the ASTM E1527-2000 standard at 7.3.2 that require all obvious uses of the property to be identified from the present, back to the property's obvious first use, or back to 1940, *whichever is earlier*.

We point out that the final rule does allow the environmental professional to exercise his or her 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" to ensure that the inquiries are done in compliance with the objectives and performance factors. We believe that this provides sufficient flexibility to allow for any circumstances where due to the availability of other information about a property an environmental professional may conclude that a comprehensive search of historical records is not necessary to meet the objectives and performance factors.

The primary objective of all appropriate inquiries is to identify conditions indicative of releases or threatened releases of hazardous substances. Prospective property owners should keep in mind that they may be held liable for releases of hazardous substances after acquiring a property if they do not comply with the statutorily-imposed continuing obligations. The performance factors included in the final rule are meant to provide guidelines for the conduct of the inquiry activities, not to draw absolute boundaries around the performance of the data collection activities by specifically defining each term. It is in the prospective property owner's best interest to conduct the inquiries as thoroughly as possible to ensure his or her ability to comply with all of the statutory criteria for the CERCLA liability protections. The Agency has embraced the performance standard approach to the final rule because it allows flexibility for a variety of circumstances and unique properties. This standard does not lend itself to bright-line

interpretation. Rather, the Agency is comfortable allowing for judicial interpretation of this standard.

Commenter Organization Name: Greenlining Institute

Comment Number: 0354

Excerpt Number: 12

Excerpt Text:

-iv. Proposed § 312.24 "Reviews of Historical Sources" places an unreasonable burden on developers that is inconsistent with the intent of the Brownfields Revitalization Act.

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 disagree with EPA's construction of the statute. We think that reading the statute's requirement of historical research to include non-obvious uses back into the 1600's for many east coast properties and 1800's for California properties is not reasonable.

The Brownfields Revitalization Act includes 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). We believe that EPA's conclusion that the statutory "previous uses and occupancies" criteria cannot be interpreted to mean "obvious" uses and occupancies doesn't adequately consider 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 an overly literal reading of the criteria would, is to require the impossible. Many commercial properties are, or have been, commercial rental properties. Some of these are demised and re-demised in varying configurations to accommodate market demand for various size tenancies over time. Subleases are common. Commercial tenants move in and move out. Uses change. There is no system in place designed to capture all of this information, yet the rule seems to require it. Interpreting the Brownfields Revitalization Act to require developers to jump through an impossible hoop in order to obtain liability protection, when the purpose of the legislation is to protect developers from liability, produces an absurd result. Courts, and federal agencies, are "required by traditional canons of statutory construction to avoid a literal interpretation of a statute that leads to an absurd result." *Hurston v. Director, Office of Workers*, 989 F.2d 1547, 1554 (9th Cir. 1993).

The committee surely recognized the problem because the text of 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 in the preamble 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 nonobvious uses earlier than the date actually searched to by the environmental professional are fair game for courtroom second guessing.

We suggest that ASTM E1527-00 § 7.3 does comply with the Brownfields Revitalization Act. We also believe that so far the only reasonable 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 the only 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.* There is no room for "performance based" courtroom second guessing.

We hope you will reconsider this requirement.

Response:

Congress included in the Brownfields Amendments a list of criteria that the Agency must include in the regulations establishing standards and practices for conducting all appropriate inquiries. These criteria are set forth in CERCLA Section 101(35)(B)(iii) and include: "...Reviews of historical sources, such as chain of title documents, aerial photographs, building department records, and land use records, to determine previous uses and occupancies of the real property since the property was first developed." (40 CFR Part 312, p. 52547). This direction from Congress is specific and consists of no limiting language.

We point out that the final rule does allow the environmental professional to exercise his or her 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" to ensure that the inquiries are done in compliance with the objectives and performance factors. We believe that this provides sufficient flexibility to allow for any circumstances where due to the availability of other information about a property an environmental professional may conclude that a comprehensive search of historical records is not necessary to meet the objectives and performance factors. Bright-line guidelines frustrate the purpose of performance standards, which is to allow for flexibility to deal with unique properties.

Commenter Organization Name: NPCA

Comment Number: 0403

Excerpt Number: 8

Excerpt Text:

The Proposed Rule also requires seemingly open-ended historic record reviews. Traditional title searches are considered reliable if they go back 50 years. The Proposed Rule's qualifiers-from the time the property contained structures or was first used for residential, agricultural, commercial, industrial or governmental purposes - do not provide an appropriate timeframe within which historic records must be sought. Government agency records must also be searched, without appropriate qualification as to the timeframe and feasibility of these searches. In some cases, the type of records the Proposed Rule requires searched do not exist, and where they do exist, they are not often readily available. In the end, with the requirement that the EP identify data gaps in the report and comment on their particular significance for each area of inquiry under each standard, EPA's lack of commercially appropriate guidelines for record searches will leave potential purchasers with little or no assurance that following the AAIs as proposed will afford them liability protection.

Response:

The statutory criteria in the Brownfields Amendments require that reviews of historical sources of information be conducted to “determine previous uses and occupancies of the real property **since the property was first developed.**” The historical records search requirements of the final rule are very similar to the requirements of the ASTM E1527-2000 standard at 7.3.2 that require all obvious uses of the property to be identified from the present, back to the property’s obvious first use, or back to 1940, *whichever is earlier.*

We point out that the final rule does allow the environmental professional to exercise his or her 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” to ensure that the inquiries are done in compliance with the objectives and performance factors. We believe that this provides sufficient flexibility to allow for any circumstances where due to the availability of other information about a property an environmental professional may conclude that a comprehensive search of historical records is not necessary to meet the objectives and performance factors. Bright-line guidelines frustrate the purpose of performance standards, which is to allow for flexibility to deal with unique properties.

Commenter Organization Name: Georgia Power

Comment Number: 0423

Excerpt Number: 9

Excerpt Text:

In §312.24 "Review of historical sources of information" (b), the timeframe that the historical records review should cover is vague and requires clarification. This is a suggested revision to provide more clarity:

-(b) "Historical documents and records reviewed must cover the earliest of the following periods of time: as far back in the history of the subject property as it can be shown that the property:

-(i) from when the subject property first contained structures, or

-(ii) from when the time the subject property was first used for residential, agricultural, commercial, industrial, or governmental purposes, or

-(iii) from 1940 in the case of perceivably undeveloped properties."

Rationale:

-The way the language is currently written, there is no guidance to prevent the EP from reviewing historical records from the 1700s. ASTM E-1527-00's Section 7.3 (Historical Use Information) has a clear standard and good examples regarding properties developed in the 1700s. EPA should consider including similar examples in the preamble to this regulation and clarify which of those examples would require the EP to document a "data gap."(See Preamble for AAI Proposed Rule at p. 52562.)

Response:

Please see response to comment 0403, excerpt 8.

Commenter Organization Name: Dannatt, Georgina

Comment Number: PM-0359-0004

Excerpt Number: 4

Excerpt Text:

My last area of comment is regarding how far back an inquiry should go. Currently, ASTM 1527 standard calls for inquiries to go back to 1940 or first developed use, whichever one is earlier. In over half the Phase One reports I review, this standard is not met, with research sometimes only going back to the 1960s or '70s.

Sometimes a consultant is relying on aerial photographs as the primary historical resource, and aerials are not available for an early period. Fire insurance maps and city directories may or may not cover the site. The consultant does not try to locate another source of information. An alternative to historical sources, such as city, building, or tax records and topographic maps that may go back to the 1920s, are not tapped at all.

When ASTM standards were developed in the 1990s, a look-back period of fifty years was chosen. This date is a good indicator of when many industrial chemicals became widely used. The 1940 date is still valid today.

I believe the proposed rule should be prescriptive in calling for research to be conducted back to a set date, rather than leaving this issue up to the provider. It cannot be ignored that pricing factors often guide research, instead of technical factors.

Response:

The statutory criteria in the Brownfields Amendments require that reviews of historical sources of information be conducted to "determine previous uses and occupancies of the real property **since the property was first developed.**" The historical records search requirements of the final

rule are very similar to the requirements of the ASTM E1527-2000 standard at 7.3.2 that require all obvious uses of the property to be identified from the present, back to the property's obvious first use, or back to 1940, *whichever is earlier*.

We point out that the final rule does allow the environmental professional to exercise his or her 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" to ensure that the inquiries are done in compliance with the objectives and performance factors. We believe that this provides sufficient flexibility to allow for any circumstances where due to the availability of other information about a property an environmental professional may conclude that a comprehensive search of historical records is not necessary to meet the objectives and performance factors. Bright-line guidelines frustrate the purpose of performance standards, which is to allow for flexibility to deal with unique properties.

Commenter Organization Name: USWAG

Comment Number: 0367

Excerpt Number: 5

Excerpt Text:

We do not understand EPA's criticism of the ASTM E1527-00 provision requiring "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. The key phrase in this provision is "whichever is earlier." In a sense, the reference to 1940 might be regarded as surplusage because if the first developed use occurred before 1940, then the review of historical sources must go back to the property's obvious first developed use and not stop at 1940. On the other hand, if the property was first developed after 1940, the search of historical records back to 1940 (the earlier of the two dates) is more stringent than the EPA proposal, hardly a basis for EPA complaint.

We also believe that a rigid requirement to search historical records to the property's first use may be of limited value and prove to be unnecessarily costly. If the property was first developed centuries ago - for example, in the 18 th century - the availability and usefulness of records several hundred years old may be limited. The ASTM standard allows the environmental professional to exercise professional judgment about searching for such ancient records. See ASTM E1527-00 § 7.3.2. EPA should adopt a similar clarification in the final rule.

Response:

The statutory criteria in the Brownfields Amendments require that reviews of historical sources of information be conducted to "determine previous uses and occupancies of the real property **since the property was first developed.**" EPA agrees with the commenter that the historical records search requirements of the final rule are very similar to the requirements of the ASTM E1527-2000 standard at 7.3.2 that require all obvious uses of the property to be identified from the present, back to the property's obvious first use, or back to 1940, *whichever is earlier*.

EPA points out that the final rule does allow the environmental professional to exercise his or her

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” to ensure that the inquiries are done in compliance with the objectives and performance factors. We believe that this provides sufficient flexibility to allow for any circumstances where due to the availability of other information about a property an environmental professional may conclude that a comprehensive search of historical records is not necessary to meet the objectives and performance factors.

3.3.2 Review of Chain of Title Documents Should Be Made a Requirement

Commenter Organization Name: Beaver, Christine

Comment Number: 0074

Excerpt Number: 2

Excerpt Text:

With regard to the proposal that it be left to the professional judgement of the environmental professional to determine what types of historical information to collect, it is my opinion that the chain of title is the best method to make All Appropriate Inquiry into past ownership of the property and should be made a requirement.

Response:

The final rule does not require that any specific type of historic information be collected. In particular, the rule does not require that persons obtain a chain of title document for the property. The rule allows for the environmental professional to use professional judgment when determining what types of historical documentation may provide the most useful information about a property's ownership, uses, and potential environmental conditions when seeking to comply with the objectives and performance factors for the inquiries. Although we agree with commenters that chain of title documents may serve as an important source of information regarding past ownership of a property, it may not be the only source of this information. To the extent that chain of title documents are otherwise obtained for other purposes during the conduct of a property sale or transaction, we believe that these documents can easily be made available to the environmental professional by the prospective landowner. Given that the final rule requires that historical records be searched for information on previous uses and ownership of a property for as far back in the history of property as can be shown that the property contained structures or was first used for residential, agricultural, commercial, industrial or governmental purposes, if chain of title documents are the best and most easily attainable source of this information, we assume that such documents will be obtained and used by the environmental professional.

Given the wide variety of property types and locations to which the final rule could apply, any list of specific documents could result in undue burdens on many prospective landowners and grantees due to difficulties in collecting any specific document for any particular property or property location. Therefore, the final requirements for reviewing historical documents allow the prospective landowner or grantee and the environmental professional to use their judgment, in accordance with generally accepted good commercial and customary standards and practices, in locating the best available sources of historical information and reviewing such sources for information necessary to comply with the rule's objectives and performance factors.

Commenter Organization Name: Perry, Brett

Comment Number: 0368

Excerpt Number: 1

Excerpt Text:

The AAI Rule Should Require Historical Chain of Title Searching to Identify Previous

Ownership

The CERCLA amendments provide the following:

To establish that the defendant had no reason to know...the defendant must have undertaken, at the time of acquisition, all appropriate inquiry into the previous ownership and uses of the property consistent with good commercial or customary practice in an effort to minimize liability. 42 U.S.C §9601(35)(B)

Historical chain of title (HCOT) searching provides the only reliable means to reliably identify "previous ownership." The proposed rule, however, seems to allow the Environmental Professional (EP) with the discretion to identify previous ownership from historical records such as aerial photographs, fire insurance maps, city directories, or chains of title to satisfy this requirement.

Given this discretion, in light of the requisite skill sets of an EP (which seems to include geology and engineering skills), EPs will only very infrequently conduct HCOT searches. Indeed, current "Phase I" practice suggests that this is the case. Currently, environmental consultants will request a HCOT only upon their client's request. In my estimation this equals about one percent of the time, with the remainder believing that using other historical sources adequately satisfies the requirement.

It is not the case however that any one of these other historical sources alone can satisfy the spirit of due diligence and define all potentially responsible parties who have owned or leased a particular parcel in the past. By listing owners' names as well as corresponding deed conveyances and leaseholds, only an HCOT can do this.

For these reasons I would suggest that the wording of the proposed rule distinguish the two very different terms "ownership" and "uses" of the property and, in turn, identify historical sources suitable for each. It should make clear the fact that different historical records have different strengths in identifying the needed information, and particularly how a HCOT is the only one that will adequately identify all prior ownership of a property. The eventual AAI final rule should require HCOT searches to identify previous ownership.

Title Insurance Provided Title Searching Versus Historical COT Searches

It is important to understand the nature of what a HCOT is, and what it is not. In most every real estate transaction, the Title Insurance or Escrow Company prepares "title reports" for the purpose of providing an insurance policy or guarantee. The sole use of a title commitment is for the issuance of insurance to protect a mortgage holder and a land owner. A title commitment/examination only discloses current information that affects the property. In this sense, there is no historical information investigated or reported. Very often an environmental consultant or their client will incorrectly conclude that since the title company is providing a report, there is no need to obtain a HCOT.

Suggested HCOT Criteria for the AAI Rule

In addition to requiring HCOT searches, the AA rule should identify the general components of a HCOT, as well as extra elements that may be required on a case-by-case basis. Each COT ought to identify the subject property by site address, legal description, and Assessor's Parcel Number (APN) when available. The current owner(s) and the percentage of respective interest in the property should also be shown. Each conveyance of the property or any portion thereof should be listed in chronological order, and include the name of the parties conveying the property as well as the names of the parties to whom it was conveyed. The type of conveying document (warranty deed, quit claim deed, probate, etc.) should be listed along with the recording agency's file number of that document. Recorded surface leases should be identified as well, since this identifies tenants whom, as much as the owner, may be a potentially responsible party. The chronology should go back at least to 1940, though in many industrial parts of the country it would be appropriate to trace ownership back further. Other items that may be included as requested in a particular instance are environmental liens or institution controls. An example HCOT has been attached herein.

Response:

The final rule does not require that any specific type of historic information be collected. In particular, the rule does not require that persons obtain a chain of title document for the property. The rule allows for the environmental professional to use professional judgment when determining what types of historical documentation may provide the most useful information about a property's ownership, uses, and potential environmental conditions when seeking to comply with the objectives and performance factors for the inquiries. Although we agree with commenters that chain of title documents may serve as an important source of information regarding past ownership of a property, it may not be the only source of this information. To the extent that chain of title documents are otherwise obtained for other purposes during the conduct of a property sale or transaction, we believe that these documents can easily be made available to the environmental professional by the prospective landowner. Given that the final rule requires that historical records be searched for information on previous uses and ownership of a property for as far back in the history of property as can be shown that the property contained structures or was first used for residential, agricultural, commercial, industrial or governmental purposes, if chain of title documents are the best and most easily attainable source of this information, we assume that such documents will be obtained and used by the environmental professional.

Given the wide variety of property types and locations to which the final rule could apply, any list of specific documents could result in undue burdens on many prospective landowners and grantees due to difficulties in collecting any specific document for any particular property or property location. Therefore, the final requirements for reviewing historical documents allow the prospective landowner or grantee and the environmental professional to use their judgment, in accordance with generally accepted good commercial and customary standards and practices, in locating the best available sources of historical information and reviewing such sources for information necessary to comply with the rule's objectives and performance factors.

Commenter Organization Name: Intertox

Comment Number: 0396

Excerpt Number: 11

Excerpt Text:

We also believe it is unwise to not require some level of title information on the subject site. Recorded title documents are an essential resource because they accurately identify past and current site owners and may identify past and current occupants and operators (through leases). This is also a resource that is easily obtained from a title company, making this a resource that could be obtained by the environmental professional or from the purchaser or an agent of the purchaser (Title Company).

Response:

Please see response to comment 0368, excerpt 1.

Commenter Organization Name: Intertox

Comment Number: 0396

Excerpt Number: 12

Other Sections: NEW - 3.4 - Recorded environmental cleanup liens searches

Excerpt Text:

-The proposed standards for searching for recorded environmental cleanup liens.

--Intertox agrees that the existence of an environmental lien may be an indicator of environmental concern. We also agree that this search is likely more easily accommodated by the purchaser or an agent of the purchaser. However, we believe the proposed rule should specifically identify title companies as the "agent of the purchaser." Title companies are the most experienced and most likely able to procure a recorded environmental lien. While it is true that recorded title documents are becoming more available online from county assessor offices, a title company is still the most qualified to obtain an environmental lien.

Response:

Although a title company may often be a good agent to obtain information on environmental cleanup liens, the Agency sees no reason to require a prospective landowner or grantee to hire a title company to obtain this information if the prospective landowner or grantee can acquire the information from another source.

Commenter Organization Name: Rybak, John Thomas

Comment Number: 0412

Excerpt Number: 14

Excerpt Text:

Land Use Restrictions.

a) Page # 52546

b) View: In the application of following Land Use Restrictions, reasonable consideration should be granted to limit business interruptions while implementing practical Land Use Restrictions. It is important to understand the type of land use restrictions that are put on to the deed and the reasoning behind the land use restrictions prior to land acquisition. Therefore the AAI performance standards should include an evaluation of these restrictions.

c) Assumptions: The Deed Restriction has to be filed each time the title is transferred into a new name, which will make the new owner aware of the land use restrictions.

d) Burden: Reduces the potential property use until such time that the Land Use Restriction is removed, which could impede the return on investment in purchasing the property.

Response:

The final rule requires the identification of institutional controls placed on the subject property. As defined in §312.10, institutional controls are non-engineered instruments, such as administrative and legal controls, that among other things, can help to minimize the potential for human exposure to contamination, and protect the integrity of a remedy by limiting land or resource use. For example, an institutional control might prohibit the drilling of a drinking water well in a contaminated aquifer or disturbing contaminated soils. Institutional controls also may be referred to as land use controls, activity and use limitations, etc., depending on the program under which a response action is conducted or a release is addressed.

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

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

Commenter Organization Name: Perry, Brett

Comment Number: PM-0127-0013

Excerpt Number: 1

Excerpt Text:

However, it is still somewhat vague of what exactly should a title report should be, and it would be nice if you could include something in there of what exactly is required, and make it a little more clear that they should be included in the Phase I.

Response:

The final rule does not require that any specific type of historic information be collected. In particular, the rule does not require that persons obtain a chain of title document for the property. The rule allows for the environmental professional to use professional judgment when determining what types of historical documentation may provide the most useful information about a property's ownership, uses, and potential environmental conditions when seeking to comply with the objectives and performance factors for the inquiries. Although chain of title documents may serve as an important source of information regarding past ownership of a property, it may not be the only source of this information. To the extent that chain of title documents are otherwise obtained for other purposes during the conduct of a property sale or transaction, we believe that these documents can easily be made available to the environmental professional by the prospective landowner. Given that the final rule requires that historical records be searched for information on previous uses and ownership of a property for as far back in the history of property as can be shown that the property contained structures or was first used for residential, agricultural, commercial, industrial or governmental purposes, if chain of title documents are the best and most easily attainable source of this information, we assume that such documents will be obtained and used by the environmental professional.

The commenter may want to seek the advice of a title search company for additional information on the specific information contained in title search documents.

3.4 Recorded Environmental Cleanup Lens Searches

Commenter Organization Name: Scalise, Frederick W, et al

Comment Number: 0105

Excerpt Number: 3

Other Sections: NEW - 3.16 - Division of responsibilities (tasks performed by EP vs. landowner/purchaser)

Excerpt Text:

This section should more clearly indicate that it is NOT the responsibility of the Environmental Professional to search for environmental cleanup liens. Searching and analyzing title and deed records is not generally within the scope of expertise of an Environmental Professional, and is best left to a title company or title insurance company. It should be solely the responsibility of the person defined in §312.1 to provide any information regarding liens to the Environmental Professional.

Response:

The final rule allows that the search for recorded environmental cleanup liens be performed either by the purchaser or through the inquiry of the environmental professional. The search for such liens may not necessarily require the expertise of an environmental professional and therefore may be more efficiently or more cost-effectively performed by the purchaser or an agent of the purchaser. Such liens may be included as part of the chain of title documents or may be recorded in some other manner or format by state or local government agencies. If such information is collected by the purchaser, or other agent of the purchaser who is not under the supervision or responsible charge of the environmental professional, the final rule allows for, but does not require, the information on environmental cleanup liens that is collected by or on the behalf of the purchaser to be provided to the environmental professional. If the information is provided to the environmental professional, he or she can make use of the information when conducting the all appropriate inquiries and when rendering conclusions or opinions regarding the environmental conditions of the property.

The decision of who conducts the search is best left up to the judgment of the prospective landowner, grantee, and environmental professional. The final rule provides in §312.22 that the search for recorded environmental cleanup liens can fall outside the inquiries conducted by the environmental professional. The search for recorded environmental cleanup liens is not included as part of the requirements governing the “results of an inquiry by an environmental professional” (§312.21). Therefore, the search may be conducted by the prospective purchaser, an attorney or agent hired by the purchaser, or the environmental professional hired by the prospective purchaser.

Commenter Organization Name: Koch, Donald

Comment Number: 0234

Excerpt Number: 1

Other Sections: NEW - 3.7 - Inclusion of specialized knowledge or experience

NEW - 3.8 - Considering the relationship of the purchase price to the value of the property

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

Excerpt Text:

I would like to comment on proposed 40 CFR 312.22. 40 CFR 312.21 defines the results of an inquiry by an environmental professional. 40 CFR 312.22 defines four additional requirements of an all appropriate inquiry and requires that this information must be provided to the environmental professional responsible for the inquiry. The mandatory provision of these criteria is inappropriate. The four criteria of an all appropriate inquiry mentioned in proposed 40 CFR 312.22 do not require the judgement of an environmental professional to interpret.

I recommend the following change in 40 CFR 312.22.

312.11 Additional Inquiries

(a)-Persons identified under 312.1(b) may provide the following information to the environmental responsible for conducting the activities listed in 312.21.

Response:

As a result of our consideration of the issues raised by commenters, today's final rule modifies the requirements of §312.22 "additional inquiries" by stating (in paragraph (a)) that "persons...*may* provide the following information [*i.e.*, the information for which the prospective landowner or brownfields grantee is responsible] to the environmental professional..." The proposed rule provided that such information "must be provided" to the environmental professional. Although we expect that most prospective landowners and grantees will furnish available information or knowledge about a property to an environmental professional he or she hired when such information could assist the environmental professional in ascertaining the environmental conditions at a property, we affirm that compliance with the statutory criteria does not require that such information be disclosed. Ultimately, CERCLA liability rests with the owner or operator of a facility or property owner and it is the information held by the property owner or operator that may be reviewed in a court of law when determining an owner or operator's liability status, regardless of whether all information was disclosed to an environmental professional during the conduct of all appropriate inquiries.

Commenter Organization Name: Koch, Donald

Comment Number: 0234

Excerpt Number: 5

Excerpt Text:

It is probably reasonable to require that the environmental cleanup lien search (proposed 312.22 (a)(1)) be provided to the environmental professional, but once again, it is not a statute requirement and it does not require the judgement of an environmental professional.

Response:

Please see response to comment 0234, excerpt 1.

Commenter Organization Name: Anthony, Tony, et.al.

Comment Number: 0292

Excerpt Number: 9

Excerpt Text:

312.25 Searches for recorded environmental cleanup liens

This section should clearly state that it is the responsibility of the purchaser to evaluate the presence of environmental liens.

Response:

Please see response to comment 0105, excerpt 3.

Commenter Organization Name: FAA

Comment Number: 0334

Excerpt Number: 11

Other Sections: NEW - 3.3 - Review of historical sources of information

NEW - 3.5 - Review of federal, state, tribal, and local government records

Excerpt Text:

- 1) FAA believes that EPA should allow the EP flexibility to determine whether title history, fire insurance maps, institutional controls, environmental liens, and other requirements are applicable at the subject property. For many FAA site assessments, these sources are not applicable, especially to remote properties in Alaska and other low population areas. Potential contamination from adjoining properties in such instances is non-existent. FAA suggests that EPA should allow more flexibility in the contents of an AAI for properties in remote, undeveloped, and unpopulated areas.

Response:

The final rule does not require that any specific type of historic information be collected. In particular, the rule does not require that persons obtain a chain of title document for the property. The rule allows for the environmental professional to use professional judgment when determining what types of historical documentation may provide the most useful information about a property's ownership, uses, and potential environmental conditions when seeking to comply with the objectives and performance factors for the inquiries.

Commenter Organization Name: FAA

Comment Number: 0334

Excerpt Number: 13

Excerpt Text:

- 3) Would environmental lien information show up in databases currently utilized by most EPs to conduct environmental site assessments? Please provide clarification on this issue.

Response:

With regard to commenters who requested that EPA provide guidance on where to search for environmental cleanup liens, we advise that prospective purchasers seek the advice of a local realtor, real estate attorney, title company, or other real estate professional. Environmental cleanup liens may be recorded as part of the land title records or as part of other state or local government land or real estate records. Recorded environmental cleanup liens may be recorded in different places, depending upon the particular state and particular locality in which the property is located.

Commenter Organization Name: Greenlining Institute

Comment Number: 0354

Excerpt Number: 16

Excerpt Text:

-Recorded Environmental Cleanup Liens

The Brownfields Revitalization Act provides that "searches for recorded environmental cleanup liens that are filed under Federal, State, or local law" shall be one of the criteria used in promulgating the All Appropriate Inquiry regulation. 42 U.S.C. § 20 9601(35)(B)(iii)(IV). The language of the statute is crystal clear, that it is recorded liens that are to be searched. All fifty states have recording acts that specify a centralized location (usually one in each county) where instruments may be validly recorded. See Curtis J. Berger & Quintin Johnstone, Land Transfer and Finance 712 (4th ed. 1993).

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 the law of the fifty states 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. This is simply not what the statute says, it says recorded liens. Liens may arise under federal and state law. For example a windfall lien arises under CERCLA itself and may be filed pursuant to federal law, but the place and manner of recording is a matter of state law by long custom and practice.

There is no indication that Congress intended to preempt or disrupt the law of the states in an area long reserved to the states. In fact, recording acts predate the Constitution. Land Transfer at 713. It would also be illogical to disrupt longstanding and well established industry practice. If any one fact is commonly known throughout the real estate industry it is the following: if you want your lien to achieve priority and provide record notice you had better record in the county recorders office. The proposed new requirement would upset a centralized and very reliable system for notice of liens.

We believe ASTM E1527-00 satisfies the statutory criteria for cleanup liens while the proposed

rule does not. In light of the information presented here, we urge EPA to reconsider this issue.

Response:

Environmental cleanup liens may be recorded as part of the land title records or as part of other state or local government land or real estate records. Recorded environmental cleanup liens may be recorded in different places, depending upon the particular state and particular locality in which the property is located.

As outlined in the preamble to the proposed rule, the Agency determined that the ASTM E1527-2000 standard differed from the statutory criteria in a few instances. As reflected in the Agency's discussions of these differences in the preamble to the proposed rule and in the Agency's economic impact analysis for the proposed rule, the changes included in the regulatory requirements to ensure that the AAI standards are reflective of Congressional intent do not represent economically significant differences over previous generally accepted good commercial and customary practices.

Commenter Organization Name: USWAG

Comment Number: 0367

Excerpt Number: 8

Excerpt Text:

Finally, EPA criticizes the ASTM standard for limiting the scope of searches for recorded environmental cleanup liens to recorded land title records. The focus of the ASTM standard is to require searches of "reasonably ascertainable" records. See ASTM E1 527-00 § 5.2.1. If EPA is to limit the cost of compliance with the AAI regulation, the Agency should not be requiring property owners to search records where there is little likelihood of finding information on environmental liens. The EPA preamble contains the cryptic claim that "in some instances, liens may be filed in places other than recorded land title records and therefore a comprehensive standard is necessary to match the scope intended by the statute." 69 Fed. Reg. at 52575. That may well be true, but EPA provides no indication where those other places may be located. If EPA believes that searching recorded land title records is insufficient, the final rule should provide specific information on what the property owner is looking for at these other places and where that information can be found.

Response:

We advise that prospective landowners and grantees seek the advice of a local realtor, real estate attorney, title company, or other real estate professional. Environmental cleanup liens may be recorded as part of the land title records or as part of other state or local government land or real estate records. Recorded environmental cleanup liens may be recorded in different places, depending upon the particular state and particular locality in which the property is located.

Commenter Organization Name: Intertox

Comment Number: 0396

Excerpt Number: 12

Other Sections: NEW - 3.3.2 - Review of chain of title documents should be made a requirement

Excerpt Text:

-The proposed standards for searching for recorded environmental cleanup liens.

--Intertox agrees that the existence of an environmental lien may be an indicator of environmental concern. We also agree that this search is likely more easily accommodated by the purchaser or an agent of the purchaser. However, we believe the proposed rule should specifically identify title companies as the "agent of the purchaser." Title companies are the most experienced and most likely able to procure a recorded environmental lien. While it is true that recorded title documents are becoming more available online from county assessor offices, a title company is still the most qualified to obtain an environmental lien.

Response:

While a title company may be the best option in many circumstances, it is not the only option and the decision on how to obtain this information remains with the prospective landowner or grantee.

Commenter Organization Name: CONNOR

Comment Number: 0398

Excerpt Number: 6

Excerpt Text:

-Subpart C - Standards and Practices, Part 312.25 (Searches for recorded environmental cleanup liens), Subpart b

--"...must be provided to the Environmental Professional" - please identify who is responsible for collecting the information prior to providing it to the Environmental Professional.

Response:

The decision of who conducts the search is best left up to the judgment of the prospective landowner or grantee and environmental professional. The final rule provides in §312.22 that the search for recorded environmental cleanup liens can fall outside the inquiries conducted by the environmental professional. The search for recorded environmental cleanup liens is not included as part of the requirements governing the results of an inquiry by an environmental professional (§312.21). Therefore, the search may be conducted by the prospective landowner or grantee, his or her attorney or agent, or the environmental professional.

Commenter Organization Name: Dismukes, James

Comment Number: 0416

Excerpt Number: 6

Other Sections: NEW - 3.3 - Review of historical sources of information

Excerpt Text:

The need for a chain of title search and a property lien search, although not specifically called for the proposed rule, will be necessary to establish the past ownership and use to the degree called for under AAI. The average cost for a chain of title is between \$250 to \$500. This is a tremendous cost addition on a percentage basis for a Phase I and typically yields no useful information as to potential environmental issues to a property.

Response:

The final rule does not require that any particular type of historical document be found or used for any particular property. Although a chain of title search may provide valuable information on previous ownership and uses of a property, the prospective landowner, grantee, and environmental professional may be able to find this information from other sources (e.g., interviews with current and past owners, other government records). The rule allows for the environmental professional to use professional judgment when determining what types of historical documentation may provide the most useful information about a property's ownership, uses, and potential environmental conditions when seeking to comply with the objectives and performance factors for the inquiries.

The requirements to search historical records and environmental cleanup liens are not new requirements. These searches also are required in the ASTM E1527-2000 standard, therefore they do not represent incremental costs to the final rule.

Commenter Organization Name: Tryon, Bill

Comment Number: 0418

Excerpt Number: 9

Excerpt Text:

With respect to searches for environmental liens, I am not aware of any other reasonably ascertainable source to identify the existence of environmental liens if not recorded in land title records. EPA states that "in some instances, liens may be filed in places other than recorded land title records." The place of these filings, and the mechanism for obtaining this information does not appear to be known to the general public. Further, if an additional resource is required to be searched for every AAI conducted, the time and cost of doing so does not appear to have been factored into the economic analysis.

Therefore, it is my recommendation that EPA accept as "reasonably ascertainable" a search for environmental liens found in recorded land title records.

Response:

Prospective landowners and grantees may want to seek the advice of a local realtor, real estate attorney, title company, or other real estate professional. Environmental cleanup liens may be recorded as part of the land title records or as part of other state or local government land or real estate records. Recorded environmental cleanup liens may be recorded in different places, depending upon the particular state and particular locality in which the property is located.

Commenter Organization Name: Westward Environmental

Comment Number: 0429

Excerpt Number: 2

Excerpt Text:

Regarding the heading of What Are the Proposed Requirements for Searching for Recorded Environmental Cleanup Liens? on page 52562 of the proposed rule:

-it states "...recorded environmental cleanup liens be performed either by the purchaser or through the inquiry of the environmental professional..." and "...the search...may be more efficiently or most cost-effectively performed by the purchaser or an agent of the purchaser."

-While the preceding statements may be true, the purchaser generally hires an Environmental Professional (EP) to perform the necessary services to complete the All Appropriate Inquiries and would expect the EP to perform this service. Our concern is that the fee for this service is, at best, hard to predict and thus propose. The inclusion of researching environmental liens will result in substantially higher proposed fees for those EP's who are willing to include them in a proposal which could result in losing the job to a less "judicious" competitor.

Response:

The decision of who conducts the search is best left up to the judgment of the prospective landowner or grantee and environmental professional. The final rule provides in §312.22 that the search for recorded environmental cleanup liens can fall outside the inquiries conducted by the environmental professional. The search for recorded environmental cleanup liens is not included as part of the requirements governing the results of an inquiry by an environmental professional (§312.21). Therefore, the search may be conducted by the prospective landowner or grantee, his or her attorney or agent, or the environmental professional.

3.5 Review of Federal, State, Tribal, and Local Government Records

Commenter Organization Name: City of Jacksonville, Florida

Comment Number: 0095

Excerpt Number: 8

Excerpt Text:

Some of the records searches are clearly unnecessary, e.g., delisted NPL sites. NPL sites extend to wherever the contamination migrated. They are not delisted until cleaned. If the site is delisted, it is irrelevant to an "all appropriate inquiry search." Similarly, "records of former CERCLIS sites with no further remedial action controls (one half mile)" are irrelevant to the evaluation of a prospective brownfield site.

Overall, the records search is so far beyond what has long been recognized as commercially appropriate (the standard EPA adopted in this negotiated rule making) that it is unconscionable, especially when one considers that the failure to review a record could be grounds for EPA to deny liability exemption, and that records searches cost money. As costs mount, developers will find that greenfield development is much, much cheaper than brownfield development, killing the Brownfield Program.

Response:

The requirements in the final rule to search government records are very similar to the records searches included in the ASTM E1527-2000 standard. Information on delisted NPL sites and former CERCLA sites may provide the prospective landowner with valuable information with regard to institutional or engineering controls that may be in place in or around the subject property. This information also could alert the environmental professional to look for evidence of residual contamination.

Liability protection would not be denied by EPA, but rather by a court and only after a preponderance of evidence shows that the property owner did not comply with the statutory criteria required for the protections. All appropriate inquiries represent only one of many criteria with which a property owner must comply in order to obtain the liability protections.

Commenter Organization Name: Worlund, John

Comment Number: 0256

Excerpt Number: 10

Excerpt Text:

While the proposed rule is very similar to the current ASTM practice, I feel that this is a missed opportunity to eliminate some of the data searches that typically prove to be of minor importance. That would include RCRA generators, which yields little information that couldn't be obtained from neighborhood observation and the ERNS list that is typically so limited in detail that it is useless.

Response:

The final rule provides that the data collection efforts be conducted in conformance with the objectives and performance standards of 312.20 (e) and 312.20(f). Although some of the required records searches may not be useful for all property types, the Agency believes that when considered in their entirety the list of government records provides a strong list of information sources for the variety of property types that may be subject to the all appropriate inquiries requirements.

Commenter Organization Name: Carvalho, Michael

Comment Number: 0257

Excerpt Number: 2

Excerpt Text:

EPA's proposed rule also requires that registries and publicly available lists of engineering and institutional controls be reviewed for all sites within one-half mile of the subject site (§312.26). Apart from the fact that such lists are not currently available in a practically reviewable form, no comprehensive database for this information exists in most states or at the federal level. Most AAI practitioners recognize that the historic (and largely political) failure of EPA to address Brownfields on a national level left states with little choice but to embark on their own experiments. In many cases, such experimentation fostered creative and critical thinking that lead to significant reforms. If adopted, EPA's proposed AAI Regulation will require states to re-think, and re-tool their processes and procedures for collecting and disseminating information relating to engineering and institutional controls. According to a national environmental data provider, EPA's Environmental Data Standard Council is setting out a standard for Institutional Control tracking and offering state agencies grant money to adopt the standard and create their own tracking systems. It is widely acknowledged that such a database is at least 5 years away - assuming that funding remains available. With the current fiscal crises in many states, there can be little disagreement that the proposed rule will materially impact existing state programs by creating significant resource allocation issues.

Response:

The final rule requires that government records and available lists for institutional and engineering controls be searched only for information on such controls at the subject property. All appropriate inquiries investigations do not have to include searches for institutional and engineering controls in place at nearby and adjoining properties. We made this change because we agree with commenters who pointed out that information on institutional and engineering controls may be difficult to find as there are no available national sources of this information. Only a few states have available lists of institutional controls. In addition, the information that may be inferred from knowledge of institutional and engineering controls that are in place at adjoining and nearby properties, *i.e.*, that there was a response action, a remedial action, or corrective action taken at the site, can be inferred from information obtained from other sources (*e.g.*, CERCLIS, RCRIS, state records of response actions).

Commenter Organization Name: FAA

Comment Number: 0334

Excerpt Number: 18

Excerpt Text:

INSTITUTIONAL CONTROLS

1) Identifying institutional controls may or may not be useful in judging whether threatened or actual releases have occurred at a subject property or nearby properties. For example, if there are known institutional controls on drilling in an area, then the situation that led to the imposition of those controls would be recorded in federal or state databases anyway. FAA believes that the requirement for EPs to identify institutional controls on a subject property is redundant and should be removed from the proposed AAI regulations.

Response:

It is important that prospective landowners obtain information on institutional and engineering controls in place at the property being acquired. It also may be important to locate information on such controls in place at nearby properties. To obtain the liability protections afforded under CERCLA (*i.e.*, innocent landowner, contiguous property owner, bona fide prospective purchaser), the statute requires, as part of the “continuing obligations,” that the property owner comply with all land use restrictions and not impede the effectiveness of institutional controls. Therefore, it is important that information on institutional and engineering controls be obtained by prospective landowners, even though information about such controls may not have been routinely obtained as part of due diligence practices prior to today’s final rule (we note that the current interim standard does include provisions for searching for “activity and use limitations”).

Commenter Organization Name: Montana DEQ

Comment Number: 0335

Excerpt Number: 5

Excerpt Text:

Proposed Section 312.20(d)(2)(vi): Institutional controls may be in place on a property but not approved by a regulatory agency. DEQ believes that people may be misled or have a false sense of protection if there are institutional controls on the property. DEQ believes EPA should include a disclaimer stating that the presence of an institutional control on the property does not equate to regulatory approval of those controls.

Response:

All appropriate inquiries requires that government records be searched for registries or publicly available lists of institutional controls and land use restrictions applicable to the subject property. If the institutional controls are not “approved” we would not expect that they would be recorded in government records. It is important that prospective landowners obtain information on institutional and engineering controls in place at the property being acquired. It also may be important to locate information on such controls in place at nearby properties. To obtain the liability protections afforded under CERCLA (*i.e.*, innocent landowner, contiguous property owner, bona fide prospective purchaser), the statute requires, as part of the “continuing obligations,” that the property owner comply with all land use restrictions and not impede the

effectiveness of institutional controls. Therefore, it is important that information on institutional and engineering controls be obtained by prospective landowners, even though information about such controls may not have been routinely obtained as part of due diligence practices prior to today's final rule (we note that the current interim standard does include provisions for searching for "activity and use limitations").

Commenter Organization Name: McKerr, Thomas

Comment Number: 0347

Excerpt Number: 25

Excerpt Text:

312.26(b)(4): What is a "public health record." The goal should be related to releases of hazardous substances or petroleum, not roach counts. This paragraph should be deleted.

Response:

Public health records may include information on releases to the environment that caused public health concerns or health damages.

Commenter Organization Name: Greenlining Institute

Comment Number: 0354

Excerpt Number: 11

Excerpt Text:

-iii. The new requirements for reviewing local government records and an "Adjoining and Nearby Property Analysis" are not authorized or permitted by the Brownfields Revitalization Act and contradict customary practice.

Another unclear requirement of the new rule is the provision stating that purchasers "must seek to identify through the conduct of the standards and practices set forth in this subpart. . . [p]roperties adjoining or located nearby the subject property that have environmental conditions that could have resulted in conditions indicative of releases or threatened releases of hazardous substances to the subject property." 69 Fed. Reg. at 52577. This adjoining property analysis is subject to the "performance based" standard in the same way that investigation of the subject property is performance based. 69 Fed. Reg. 52562. In other words, the environmental professional must either prove a negative, that there are no environmental conditions indicative of concern with respect to adjoining properties or must qualify her report.

In performing the adjoining property analysis, the environmental professional must search a long list of records, including a mandatory search of unspecified local government records. Proposed § 312.26. Local government records could include not only records of cities and counties, but school districts, special districts, joint powers authorities, utility districts (utility districts may well have relevant records of sewer incidents involving releases of hazardous substances), and many others. In California alone, there are over 7000 local government entities. Even if "local government" were limited to cities and counties, their records are often not standardized or organized in any way that lends itself to systematic searches. This makes fair game for a plaintiff

seeking to show that an adjoining property analysis did not measure up to the performance based standard.

In view of the uncertainty created by the proposed adjoining property analysis/local record requirement, it is easy to see why current generally accepted good commercial and customary standards and practices avoids an open-ended local government records/adjoining property analysis. ASTM E1527 makes review of local government records optional, and then to "enhance and supplement" federal and state records, and only if such local records are "generally obtained, pursuant to local good commercial or customary practice." ASTM E1527-00 § 7.2.2. Moreover, no record is expected to be reviewed that is not geographically indexed. ASTM E1527 § 3.3.27 [Footnote: There is some indication in the preamble's explanation of this section that the committee may have intended that the review of records with respect to adjoining properties be restricted to a specific list of records--not including any local records--that are generally geographically indexed. Under this reading, an additional search involving local government records would be conducted only if specific indications of contamination showed up within that initial list of records. 69 Fed. Reg. at 563. However, the text of the proposed rule requires that "[w]ith regard to nearby or adjoining properties, the review of...local government records. . . should include identification of the following: (1) Properties for which there are government records of reported releases or threatened releases." Proposed § 312.26. The general requirement of § 312.26 is also stated as reviewing federal, tribal, state, and local records of the subject property and adjoining properties "for the purposes of achieving the objectives and performance factors of § 312.20(d) and (e)." Proposed §312.26(a). Therefore the text of the rule would require searching unspecified local government records of adjoining properties for reported releases or threatened releases and as needed to identify conditions indicative of releases or threatened releases with respect to the subject property. We do not know if these ambiguities are the result of intentionally vague compromise language. In any event we suggest that the text of the rule should be revised to make clear exactly what is required. If a tiered approach was indeed intended, we would suggest something along the lines of the following: "search this list of records first, and only if indications of a release are found among these records, then expand the search to gain more complete information regarding the release."

Current generally accepted practice with regards to adjacent properties is represented by the requirements of ASTM E1527 § 7.2, which employs the checklist approach to specifically enumerated record sources. The proposed adjoining/nearby property analysis is entirely new to environmental site assessment practice. See, e.g., Client Alert at 3. We believe that the proposed adjoining/nearby property analysis does not comply with the requirements of the Brownfields Revitalization Act to promulgate standards to "carry out all appropriate inquiries" in accordance with "generally accepted good commercial and customary standards and practices." 42 U.S.C. § 9601(35)(B). Nor do we think it complies with Congressional intent to clarify the obligations of prospective purchasers, but rather further obscures what purchasers must do to obtain liability protection.

The local records review criteria of the Brownfields Revitalization Act, 42 U.S.C. § 9601(35)(B)(iii)(V), is directly addressed by ASTM E1527 § 7.2.2 in a way that conforms to the intent of the statute. We believe that the open-ended performance based approach to local

records of the proposed rule is unworkable and not consistent with the intent of Congress.

Response:

The government records searches included in the final rule are very similar to the government records searches included in the ASTM E1527-2000 standard, which also includes requirements to search government records for information about adjoining and nearby properties. The Small Business Liability Relief and Brownfields Revitalization Act clearly provides EPA with the authority to develop standards and practices for the conduct of all appropriate inquiries that include the collection of information about the potential environmental conditions of nearby properties that may have an impact on the subject property. The statutory criteria for the review of government records includes: “reviews of Federal, State, and local government records....concerning contamination **at or near** the facility.” In addition, one purpose of conducting all appropriate inquiries is to obtain protection from liability as a contiguous property owner. The definition of a contiguous property owner under CERCLA is “[a] person that owns real property that is contiguous to or otherwise similarly situated with respect to, and that is or may be contaminated by a release or threatened release of a hazardous substance from, real property that is not owned by that person...”

Commenter Organization Name: Georgia Power

Comment Number: 0423

Excerpt Number: 11

Excerpt Text:

In §312.26 "Reviews of Federal, Tribal, State, and local government records" (b)(4), we recommend striking "public health records" entirely from this section.

Rationale:

-Public health records are not typically found in accessible databases and are not normally reviewed under current ASTM practices.

-Although public health records may occasionally provide useful information relevant to an environmental release, the review of public health records should be conducted only in those instances where major data gaps exist and should be left to the EP's judgment.

-If the EP is required to review public health records in order to meet compliance with this regulation, the cost of the assessment report is certain to escalate.

Response:

Public health records may include information on releases to the environment that caused public health concerns or health damages. The search for public health records should be conducted in conformance with the performance factors of 312.20(f).

Commenter Organization Name: Dannatt, Georgina

Comment Number: PM-0359-0004

Excerpt Number: 3

Excerpt Text:

My second area of comment is regarding review of federal, tribal, state and local government records. At some point in the last few years, many providers have come to think that the review of actual records, actual agency records, are now optional and not included in the Phase One assessment. Too many companies obtain a commercially available listing of government databases, or conduct their own database search online, and that is their only inquiry into government records. Their assumption is that if a site is not listed with a problem, there are no issues. Actual review of agency files is not done, because it's time-consuming and therefore adds to the consultant's cost, or else access cannot be obtained in the time frame allotted for the assessment.

I believe more emphasis must be put on actual review of records and case files. Information such as violations, agency site inspection reports, and lists of chemicals used by previous industrial tenants can usually only be obtained through review of the local file. The extent of soil and groundwater contamination is rarely listed on a government database, and without file review, no one really knows if the subject property has been impacted by a neighboring site.

Response:

EPA appreciates the commenter's concerns. The final rule does not require that actual government records be obtained and reviewed. The Agency is concerned that such a requirement would be overly burdensome and in some cases only data bases of the information included in government records may be accessible to the public. We also note that the search of government records or data bases should merely be used as a screening mechanism for identifying adjoining or nearby properties that may represent potential environmental concerns to the subject property. After identifying nearby properties that may have on-going releases or previously had releases of hazardous substances, the environmental professional should seek additional information regarding the potential for these properties to affect the property that is the subject of the all appropriate inquiries investigation.

3.5.1 Review of Tribal Records

Commenter Organization Name: Hartline, Joe

Comment Number: 0118

Excerpt Number: 1

Excerpt Text:

It is not clear what the value is of mandating that tribal records be searched. EPA Region 4 tells me there are no tribes in Georgia. The National Geographic recently published a map showing three areas that belong to tribes in Georgia. So what source is correct? Do I have to contact a tribe in Oklahoma that may have traditional ties to a property in Georgia? What likelihood is there that the tribe will have relevant information? I propose that it be optional for an environmental professional to search tribal records. The professional may see value in that search in certain parts of that country, but not in others.

Response:

In response to commenters who pointed out that it may be difficult to obtain or gain access to tribal government records, we point out that such records need only be searched for and reviewed in those instances where the subject property is located on or near tribal-owned lands. In these cases, it is important to attempt, within the scope of the rule's objectives and performance standards, to review such records. When such records are not available, necessary information should be sought from other sources. When no information is available and the objectives of the final rule cannot be met and the result is a lack of information, the lack of information must be documented as a data gap in compliance with 312.21(c)(2).

Commenter Organization Name: Worlund, John

Comment Number: 0256

Excerpt Number: 11

Excerpt Text:

I have no problem adding tribal records except to comment that from my experience they do not exist in any usable form. EPA or the Tribes will incur considerable cost to develop a usable database. I question the value of including such a database until it exists in fact.

Response:

Please see response to comment 0118, excerpt 1.

Commenter Organization Name: Rose and Westra

Comment Number: 0320

Excerpt Number: 16

Excerpt Text:

Section 312.25(a) requires the EP to search for the existence of environmental cleanup liens that are filed or recorded under federal, tribal, state, or local law. Section 312.26 further requires searches of other tribal records. A tribal government, being a sovereign nation, would neither be

required to file a cleanup lien, nor be required to comply with The Freedom of Information Act. Accordingly, an EP may not be able to complete this requirement regardless of his/her efforts. Therefore, R&W recommends the deletion of any reference to tribal law in § 312.25(a).

Response:

Please see response to comment 0118, excerpt 1.

Commenter Organization Name: Mille Lacs Ojibwe

Comment Number: 0330

Excerpt Number: 9

Excerpt Text:

The Band supports the inclusion of tribal environmental records as a component of an inquiry, but to the extent of all tribal records being accessible to a general search, the Band supports a record search that is limited to the scope of the seven types of records enumerated in the proposed rule at § 312.26(b)(1) through (7) and is consistent with the objectives and performance factors in § 312.20(d) and (e). As a general premise, the Mille Lacs Band treats all tribal records as confidential and absent a reason to the contrary, the Band will negotiate access to any necessary information. Although the Band makes every effort to comply with all federal laws and regulations, for any records requests that go beyond the scope of the proposed rules, the Band may ask to negotiate access and also ask that such requests be directed through a designated contact person within the Mille Lacs Band of Ojibwe Department of Natural Resources.

Response:

Tribal records need only be searched for and reviewed in those instances where the subject property is located on or near tribal-owned lands. In these cases, it is important for the environmental professional to attempt, within the scope of the rule's objectives and performance standards, to review such records. When such records are not available, necessary information should be sought from other sources. When no information is available and the objectives of the final rule cannot be met and the result is a lack of information, the lack of information must be documented as a data gap in compliance with §312.21(c)(2). The Agency points out that in those cases where the subject property is located on or near a tribal-owned land, it may be in the tribe's best interest to provide the required information to the environmental professional or the prospective landowner or grantee.

Commenter Organization Name: Mille Lacs Ojibwe

Comment Number: 0330

Excerpt Number: 13

Excerpt Text:

The Mille Lacs Band recommends that this section include tribal historical documents and records consistent with the objectives and performance factors in § 312.20(d) and (e). As a general premise, the Mille Lacs Band treats all tribal records, including historical documents, as confidential and absent a reason to the contrary, the Band will negotiate access to

any necessary information. Although the Band makes every effort to comply with all federal laws and regulations, for any records requests that go beyond the scope of the proposed rules, the Band may ask to negotiate access and also ask that such requests be directed through a designated contact person within the Mille Lacs Band of Ojibwe Department of Natural Resources.

Response:

Tribal records need only be searched for and reviewed in those instances where the subject property is located on or near tribal-owned lands. In these cases, it is important for the environmental professional to attempt, within the scope of the rule's objectives and performance standards, to review such records. When such records are not available, necessary information should be sought from other sources. When no information is available and the objectives of the final rule cannot be met and the result is a lack of information, the lack of information must be documented as a data gap in compliance with §312.21(c)(2). The Agency points out that in those cases where the subject property is located on or near a tribal-owned land, it may be in the tribe's best interest to provide the required information to the environmental professional or the prospective landowner or grantee.

Commenter Organization Name: Grand Rapids C of C

Comment Number: 0345

Excerpt Number: 5

Excerpt Text:

Section 312.25(a) requires the Environmental Professional to search for the existence of environmental cleanup liens that are filed or recorded under federal, tribal, state, or local law. The Grand Rapids Area Chamber of Commerce takes issue with the inclusion of "tribal law" in this section. A tribal government, being a sovereign nation, would not be required to file a cleanup lien or have to comply under the Freedom of Information Act. Accordingly, an Environmental Professional may be unable to complete this requirement regardless of their efforts. Therefore, the Grand Rapids Area Chamber of Commerce recommends the deletion of any reference to tribal law in § 312.25(a).

Response:

Please see response to comment 0118, excerpt 1.

Commenter Organization Name: Intertox

Comment Number: 0396

Excerpt Number: 14

Excerpt Text:

Also, it is our experience that few if any tribal records are reviewed for an environmental site assessment except in those instances when such an assessment occurs on tribal land. If this recommendation remains in the final rule we suggest that the U.S. EPA identify what types of tribal records are generally available and are considered a "government record."

Response:

Please see response to comment 0118, excerpt 1.

3.5.2 Adjustments to Search Distances

Commenter Organization Name: Goodman, J. Dwight

Comment Number: 0097

Excerpt Number: 7

Excerpt Text:

Search radius for regulatory data which is similar to the current ASTM standard seems to be appropriate.

Response:

EPA thanks the commenter for the stated support.

Commenter Organization Name: Goodman, J. Dwight

Comment Number: 0097

Excerpt Number: 11

Excerpt Text:

Although I have seen a chart which was prepared by others than EPA, what is the proposed search radius criteria for the typical databases (RCRA, CERCLA, LUST, etc.)?

Response:

In the case of government records searches for nearby properties, the final rule includes minimum search distances (*e.g.*, properties located either within one mile or one-half mile of the subject property) for obtaining and reviewing records or data bases concerning activities and facilities located on nearby properties. The search distances are based upon our best judgment regarding the potential impacts that incidents or circumstances at an adjoining property may have on the subject property. With the exception of the required searches for institutional and engineering controls, the search distances finalized in today's rule are the search distances that were proposed in the proposed rule. For example, government records identifying properties listed on the NPL must be searched to obtain information on NPL sites located within one mile of the subject property. NPL sites located beyond one mile of a property most likely will have little or no impact on the environmental conditions at the subject property. In the case of two types of records, records of hazardous waste handler and generator records and permits, records of registered storage tanks, the final requirements specify that such records only be searched for information specific to the subject property and adjoining properties (the rule contains no requirement to search for these two types of government records for other nearby properties). The final rule requires that available lists of institutional controls and engineering controls only be searched for information on the subject property. The final rule allows the environmental professional to adjust the search distances for reviewing government records of nearby properties based upon his or her professional judgment.

Commenter Organization Name: Scalise, Frederick W, et al

Comment Number: 0105

Excerpt Number: 5

Excerpt Text:

§312.26(d): We would suggest adding "Demonstrated expert knowledge of the local area in which the subject property is located" to the list of factors for determining if alternate search distances are appropriate.

"Demonstrated expert knowledge of the local area" could be defined as have conducted at least 10 environmental inquiries in the immediate geographical area (i.e., within 5 miles) where the subject property is located within a 5 year period.

REASON: It would be expeditious, and make for a better report, if an Environmental Professional can simply state that "search distances used were modified from standard AAI specifications, and are known to be appropriate for the subject property, based upon demonstrated expert knowledge of the local area of the subject property".

Response:

The final rule allows the environmental professional to adjust the search distances for reviewing government records of nearby properties based upon his or her professional judgment. The list of factors provided in the final rule upon which the environmental professional may base his or her decision to adjust the search distances includes geologic, hydrogeologic, or topographic conditions of the subject property and surrounding environment; land use or development densities; the property type; existing or past uses of surrounding properties; and other relevant factors. The combination of these factors is very similar to the commenter's suggested factor. Therefore, EPA sees no reason to amend the list of factors as suggested by the commenter.

Commenter Organization Name: Myers, Steve

Comment Number: 0242

Excerpt Number: 12

Excerpt Text:

12 Steve Myers Data Accuracy 312.26(d) and 52562-64 (search radii) If the reason for altering search radii are documented but incorrect from a logical and/or technical standpoint, would this invalidate an owner's ability to claim an 'Innocent Landowner' defense.

Response:

An incorrect reason for adjusting the search radii for a government records search most likely would not in itself result in a property owner's inability to claim the innocent landowner defense. In all likelihood, a release from the person's property would first have to be found and result in the expenditure of funds to remove or remediate the release. A determination regarding the property owner's liability and potentially the adequacy of the all appropriate inquiries investigation would then have to be made by a court.

Commenter Organization Name: Worlund, John

Comment Number: 0256

Excerpt Number: 13

Excerpt Text:

Similarly, the requirement under the AAI rule to identify NFRAP (No Further Remedial Action Planned) sites to the same distance as active release sites (½-mile) is also overly burdensome. EPA has taken measures to reduce the sheer volume of sites that appear on the CERCLIS by archiving those sites where no further remedial was warranted. This certainly could mean that contamination may be present, but not to such an extent that would require concern out to ½-mile from a subject property. I would recommend that EPA consider adopting either ¼ mile radius or adjacent property only search.

Response:

Information regarding NFRAP sites is still available in CERCLIS. This requirement is the same as the government records search required under the interim standard (ASTM E1527-2000).

Commenter Organization Name: PBS & J

Comment Number: 0270

Excerpt Number: 2

Excerpt Text:

The new minimum search distance proposed is too extensive. We propose adopting the current ASTM 1527-00 search distance. The proposed search distances add unjustified additional costs for the research, as well as there being no guarantee that the data will be available. To many state data inconsistencies or no data at all.

Response:

The minimum search distance requirements are very similar to the government records search distances required under the interim standard (ASTM E1527-2000). The final rule requires that all appropriate inquiries include a search for institutional controls for the subject property only (and not include a search for institutional controls at surrounding properties).

Commenter Organization Name: anonymous institution

Comment Number: 0315

Excerpt Number: 3

Excerpt Text:

The Rule also proposes that the environmental professional can adjust the search radii using his/her judgment based on the site geology or other relevant considerations. In our experience, environmental professionals have abused this section of the ASTM Phase I Assessment. Specifically, search radii are inaccurately narrowed based on "distance" or the inferred groundwater direction, in an effort to reduce the need for a regulatory file review which slows the Phase I due diligence process and is costly to the environmental professional. Furthermore, groundwater direction cannot be definitively determined without three monitoring wells and subsurface strata vary greatly from reference material which focus on regional trends. Allowing liberal adjustments of the search radii will further foster an environment in which database reports are ordered by environmental professionals with reduced radii in order to save money.

Radii flexibility will reduce the need for valuable file reviews, discussions with regulatory authorities or case managers, the pursuit of indemnity agreements, and will result in an increase in liability for the User. At a minimum, the Rule should state that radii adjustments should be evaluated on a property by property basis and the report must clearly state the reasoning behind any adjustment so that the User is aware of the rationale utilized.

Response:

Although the final rule allows the environmental professional to adjust the minimum search distance for the government records search based upon several site-specific factors, the final rule requires environmental professionals to document the rationale for making any modifications to the required minimum search distances included in section 312.26 of the regulation. EPA believes that the final rule allows for flexibility but does not promote liberal adjustments to save money, since environmental professionals will have to document their rationales for adjusting the search distances.

Commenter Organization Name: Mille Lacs Ojibwe

Comment Number: 0330

Excerpt Number: 16

Excerpt Text:

The Band agrees with the proposed language that allows an Environmental Professional to use his or her professional judgment to modify the search distance from the subject property boundary line.

Response:

EPA thanks the commenter for the stated support of the proposed rule provision.

Commenter Organization Name: FAA

Comment Number: 0334

Excerpt Number: 12

Excerpt Text:

- 2) FAA agrees with EPA that it would be appropriate to allow the EP to adjust search distances for adjoining and nearby properties. However, EPA does not explain in the proposed rule whether adhering to ASTM standard search radii has led to EPs missing information on actual or threatened releases in the past. Perhaps the EPA standard should suggest that if the data obtained using the proposed standard search distances suggest a potential threat of release from sources greater than the standard search radius, the EP should consider greater search radii for analysis and interpretation of available data.

Response:

The search of government data bases is meant to provide information about nearby properties that may pose a potential concern to the property because of the properties' proximity and use. Facilities located more than a half mile or mile from the subject property may not pose threats to the subject property due to their substantial distance from the property. Therefore, rather than

increase the search distances for records of nearby properties, EPA would recommend, as the commenter seems to suggest, that environmental professionals only search for additional information for properties that are further away, if evidence of a release is found at the subject property and no potential sources of the release can be found after completing all of the records searches as required by the final rule.

Commenter Organization Name: Montana DEQ

Comment Number: 0335

Excerpt Number: 8

Excerpt Text:

Proposed Section 312.26(c)(3)(i): DEQ believes that researching records of RCRA small and large quantity generators should not be limited to adjoining properties. DEQ believes that the radius of search should be one-quarter-mile. The potential property owner should be aware of any facilities in the area.

Response:

EPA disagrees with the commenter. The final rule requires that searches of government records be performed to located RCRA large and small quantity generators at surrounding properties. It is not likely that such facilities pose substantial threats to a property if located further away from the subject property. However, EPA would recommend that environmental professionals search for additional information for properties that are further away if evidence of a release is found at the subject property and no potential sources of the release can be found after completing all of the records searches as required by the final rule.

Commenter Organization Name: McKerr, Thomas

Comment Number: 0347

Excerpt Number: 26

Excerpt Text:

312.26(c): When ASTM set search distances for various lists of environmental sites, it was very conservative because there was not a lot of experience of the potential effects of a listed site on a property being assessed. Since 1992 experience and studies e.g., the Lawrence Livermore petroleum effects study, have shown effects to be generally much more geographically limited (recognizing that there are geological conditions where even 1527 distances are inadequate).

Response:

The search of government data bases is meant to provide information about nearby properties that most likely could pose a potential concern to the property because of the properties' proximity and use. Facilities located more than a half mile or mile from the subject property may not pose threats to the subject property due to their substantial distance from the property. Therefore, rather than increase the search distances for records of nearby properties, EPA would recommend that environmental professionals only search for additional information for properties that are further away, if evidence of a release is found at the subject property and no potential sources of the release can be found after completing all of the records searches as

required by the final rule.

Commenter Organization Name: McKerr, Thomas

Comment Number: 0347

Excerpt Number: 29

Excerpt Text:

312.26(c)(2)(iv): What is the concern relating to a CERCLIS-NFRAP site that is further than an adjoining site away from the Property? This is giving the same weight to an NFRAP site as to an active CERCLIS site.

312.26(c)(3)(i): add "or comparable state or tribal generators."

312.26(c)(3)(iii): delete "registered". Many jurisdictions do not require the registration of farm or heating oil tanks but these can obviously have an effect on a property even if only an adjoining site. If the information concerning these tanks is available, it should be included.

Response:

Identifying NFRAP sites and CERCLIS sites may provide the environmental professional with information regarding the location of properties where remedial actions have taken place and residual contamination may exist. The final rule requires that government records be searched for information on properties within one mile of the subject property that are NPL sites or tribal- and state-equivalent sites. The final rule requires that government records be searched for information on properties within one-half mile of the subject property that are former CERCLIS sites with NFRAP notices.

EPA believes that the commenter's request to amend 312.26(c)(3)(i) is not necessary because the final rule at 312.26(c)(3)(ii) requires a search of government records for federally-permitted, tribal-permitted, or state-permitted (or registered) landfills and solid waste management facilities. In addition, section 312.26(c)(4) requires a review of additional government records with regard to sites identified under 312.26 (c)(1) through (c)(3) that may be necessary in the judgment of the environmental professional to meet the objectives and performance factors.

Although releases from non-registered storage tanks may affect the environmental conditions of a property, information about non-registered storage tanks most likely will not be found in government data bases.

Commenter Organization Name: Intertox

Comment Number: 0396

Excerpt Number: 13

Excerpt Text:

-The proposed standards for reviewing federal, state, tribal and local government records.

--The proposed standards for reviewing federal, state, tribal, and local government records are

fairly similar to the existing ASTM standard. However, shrinking the minimum impact distance to ½ mile is more reasonable considering the likelihood of contaminant migration. Especially beneficial is allowing latitude in determining impact distances by the environmental professional. We disagree however, that reviewing actual records is not necessary. The fact that a site of concern appears on a database and is within ½ mile radius of the subject site is not proof of environmental concern. Accurate and pertinent determinations of adjacent environmental liability can only be assessed by reviewing Phase I, II, and III environmental site assessments. It is that level of detail that will more precisely characterize environmental liabilities of the site under investigation.

Response:

EPA thanks the commenter for the support and information. EPA agrees that the government records search is best viewed only as a screening tool for identifying nearby properties that could impact the subject property. Once such properties are identified, additional information may need to be obtained to assess the types and extent of any impacts. Although it may be prudent for prospective property owners to undertake additional and more extensive inquiries, including Phase II and Phase III, to identify the extent of any potential impacts and ensure that once the property is purchased the property owner can comply with the statutorily-imposed continuing obligations, such inquiries are beyond the scope of all appropriate inquiries.

3.5.2.1 Search Distance for Institutional and Engineering Controls

Commenter Organization Name: Worlund, John

Comment Number: 0256

Excerpt Number: 12

Excerpt Text:

The Review of Institutional Controls (IC's) identified within ½ mile of the property represents a considerable expansion of effort beyond current industry practice. Especially as the number of IC's increase with time. Most IC's are very specific to the subject properties and don't address adjacent properties. The most common form of IC is a risk-based closure that allows residual contamination to remain on the property. In highly industrialized areas these IC will become plentiful. Requiring the EP to review every site specific IC identified is burdensome and likely to provide little useful information. IC review should be limited to the subject property and any adjoining properties as appropriate.

Response:

The final rule requires that government records and available lists for institutional and engineering controls be searched only for information on such controls at the subject property. All appropriate inquiries investigations do not have to include searches for institutional and engineering controls in place at nearby and adjoining properties. We made this change because we agree with commenters who pointed out that information on institutional and engineering controls may be difficult to find as there are no available national sources of this information. Only a few states have available lists of institutional controls. In addition, the information that may be inferred from knowledge of institutional and engineering controls that are in place at adjoining and nearby properties, *i.e.*, that there was a response action, a remedial action, or corrective action taken at the site, can be inferred from information obtained from other sources (*e.g.*, CERCLIS, RCRIS, state records of response actions).

Commenter Organization Name: ENSR International

Comment Number: 0314

Excerpt Number: 4

Excerpt Text:

§ 312.26 (c) (2) (iii) establishes the obligation to conduct a search of registries or publicly available lists of engineering and institutional controls within one-half mile of the subject property.

Comment: This is an unreasonable requirement, and one that will be impossible to achieve within a reasonable transaction schedule and budget. Presently, commercial data base vendors, such as EDR, have only limited geographical coverage on this topic. It not clear that even EDR's coverage encompasses the full range of engineering and institutional controls that could be in-place in a given area. As noted in the EPA's preamble (FR, page 52559, Para. 6), institutional controls encompass not only environmental cleanup liens, but also zoning restrictions, building or excavation permits, well drilling prohibitions, easements and covenants. In addition, while

the preamble notes (FR, page 52562, Para. 2) that the proposed rule does not require that persons obtain a chain of title, this may in fact be necessary in order to determine if a property has engineering or institutional controls in place. Clearly, the scope can be quite broad.

A one-half-mile radial search broadly encompasses about 5,000 acres. In an urban area, it would not be unreasonable to assume an average property size of one-quarter acre. This translates to over 20,000 separate properties within the one-half mile area of interest. Even if municipal records on this issue were organized by street address, the effort required to match the institutional control records against the radial area of interest is enormous. A one-half-mile radius might easily involve more than one jurisdiction, which only further increases the effort required to research this issue.

If you are going to impose this requirement, we recommend limiting the radius search to the subject property plus the abutting properties. A one-half mile radius is unreasonable and probably of no relevance, particularly in an urban environment.

Response:

The final rule requires that government records and available lists for institutional and engineering controls be searched only for information on such controls at the subject property. All appropriate inquiries investigations do not have to include searches for institutional and engineering controls in place at nearby and adjoining properties. We made this change because we agree with commenters who pointed out that information on institutional and engineering controls may be difficult to find as there are no available national sources of this information. Only a few states have available lists of institutional controls. In addition, the information that may be inferred from knowledge of institutional and engineering controls that are in place at adjoining and nearby properties, *i.e.*, that there was a response action, a remedial action, or corrective action taken at the site, can be inferred from information obtained from other sources (*e.g.*, CERCLIS, RCRIS, state records of response actions).

Commenter Organization Name: Rose and Westra

Comment Number: 0320

Excerpt Number: 17

Other Sections: MODIFIED - 4.1 - The impact of the rule is underestimated

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:

See response to comment number 0314, excerpt 4.

Commenter Organization Name: Rose and Westra

Comment Number: 0320

Excerpt Number: 18

Excerpt Text:

Lastly, remedial actions involving institutional controls and engineering controls are typically nearly completion. If the sources of contamination addressed by these measures posed a material threat to the property subject to the AAI investigation, the property would be subject to such controls. R&W requests that the EPA limit the requirement to search for records of brownfield sites, engineering controls, and institutional controls to the property that is subject to the AAI investigation.

Response:

See response to comment number 0314, excerpt 4.

Commenter Organization Name: Edwards, Amy

Comment Number: 0333

Excerpt Number: 2

Excerpt Text:

My third comment concerns the need to search within one-half mile of a site for institutional and engineering controls in registries or publicly available lists (312.26(c)(2)(ii) and (iii)). Information about institutional controls is not "readily available" at the present time in many jurisdictions, and requiring a half mile search for this information would significantly increase the cost of conducting routine environmental due diligence. I appreciate the drafters' goal of trying to increase the number of databases and registries that collect information about institutional controls; having more sources of information about institutional controls will be beneficial in the long run. In the interim, however, as these sources of information continue to evolve, I would suggest that the rule contain some kind of cautionary language that the EP and the user need to use "commercially reasonable efforts" to try to obtain this information.

Response:

See response to comment number 0314, excerpt 4.

Commenter Organization Name: McKerr, Thomas

Comment Number: 0347

Excerpt Number: 28

Excerpt Text:

312.26(c)(2)((ii and iii): What possible effect will an engineering or institutional control beyond an adjoining site have on the Property being assessed? What would be required of a property owner or buyer based on a control at a site ½ mile from the property assessed? This search distance should be limited to the property and adjoining sites.

Response:

See response to comment number 0314, excerpt 4.

Commenter Organization Name: USWAG**Comment Number:** 0367**Excerpt Number:** 4**Excerpt Text:**

B. Records Search for Properties with Institutional Controls. Proposed section 312.26(c)(2)(iii) requires a search of governmental records or databases to identify properties with institutional controls up to a distance of Vi mile from the subject property. Although US WAG agrees that AAI should include a search of records to identify nearby properties subject to institutional controls, we believe that searching up to V2 mile from the subject property is not necessary to protect human health and the environment. Moreover, the Vi mile requirement is considerably beyond current industry practice and will significantly increase costs with little additional useful information. It appears EPA has not considered this additional cost in the economic analysis of this proposal.

Institutional controls typically are specific to the property they affect, and as the distance to the subject property increases, the potential impact on the subject property rapidly disappears. In industrialized areas, particularly in areas targeted for Brownfields redevelopment, institutional controls are commonplace, often relating to leaking underground storage tanks, and requiring the environmental professional to review every identified institutional control within a Vi mile radius of the subject property would be highly burdensome. To be sure, proposed section 312.26(d) allows the environmental professional to modify this distance based on professional judgment and taking into account seven factors specified in the rule, but such a modification must be documented and that will make the environmental professional reluctant to exercise this discretion to modify the search distance. See 69 Fed. Reg. at 52563-64. We recommend that EPA modify the proposal rule to limit the search for institutional controls to the subject and adjoining property.

Response:

See response to comment number 0314, excerpt 4.

Commenter Organization Name: NPCA**Comment Number:** 0403**Excerpt Number:** 7**Excerpt Text:**

Record searches are also expanded under the Proposed Rule. AAIs now must identify engineering and institutional controls on or within one-half mile of the property (emphasis added). Thus, traditional methods of title searching will not suffice under the Proposed Rule's standards. Engineering and institutional controls are not necessarily found in chain of title searches as these controls can be recorded by other instruments, such as land purchase contracts, easements and other agreements. Thus, potential purchasers will need to hire a title company to

do a full title exam, not only for the subject property but for the properties within a one-half mile radius, increasing the cost greatly. Assuming an EP can identify all such controls for the subject property, how far must the EP go to find them for property within one-half mile of the subject property? What relevance do controls on properties one-half mile away have on the evaluation of the subject property? Given the fact that these controls will be difficult, and may be impossible to find for the subject property, not to mention properties within a one-half mile radius, wouldn't it be an automatic data gap if no controls were found?

Response:

See response to comment number 0314, excerpt 4.

Commenter Organization Name: Dismukes, James

Comment Number: 0416

Excerpt Number: 4

Other Sections: NEW - 4.1 - The impact of the rule is underestimated

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:

See response to comment number 0314, excerpt 4.

Commenter Organization Name: Tryon, Bill

Comment Number: 0418

Excerpt Number: 7

Other Sections: NEW - 4.1 - The impact of the rule is underestimated

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 EP 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:

See response to comment number 0314, excerpt 4.

3.5.3 Government Records May Not Be Reasonably Ascertainable

Commenter Organization Name: Beaver, Christine

Comment Number: 0074

Excerpt Number: 4

Excerpt Text:

With regard to the local agency record searches, it is my experience that the ability to obtain information is often complicated by a lack of cooperation, and creates data gaps.

Response:

The final rule provides that if information required to meet the objectives of the all appropriate inquiries cannot be found or collected in compliance with the performance factors, which include gathering information that is publicly available, obtainable from its source within reasonable time and cost constraints, and which can be practicably reviewed (see §312.20(f)(1)), then the environmental professional should document the lack of availability of the information as a data gap. If required information cannot be found or collected in compliance with the objectives and performance factors and such information represents data gaps that affect the ability of the environmental professional to identify conditions indicative of releases or threatened releases of hazardous substances, then the data gaps and their significance should be noted in the written report of findings in compliance with §312.20(f).

Commenter Organization Name: Beaver, Christine

Comment Number: 0074

Excerpt Number: 5

Excerpt Text:

Another example, is searching for records at the New York City Buildings Department in Queens County is such an exhaustive process (due to the filing system, constraints on the number of files that are permitted to be reviewed at one time, and the inability to access archived records on certain days and hours) that we generally conclude under ASTM 1527-00 standards that it was not reasonably ascertainable to review these records given time and cost constraints.

Response:

The final rule provides that if information required to meet the objectives of the all appropriate inquiries cannot be found or collected in compliance with the performance factors, which include gathering information that is publicly available, obtainable from its source within reasonable time and cost constraints, and which can be practicably reviewed (see §312.20(f)(1)), then the environmental professional should document the lack of availability of the information as a data gap. If required information cannot be found or collected in compliance with the objectives and performance factors and such information represents data gaps that affect the ability of the environmental professional to identify conditions indicative of releases or threatened releases of hazardous substances, then the data gaps and their significance should be noted in the written report of findings in compliance with §312.20(f).

Commenter Organization Name: City of Jacksonville, Florida

Comment Number: 0095

Excerpt Number: 7

Excerpt Text:

Sec. 312.26 requires a review of government agency records. So long as the records are available electronically, or upon request of the agency under the Freedom of Information Act or other public records law requiring the agency to allow inspection of the records on demand, the burden is reasonable. The regulation, however, doesn't limit the records to those readily available. A prospective brownfield developer should not have to hire a librarian or historic documents research to paw through government files to fulfill "all appropriate inquiry" requirements.

Response:

The final rule provides that if information required to meet the objectives of the all appropriate inquiries cannot be found or collected in compliance with the performance factors, which include gathering information that is publicly available, obtainable from its source within reasonable time and cost constraints, and which can be practicably reviewed (see §312.20(f)(1)), then the environmental professional should document the lack of availability of the information as a data gap. If required information cannot be found or collected in compliance with the objectives and performance factors and such information represents data gaps that affect the ability of the environmental professional to identify conditions indicative of releases or threatened releases of hazardous substances, then the data gaps and their significance should be noted in the written report of findings in compliance with §312.20(f).

Commenter Organization Name: Scalise, Frederick W, et al

Comment Number: 0105

Excerpt Number: 4

Excerpt Text:

§312.26 (b) should indicate, "...should, to the extent records are available and reasonably accessible, include:"

REASON: Availability, accessibility and formatting of state and local records varies widely from one jurisdiction to another.

Response:

The final rule provides that if information required to meet the objectives of the all appropriate inquiries cannot be found or collected in compliance with the performance factors, which include gathering information that is publicly available, obtainable from its source within reasonable time and cost constraints, and which can be practicably reviewed (see §312.20(f)(1)), then the environmental professional should document the lack of availability of the information as a data gap. If required information cannot be found or collected in compliance with the objectives and performance factors and such information represents data gaps that affect the ability of the environmental professional to identify conditions indicative of releases or threatened releases of hazardous substances, then the data gaps and their significance should be noted in the written

| report of findings in compliance with §312.20(f).

Commenter Organization Name: Anthony, Tony, et.al.

Comment Number: 0292

Excerpt Number: 10

Excerpt Text:

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

This section should state what is considered to be a reasonable period time for the consultant to await information that is requested from the various federal, state, tribal, and local agencies on the basis of a site's appearance on the environmental database(s) that are reviewed. We contend that a reasonable period of time for access to the requested information is 10 business days, however, given the greater lengths of time many such agencies take to respond to information requests, it is likely that many responses, not to mention the desired information, will not be obtainable within the 10 business day period.

Response:

The final rule provides that if information required to meet the objectives of the all appropriate inquiries cannot be found or collected in compliance with the performance factors, which include gathering information that is publicly available, obtainable from its source within reasonable time and cost constraints, and which can be practicably reviewed (see §312.20(f)(1)), then the environmental professional should document the lack of availability of the information as a data gap. If required information cannot be found or collected in compliance with the objectives and performance factors and such information represents data gaps that affect the ability of the environmental professional to identify conditions indicative of releases or threatened releases of hazardous substances, then the data gaps and their significance should be noted in the written report of findings in compliance with §312.20(f).

Commenter Organization Name: Georgia Power

Comment Number: 0423

Excerpt Number: 10

Excerpt Text:

In §312.26 "Reviews of Federal, Tribal, State, and local government records" (b), the requirements to review local government's records AND databases on the subject and adjoining properties are overly burdensome. The following revisions would address this concern:

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

Rationale:

-Local government records are generally not easily accessible or practicably reviewable; therefore, the requirement should be to review local government's records OR databases.

-Changing the "and" to an "or" would make it consist with the language and premise of §312.26 (a) and (c).

-The review of government records should be limited to the readily available information already provided in an EDR or similar reports.

Response:

The final rule at §312.26(b) requires the review of federal, tribal, and state government records or databases of such government records.

The final rule provides that if information required to meet the objectives of the all appropriate inquiries cannot be found or collected in compliance with the performance factors, which include gathering information that is publicly available, obtainable from its source within reasonable time and cost constraints, and which can be practicably reviewed (see §312.20(f)(1)), then the environmental professional should document the lack of availability of the information as a data gap. If required information cannot be found or collected in compliance with the objectives and performance factors and such information represents data gaps that affect the ability of the environmental professional to identify conditions indicative of releases or threatened releases of hazardous substances, then the data gaps and their significance should be noted in the written report of findings in compliance with §312.20(f).

Commenter Organization Name: Anonymous

Comment Number: 0427

Excerpt Number: 1

Excerpt Text:

In regards to databases required to review for a site. The records requested to be examined for each piece of property are going to increase the expense of a professional review of a property.

Tribal records for one are mostly non-existent, and not easily obtainable, nor are local records always easily reviewed.

Public health records to be searched _ This is kind of open. What public health records exactly?? There are literally tons!

Response:

The final rule provides that if information required to meet the objectives of the all appropriate inquiries cannot be found or collected in compliance with the performance factors, which include gathering information that is publicly available, obtainable from its source within reasonable time and cost constraints, and which can be practicably reviewed (see §312.20(f)(1)), then the environmental professional should document the lack of availability of the information as a data gap. If required information cannot be found or collected in compliance with the objectives and performance factors and such information represents data gaps that affect the ability of the environmental professional to identify conditions indicative of releases or threatened releases of hazardous substances, then the data gaps and their significance should be noted in the written report of findings in compliance with §312.20(f).

3.5.4 The Agency Should Provide More Guidance on How Best to Obtain Information about Institutional and Engineering Controls

Commenter Organization Name: Edwards, Amy

Comment Number: 0333

Excerpt Number: 1

Excerpt Text:

The proposed AAI rule does an excellent job of establishing as one of the objectives of "all appropriate inquiries" the need to identify institutional and engineering controls as potential indications of "conditions indicative of releases or threatened releases"(312.20(d)(1)(v) and (vi)). This information is important not only for satisfying the threshold step of establishing that one has conducted "all appropriate inquiries", but also in later taking "reasonable steps" - in this case, satisfying one's ongoing obligation "not to impede the effectiveness or integrity of any institutional control employed in connection with a response action" (69 Fed. Reg. 52559) and thereby qualifying for one or more of the "landowner liability protections" established pursuant to the Small Business Liability Relief and Brownfields Revitalization Act (Pub. L. 107-118).

My first comment concerns the best way in which to find information about institutional and engineering controls that may have been placed on a site. The proposed rule imposes this burden upon both the environmental professional and the person commissioning the report, a requirement that I support. Information about institutional and engineering controls is not routinely requested or obtained as part of current environmental due diligence practices, even though awareness of these restrictions is critically important in ensuring their long-term durability and enforceability.

The key question is how best to find this information. The proposed rule mentions, inter alia, requesting a "chain of title" report (312.24(a); see also 69 Fed. Reg. 52559). However, during the six years we spent crafting and later revising the ASTM E 2091-00 Standard Guide, as well as during my two years of service as an advisor to the National Conference of Commissioners on Uniform State Laws while it developed the Uniform Environmental Covenants Act, it became very clear that a routine "chain of title" report frequently will not contain information about institutional or engineering controls. It is my understanding that this practice has evolved because title companies frequently do not insure "environmental conditions", so they may not "flag" institutional or engineering controls in their "chain of title" reports. I have been advised that title companies DO have an obligation to highlight in their reports "restrictions of record on title", even when those restrictions have been recorded because of underlying environmental conditions. Thus, there appears to be a misunderstanding or lack of communication between the real estate and environmental communities in terms of how best to request this information. I would suggest that the rule provide greater guidance on how best to obtain information about institutional and engineering controls.

Based upon the conversations that I have had with representatives of title search companies and the real estate bar, it is my understanding that persons requesting information about institutional or engineering controls should let their title search company know that they are looking for

"restrictions of record on title". This information is also sometimes referred to as a "historical environmental title search" by some title search companies. Information about institutional controls is also routinely recorded in local land records, so the EP and the person commissioning the AAI report should be directed to check those records. Similarly, the computerized database search companies are beginning to collect this information, and a number of states are beginning to create registries to track this information, so these sources of information should be consulted as well.

My second comment concerns how to search for institutional controls that are not "restrictions of record on title". The proposed rule correctly notes that there are several different types of institutional controls, including easements and covenants (i.e., proprietary controls), zoning, permits and orders, and well advisories. Only proprietary controls typically appear in a "chain of title" report or a "historical environmental title search" because they constitute "restrictions of record on title"; the other types of restrictions do not. Database companies and registries likewise do not typically track these other types of institutional controls. Accordingly, it will be important to define in the final rule where the EP and the purchaser must look to satisfy AAI, as these other types of institutional controls are not "readily available" at the present time. As part of a Phase I Environmental Site Assessment (ESA) today, an EP does not typically look at the underlying Record of Decision to determine whether zoning or excavation permits might have been used as an institutional control at the site. To require that an EPA or purchaser examine the underlying administrative record to determine whether an institutional control should have been implemented at a site, as recommended by EPA's Common Elements Guide, will unnecessarily and dramatically increase the cost of AAI. I would encourage the agency to drop all such implied requirements from the final rule.

Response:

EPA thanks the commenter for the information and advice on how to search for institutional controls. EPA incorporated much of the commenter's advice into the preamble for the final rule.

3.5.5 The Agency Should Provide the Definition of Engineering Controls

Commenter Organization Name: Prevatte, Chad M

Comment Number: 0093

Excerpt Number: 1

Excerpt Text:

The term "engineering controls" is used throughout the standard, however it is not defined. What is the definition of "engineering controls" relative to this standard?

Response:

Engineering controls are physical modifications to a property (e.g., capping, slurry walls) to reduce or eliminate the potential for exposure to hazardous substances at the property.

Commenter Organization Name: SCANA

Comment Number: 0373

Excerpt Number: 6

Excerpt Text:

It is also requested that the term "engineering controls" be defined in §312.10. The Agency adequately discussed the nature of the term "institutional controls" on page 52559 of the preamble and defined it in §312.10, but failed to convey exactly what the Agency's intention is for the term "engineering controls". Although the term "engineering controls" is specifically used in the proposed rule at §312.26(c)(2)(ii), it has not been defined and is arguably a generic term in the environmental field. Again, it would be beneficial to the regulated community to completely understand what the Agency intends by the use of this term moving forward under the final rule.

Response:

Engineering controls are physical modifications to a property (e.g., capping, slurry walls) to reduce or eliminate the potential for exposure to hazardous substances at the property.

3.5.6 Record Listings Should Be Replaced by Specific Government Facility Listings

Commenter Organization Name: Westward Environmental

Comment Number: 0429

Excerpt Number: 3

Excerpt Text:

Regarding the heading of What Are the Proposed Requirements for Reviewing Federal, State, Tribal, and Local Government Records? on page 52562 of the proposed rule:

-it states "The proposed rule...would require that...government records be searched for information...".

-While we agree that these records should be identified, researching these records can be, as noted in your "For example, in the case of NPL sites..." example, a very time consuming exercise that cannot be predicted at the time an EP proposes to perform an All Appropriate Inquiries project for a client.

-We would suggest that specific government facility listings [similar to what is recommended in ASTM 1527] be part of the All Appropriate Inquiry in lieu of researching records associated with these listings as the number of facilities and the time/effort required to perform this research would initially be unknown. The researching of records will in the vast majority of cases, require professional labor in a locality that is different (oftentimes substantially so) than the property being evaluated.

Response:

The final rule provides that if information required to meet the objectives of the all appropriate inquiries cannot be found or collected in compliance with the performance factors, which include gathering information that is publicly available, obtainable from its source within reasonable time and cost constraints, and which can be practicably reviewed (see §312.20(f)(1)), then the environmental professional should document the lack of availability of the information as a data gap. If required information cannot be found or collected in compliance with the objectives and performance factors and such information represents data gaps that affect the ability of the environmental professional to identify conditions indicative of releases or threatened releases of hazardous substances, then the data gaps and their significance should be noted in the written report of findings in compliance with §312.20(f).

3.6 Visual Inspections

Commenter Organization Name: Goodman, J. Dwight

Comment Number: 0097

Excerpt Number: 8

Excerpt Text:

Requirements for on-site inspections are also appropriate.

Response:

EPA thanks the commenter for the stated support of the proposed requirements.

Commenter Organization Name: Anthony, Tony, et.al.

Comment Number: 0292

Excerpt Number: 11

Excerpt Text:

312.27 Visual inspections of the facility and of adjoining properties

We support this section.

Response:

EPA thanks the commenter for the stated support of this provision of the rule.

3.6.1 Visual Inspection of the Subject Property

Commenter Organization Name: Rybak, John Thomas

Comment Number: 0412

Excerpt Number: 7

Excerpt Text:

Proposed standard for conducting visual inspections.

a) Page # 52580

b) View: Visual inspection of the property is one of the most critical aspects of the AAI process. It is vital to inspect all areas of the Subject and inside all Subject Buildings. Without such complete access and inspection the AAI process should be considered incomplete. At a minimum the property should be inspected from all sides from the adjoining properties. However this should not be considered adequate and the EP should make recommendations that a re-inspection with full and complete access should be conducted. Inability to access the property should be qualified and provide an opinion on relevance.

c) Assumptions: Without full and complete access of the property, AAI cannot be properly achieved. The following risks could be easily overlooked; internal floor drains, hazardous waste storage, chemical staining, chemical spillage, exterior signs of USTs (i.e. vent pipes), surface staining, stressed vegetation, etc.

d) Burden: This should not place an unreasonable burden on the EP. This is a main part of any Phase I.

Response:

EPA thanks the commenter for the stated support and input regarding this provision of the rule.

3.6.1.1 The Agency Should Clarify Whether the Visual Site Inspection Must Be Performed by an EP

Commenter Organization Name: Prevatte, Chad M

Comment Number: 0093

Excerpt Number: 6

Excerpt Text:

Can someone under the supervision of the environmental professional perform a site visit? §312.27(a) is not clear on the personnel requirement of the site visit.

Response:

Yes. An individual not meeting the definition of environmental professional but under the supervision or responsible charge of an environmental professional may perform the on-site visual inspection of the subject property. In the preamble to the final rule EPA only recommends that this task be performed by an environmental professional.

Commenter Organization Name: Roeser, Daniel

Comment Number: 0249

Excerpt Number: 5

Excerpt Text:

Visual Inspections of the facility and adjoining properties.

Along with review of results and developing conclusions, the site inspection is one of the most important elements of AAI. It is a key inquiry task requiring the breadth of education, experience, and judgment of an EP to recognize the variety of physical and visual evidence that may indicate a release or threat of release. This evidence, generally visible in nature, is very difficult to accurately and effectively transfer to a non-participating third party (i.e. the EP) for effective evaluation and/or quality assurance. Therefore, I strongly recommend that the EP be required by the rules to perform, not just supervise, the site inspections.

Response:

EPA appreciates the commenter's input. EPA continues to recommend that an individual meeting the definition of an environmental professional conduct the on-site visual inspection. However, based upon input from other commenters and the Agency's concerns regarding the burden that may be placed upon some prospective property owners, the final rule does not require that the on-site visual inspection be performed by an environmental professional. An individual not meeting the definition of environmental professional but under the supervision or responsible charge of an environmental professional may perform the on-site visual inspection of the subject property.

Commenter Organization Name: CES

Comment Number: 0262

Excerpt Number: 1

Excerpt Text:

Nearly all of the discrepancies between what the EPA requires of the ASTM E1527 document and the proposed regulation have been met. The ASTM E50 Committee and the EPA have developed a strong definition of an environmental professional (EP), however, a key area of weakness in CERCLA defense remains: the involvement of the EP in conducting the on-site visual inspection (site reconnaissance).

The proposed regulation states in strong language that the EPA highly recommends that the EP be involved in the on-site and adjacent site reconnaissance when conducting AAI, but falls short in specifying that involvement. The proposed regulation states that the EP should be, at a minimum, involved in the "planning" of the site reconnaissance. If this language were to stand, there will be no net change between what is currently in ASTM E1527-00 and what will occur when 40 CFR §312 takes effect. Approximately 95% of all Recognized Environmental Conditions (REC) are identified during the site reconnaissance portion of the Phase I ESA, and only 5% are discovered during the historical research and property records review.

CES has conducted Phase I ESAs since 1990, and are intimately familiar with the work products and practices of our industry. There are usually 15-20 key areas of a company that requires evaluation when conducting a Phase I ESA. This number increases based on the complexity of the process or the size of the structure. An experienced individual is required to identify the byproducts of a particular process, what wastes are generated, and where shortcuts would be made by a company trying to avoid financial responsibilities in the due diligence process. The language, as it is proposed, will continue the practice conducting the Phase I ESA and conducting AAI under 40 CFR §312 without the full benefit of the EP being involved in the key components of the process. There are two primary methodologies for conducting a Phase I ESA: real estate agents, brokers and/or landowners preparing the report, or selecting a consulting firm to write the report. The definition of "planning" will be met if the real estate agent/broker and/or landowner conducts the Phase I ESA and provides a copy to an EP for review. This is unacceptable as the broker/agent/landowner is not qualified to identify an REC, and the EP will also not identify the REC since they are relying on information provided to them by the preparer of the report. Similarly, a consulting firm will rely on less experienced staff to conduct the site reconnaissance and prepare the report, with the EP (usually a project manager) reviewing the report. Again, the EP is looking through the eyes of the preparer of the report, and will not be able to identify things that the inexperienced personnel missed. Both of these examples will meet the definition of "planning" as identified in the proposed regulation.

CES recommends that the "planning" requirement be lifted from the regulation, and is replaced with language that requires the EP be on-site with the individual tasked with the responsibility for preparing the report. The site reconnaissance typically requires 1-3 hours to conduct in 90% of properties depending on complexity, and will not negatively impact the profitability of those conducting the Phase I ESA or the AAI inquiry under 40 CFR §312. Secondly, by having a provision for State-certified EP programs, there will be no need for a professional engineer or geologist on-site which also contributes to increased costs. Junior staffers in consulting firms and brokers/agents with three years experience that have been certified by a State program will

meet the definition of an EP, and will be qualified to either accompany a non-EP to the site reconnaissance and oversee its completion or conduct the investigation on their own.

Response:

EPA appreciates the commenter's input. EPA continues to recommend that an individual meeting the definition of an environmental professional conduct the on-site visual inspection. However, based upon input from other commenters and the Agency's concerns regarding the burden that may be placed upon some prospective property owners, the final rule does not require that the on-site visual inspection be performed by an environmental professional. An individual not meeting the definition of environmental professional but under the supervision or responsible charge of an environmental professional may perform the on-site visual inspection of the subject property.

Commenter Organization Name: ENSR International

Comment Number: 0314

Excerpt Number: 5

Excerpt Text:

The preamble strongly suggests in several places (including FR, page 52565) that an EP must conduct at least the site inspection; however it also states (FR, page 52565, last paragraph) that it would be sufficient for an EP to be involved in the planning of a site inspection.

Comment: We strongly encourage you to specifically define those aspects of the site investigation that must be performed by an EP. The proposed rule is not clear on this issue. While we are in support of an EP being involved in the assessment process, we also feel that the EP should supervise and sign-off on the document, but not necessarily be obligated to perform any one step of the investigative process. In addition, the implication of the EP performing the site inspection, but not necessarily any other portion of the assessment, would result in fragmenting the investigation between multiple people. In our experience, this multi-person staffing approach leads to a greater potential for important information to be lost or misinterpreted, and for conflicts between what is seen, and what the research indicates, to go unresolved. A single investigator who not only conducts the records research, but also performs the site inspection and interviews with facility personnel is the preferred approach.

Response:

EPA continues to recommend that an individual meeting the definition of an environmental professional conduct the on-site visual inspection. However, based upon input from other commenters and the Agency's concerns regarding the burden that may be placed upon some prospective property owners, the final rule does not require that the on-site visual inspection be performed by an environmental professional. An individual not meeting the definition of environmental professional but under the supervision or responsible charge of an environmental professional may perform the on-site visual inspection of the subject property.

Commenter Organization Name: McKerr, Thomas

Comment Number: 0347

Excerpt Number: 13

Excerpt Text:

Role of the Environmental Professional in the Visual Inspection. The preamble states that "It is EPA's recommendation that the visual inspections of the subject property and adjoining properties be conducted by an individual who meets the proposed regulatory definition of an environmental professional." Why does section 312.27 fink out? If the EP does not personally perform the site inspection and can justify it, then require the EP to state the justification and explain why the property inspector that did the inspection was qualified..

312.27: If any aspect of the AAI requires the personal experience of the Environmental Professional, this is it. Leave an "out": if the Environmental Professional is not the actual inspector, he/she should explain why not and also explain why the person that actually did the site inspection was qualified to do so. The rule proposes that releases that "generally would not pose a threat to human health or the environment" can be excluded but this is strictly dependent of the judgment of the Environmental Professional. How can this be done properly if he/she is not there?

Response:

EPA continues to recommend that an individual meeting the definition of an environmental professional conduct the on-site visual inspection. However, based upon input from other commenters and the Agency's concerns regarding the burden that may be placed upon some prospective property owners, the final rule does not require that the on-site visual inspection be performed by an environmental professional. An individual not meeting the definition of environmental professional but under the supervision or responsible charge of an environmental professional may perform the on-site visual inspection of the subject property.

Commenter Organization Name: Potter and Adams

Comment Number: 0351

Excerpt Number: 3

Excerpt Text:

Please clarify whether the EP must conduct the site visit. Section 312.10(b)(5) does allow a person not meeting the definition of EP to assist in the conduct of AAI when under the supervision or responsible charge of an EP. This idea is supported in the Preamble section III.K.3., however, this section of the Preamble also clearly states that EPA recommends the visual inspection be conducted by an EP. Clarification on this matter is requested, in light of the litigious nature of the assessment industry. As noted below, the incremental cost increase of requiring site visits to be conducted by the EP is not accounted for in the cost analysis.

Response:

EPA continues to recommend that an individual meeting the definition of an environmental professional conduct the on-site visual inspection. However, based upon input from other commenters and the Agency's concerns regarding the burden that may be placed upon some prospective property owners, the final rule does not require that the on-site visual inspection be performed by an environmental professional. An individual not meeting the definition of

environmental professional but under the supervision or responsible charge of an environmental professional may perform the on-site visual inspection of the subject property.

Commenter Organization Name: Terracon

Comment Number: 0355

Excerpt Number: 1

Excerpt Text:

The proposed 40CFR part 312.27 requires that the inquiry of the environmental professional must include a visual inspection of the facility and adjoining properties. The inquiry of the environmental professional is defined at 312.21 as "by an environmental professional, or conducted under the supervision or responsible charge of, an environmental professional?". Therefore, the proposed rule allows the visual inspection to be conducted by either the environmental professional or someone acting under the supervision or responsible charge of an environmental professional. In our view, the proposed rule relies on the judgement of the environmental professional how the visual inspection should be conducted. We agree with the proposed rule as written and believe it is consistent with the statutory requirements of all appropriate inquiries. However, in the preamble to the proposed rule, the EPA recommends that visual inspections be conducted by individuals who meet the proposed regulatory definition of an environmental professional. Additionally, the EPA infers that individuals other than environmental professionals may not conduct "sufficient and accurate" environmental inspections. Furthermore, the EPA argues that the environmental professional conducting the visual inspection is "vital" to the process. We believe that the EPA's comments within the preamble are inconsistent and contradictory to the proposed regulation. By making such strong statements and recommendations, the EPA is in effect imposing a requirement that is not promulgated in the proposed regulation. The EPA should clearly state within the preamble of the final rule that an environmental professional is not required to conduct the visual inspection and it is solely up to the judgement of the environmental professional as to who conducts the visual inspection.

Response:

EPA continues to recommend that an individual meeting the definition of an environmental professional conduct the on-site visual inspection. However, based upon input from other commenters and the Agency's concerns regarding the burden that may be placed upon some prospective property owners, the final rule does not require that the on-site visual inspection be performed by an environmental professional. An individual not meeting the definition of environmental professional but under the supervision or responsible charge of an environmental professional may perform the on-site visual inspection of the subject property. In the preamble to the final rule EPA clearly states that the on-site visual inspection does not have to be conducted by the environmental professional.

Commenter Organization Name: Osuch, Debra

Comment Number: 0365

Excerpt Number: 2

Excerpt Text:

312.27 Visual Inspections of the facility and adjoining properties.

The site inspection is one of the most important elements of AAI. It is a key inquiry task requiring the experience and judgment of an Environmental Professional. Therefore, I recommend that the Environmental Professional be required by the rules to perform, not just supervise, the site inspections.

Response:

EPA appreciates the commenter's input. EPA continues to recommend that an individual meeting the definition of an environmental professional conduct the on-site visual inspection. However, based upon input from other commenters and the Agency's concerns regarding the burden that may be placed upon some prospective property owners, the final rule does not require that the on-site visual inspection be performed by an environmental professional. An individual not meeting the definition of environmental professional but under the supervision or responsible charge of an environmental professional may perform the on-site visual inspection of the subject property.

Commenter Organization Name: USWAG

Comment Number: 0367

Excerpt Number: 9

Excerpt Text:

Role of the Environmental Professional in the On-Site Visual Inspection of the Property. Although visual inspection of the subject and adjoining properties is the responsibility of the environmental professional (as defined in proposed section 312.10), EPA recognizes that "[a] person who does not qualify as an environmental professional . . . may assist in the conduct of all appropriate inquiries . . . if such person is under the supervision or responsible charge of a person meeting the definition of an environmental professional. . . when conducting such activities." Proposed section 312.10(b)(5). US WAG agrees with EPA that the visual inspection need not be conducted solely by the environmental professional but may "be conducted under the supervision or responsible charge of an environmental professional." 69 Fed. Reg. at 52565. This is consistent with other recent EPA regulations that assign ultimate responsibility to a professional but allow the professional's agent to conduct the site visit. See, e.g., 40 C.F.R § 112.3(d)(1)(ii); 67 Fed. Reg. 47042, 47054 (July 17, 2002) (requiring SPCC plan to contain an attestation that a professional engineer or his agent visited and examined the facility). EPA should confirm that "under the supervision or responsible charge" does not require the physical presence of the environmental professional.

Response:

EPA continues to recommend that an individual meeting the definition of an environmental professional conduct the on-site visual inspection. However, based upon input from other commenters and the Agency's concerns regarding the burden that may be placed upon some prospective property owners, the final rule does not require that the on-site visual inspection be performed by an environmental professional. An individual not meeting the definition of

environmental professional but under the supervision or responsible charge of an environmental professional may perform the on-site visual inspection of the subject property. In the preamble to the final rule EPA clearly states that the on-site visual inspection does not have to be conducted by the environmental professional.

Commenter Organization Name: Kehres

Comment Number: 0395

Excerpt Number: 3

Excerpt Text:

Along with review of results and development of conclusions, the site inspection is one of the most important elements of AAI. It is a key inquiry task requiring the breadth of education, experience, and judgment of an EP to recognize the variety of physical and visual evidence that may indicate a release or threat of release. This evidence, generally visible in nature, is very difficult to accurately and effectively transfer to a nonparticipating third party (i.e. the EP) for effective evaluation and/or quality assurance.

Therefore, I strongly recommend that the EP be required by the rules to perform, not just supervise the site inspections.

Response:

EPA appreciates the commenter's input. EPA continues to recommend that an individual meeting the definition of an environmental professional conduct the on-site visual inspection. However, based upon input from other commenters and the Agency's concerns regarding the burden that may be placed upon some prospective property owners, the final rule does not require that the on-site visual inspection be performed by an environmental professional. An individual not meeting the definition of environmental professional but under the supervision or responsible charge of an environmental professional may perform the on-site visual inspection of the subject property.

Commenter Organization Name: Andrews, Douglas

Comment Number: 0399

Excerpt Number: 4

Excerpt Text:

2. 312.27 Visual Inspections of the facility and adjoining properties.

Along with review of results and development of conclusions, the site inspection is one of the most important elements of AAI. It is a key inquiry task requiring the breadth of education, experience, and judgment of an EP to recognize the variety of physical and visual evidence that may indicate a release or threat of release. This evidence, generally visible in nature, is very difficult to accurately and effectively transfer to a non-participating third party (i.e. the EP) for effective evaluation and/or quality assurance. Therefore, I strongly recommend that the EP be required by the rules to perform, not just supervise, the site inspections.

Response:

EPA appreciates the commenter's input. EPA continues to recommend that an individual meeting the definition of an environmental professional conduct the on-site visual inspection. However, based upon input from other commenters and the Agency's concerns regarding the burden that may be placed upon some prospective property owners, the final rule does not require that the on-site visual inspection be performed by an environmental professional. An individual not meeting the definition of environmental professional but under the supervision or responsible charge of an environmental professional may perform the on-site visual inspection of the subject property.

Commenter Organization Name: Rybak, John Thomas

Comment Number: 0412

Excerpt Number: 16

Excerpt Text:

EP Should do the Site Inspection.

a)Page # 52565

b) View: The Goal of AAI is to increase quality of the Phase I, not to shortcut the process. The site inspection must be conducted by the EP, as they have the experience to properly evaluate the property and risks. Current field practices often send junior employees out to conduct the site inspection and draft the basic Phase I report. This is a function of time and money. Senior employees are often bound by time constraints, and not available to complete each Phase I, and junior employees are expensed at a lower overhead. This practice does not increase the quality of the Phase I report, achieve the objectives of AAI, and is prone to more mistakes being missed in the Phase I process by unqualified staff.

c) Assumptions: The EP is narrowly defined within this proposal to qualify individuals to conduct Phase I reports. If the purchaser needs to rely on the Phase I to prove in court they conducted AAI, the Site Inspection should be performed by an EP. Anything less will not assure the EP has complete knowledge and involvement in the process, and would negate the relevance of their signature.

d) Burden: Having EP's conduct the Site Inspection of the Phase I will increase quality and cost.

Response:

EPA appreciates the commenter's input. EPA continues to recommend that an individual meeting the definition of an environmental professional conduct the on-site visual inspection. However, based upon input from other commenters and the Agency's concerns regarding the burden that may be placed upon some prospective property owners, the final rule does not require that the on-site visual inspection be performed by an environmental professional. An individual not meeting the definition of environmental professional but under the supervision or responsible charge of an environmental professional may perform the on-site visual inspection of the subject property.

Commenter Organization Name: Dismukes, James

Comment Number: 0416

Excerpt Number: 2

Excerpt Text:

Requiring an Environmental Professional to personally perform a site visit will add more than EPA's projected \$539. Since an EP in training requires from 3 to 5 years experience, almost all site visits will now have to be performed by a minimum of 2 persons, the EP and the EP in training so that the EP in training can obtain the required experience.

Response:

EPA appreciates the commenter's input. EPA continues to recommend that an individual meeting the definition of an environmental professional conduct the on-site visual inspection. However, based upon input from other commenters and the Agency's concerns regarding the burden that may be placed upon some prospective property owners, the final rule does not require that the on-site visual inspection be performed by an environmental professional. An individual not meeting the definition of environmental professional but under the supervision or responsible charge of an environmental professional may perform the on-site visual inspection of the subject property.

Commenter Organization Name: Tramm, Kenneth

Comment Number: 0425

Excerpt Number: 1

Excerpt Text:

The proposed 40CFR part 312.27 requires that the inquiry of the environmental professional must include a visual inspection of the facility and adjoining properties. The inquiry of the environmental professional is defined at 312.21 as ".by an environmental professional, or conducted under the supervision or responsible charge of, an environmental professional.".

Therefore, the proposed rule allows the visual inspection to be conducted by either the environmental professional or someone acting under the supervision or responsible charge of an environmental professional. In our view, the proposed rule relies on the judgement of the environmental professional how the visual inspection should be conducted. We agree with the proposed rule as written and believe it is consistent with the statutory requirements of all appropriate inquiries. However, in the preamble to the proposed rule, the EPA recommends that visual inspections be conducted by individuals who meet the proposed regulatory definition of an environmental professional. Additionally, the EPA infers that individuals other than environmental professionals may not conduct "sufficient and accurate" environmental inspections. Furthermore, the EPA argues that the environmental professional conducting the visual inspection is "vital" to the process. We believe that the EPA's comments within the preamble are inconsistent and contradictory to the proposed regulation. By making such strong statements and recommendations, the EPA is in effect imposing a requirement that is not promulgated in the proposed regulation. The EPA should clearly state within the preamble of the final rule that an environmental professional is not required to conduct the visual inspection and

it is solely up to the judgement of the environmental professional as to who conducts the visual inspection.

Response:

EPA continues to recommend that an individual meeting the definition of an environmental professional conduct the on-site visual inspection. However, based upon input from other commenters and the Agency's concerns regarding the burden that may be placed upon some prospective property owners, the final rule does not require that the on-site visual inspection be performed by an environmental professional. An individual not meeting the definition of environmental professional but under the supervision or responsible charge of an environmental professional may perform the on-site visual inspection of the subject property. In the preamble to the final rule EPA clearly states that the on-site visual inspection does not have to be conducted by the environmental professional.

Commenter Organization Name: Hoskins, Herbert

Comment Number: 0428

Excerpt Number: 3

Excerpt Text:

Along with review of results and development of conclusions, the site inspection is one of the most important elements of AAI. It is a key inquiry task requiring the breadth of education, experience, and judgment of an EP to recognize the variety of physical and visual evidence that may indicate a release or threat of release. This evidence, generally visible in nature, is very difficult to accurately and effectively transfer to a non-participating third party (i.e. the EP) for effective evaluation and/or quality assurance. Therefore, I strongly recommend that the EP be required by the rules to perform, not just supervise, the site inspections.

Response:

EPA appreciates the commenter's input. EPA continues to recommend that an individual meeting the definition of an environmental professional conduct the on-site visual inspection. However, based upon input from other commenters and the Agency's concerns regarding the burden that may be placed upon some prospective property owners, the final rule does not require that the on-site visual inspection be performed by an environmental professional. An individual not meeting the definition of environmental professional but under the supervision or responsible charge of an environmental professional may perform the on-site visual inspection of the subject property.

Commenter Organization Name: Haley and Aldrich

Comment Number: 0432

Excerpt Number: 3

Excerpt Text:

We also concur that environmental professional does not have to do all of the work, just oversee and design the assessment; however, it is EPAs "recommendation" that visual inspections of the subject property and adjoining properties actually be conducted by an environmental professional.

We agree that the person conducting the site visit should have adequate education and experience but we disagree that, in the case of the site visit, five years of experience is required. Although it is only EPA's "recommendation" that the EP conduct the site visit, we feel that in order to adequately follow the AAI rule, you would need to follow EPA's "recommendations". In addition, although the Preamble states that it is just the "recommendation" of EPA that the EP conduct the site visit, under the actual rule in section 312.27 which describes the site visit, it states: "the inquiry of the environmental professional must include..." indicating it is the EP who must conduct the site visit. We propose instead that two years of relevant experience be required for the person conducting the site visit and that the environmental professional be involved in planning for the on-site visual inspection.

Response:

EPA continues to recommend that an individual meeting the definition of an environmental professional conduct the on-site visual inspection. However, based upon input from other commenters and the Agency's concerns regarding the burden that may be placed upon some prospective property owners, the final rule does not require that the on-site visual inspection be performed by an environmental professional. An individual not meeting the definition of environmental professional but under the supervision or responsible charge of an environmental professional may perform the on-site visual inspection of the subject property. In the preamble to the final rule EPA clearly states that the on-site visual inspection does not have to be conducted by the environmental professional.

Commenter Organization Name: Dismukes, James

Comment Number: PM-0127-0012

Excerpt Number: 1

Excerpt Text:

I think there's a conflict in the portion of the documentation that calls for an environmental professional to do the visual site visit, in one paragraph, and in the following paragraph, it calls that the environmental professional should at a minimum be involved in the planning of the site visit.

I think that needs to be clarified, as to whether or not the environmental professional himself or themselves, will be required to do the visual site inspection.

Typically, that's done by a technician type person, and the findings, along with the pictures, are brought back to be reviewed by the environmental professional under the environmental professional's responsible charge.

Requiring a professional engineer, a professional geologist to spend five hours to drive to the site, do the inspection, take the pictures, do a site sketches, it's going to add tremendously to the cost of the Phase I. Your proposed \$41 to \$47 would be more like \$400 to \$600, increasing the cost of the Phase I.

Response:

EPA continues to recommend that an individual meeting the definition of an environmental professional conduct the on-site visual inspection. However, based upon input from other commenters and the Agency's concerns regarding the burden that may be placed upon some prospective property owners, the final rule does not require that the on-site visual inspection be performed by an environmental professional. An individual not meeting the definition of environmental professional but under the supervision or responsible charge of an environmental professional may perform the on-site visual inspection of the subject property. In the preamble to the final rule EPA clearly states that the on-site visual inspection does not have to be conducted by the environmental professional.

3.6.1.2 *Visual Inspection of Very Large Properties*

Commenter Organization Name: R.W. Beck, Inc.

Comment Number: 0247

Excerpt Number: 1

Excerpt Text:

The proposed rule requires that visual on-site inspections include "areas where hazardous substances may be or may have been used, stored, treated, handled, or disposed." Certain Phase I ESAs that we have performed have been conducted for very large properties, on the order of 100,000 acres or more. These properties may be remote, do not usually have restricting physical limitations to visual inspection (except for snow or impassable roads), but are so large as to make close visual inspection impractical, or impossible in terms of the time constraints imposed for providing useful information to the prospective purchaser. Such properties (in the case of timber property) have reasonable access to areas where hazardous substances may have been used (e.g., new or old timber roads to recent or historical large-scale timbering operations). However, roads can be so numerous, that again, visual inspection of all roads (and the adjacent areas where hazardous substances were used in the timbering operation) is neither practical, nor possible in terms of time constraints. Further, it would not be unusual for such a 100,000-acre property, that the legal boundary with adjoining properties can approach 80 or more linear miles, often in remote, or inaccessible areas. Therefore, while "every effort" would be made to conduct the on-site inspection for AAI purposes, it is not clear what level of visual inspection is required for a property of such large proportion, in order to meet the AAI standard. To date, such efforts have been performed via helicopter (which does not allow a close visual inspection), 4-wheel drive access, or walking (to specific areas of concern). The EPA should provide additional clarification of the term "visual inspection", especially at very large properties.

Response:

The final rule, as did the proposed rule, requires that an on-site visual inspection be conducted of the subject property. The on-site visual inspection must include a visual inspection of the areas where hazardous substances may be or may have been used, stored, treated, handled, or disposed. The final rule requires that physical limitations to the visual inspection must be noted, including limitations such as those mentioned by the commenter.

The final rule provides a limited exemption from the on-site visual inspection in the unusual circumstances where the prospective property owner or environmental professional cannot gain access to the property due to physical limitations, remote and inaccessible location, or other inability to obtain access to the property. In such circumstances, a visual inspection must be conducted from an "off-site" vantage point. Documentation of efforts undertaken to obtain access and an explanation of why such efforts were unsuccessful should be noted in the written report.

EPA understands that visual inspections of large properties may be difficult. However, the Agency advises that every effort should be made to visually inspect those areas where hazardous substances may be or may have been used, stored, treated, handled, or disposed. The prospective

property owner must be aware of any releases or threatened releases from these areas to ensure that if he or she purchases the property he or she can comply with the statutorily-imposed continuing obligations to retain protection from CERCLA liability.

3.6.2 Limited Exemption from Conducting an On-Site Inspection of the Subject Property

Commenter Organization Name: Worlund, John

Comment Number: 0256

Excerpt Number: 14

Excerpt Text:

This good faith exception appears to be an extraneous provision for very limited circumstances. It is subject to misinterpretation concerning the satisfaction of good faith effort. It would better be handled as a data gap under the current AAI rule or as a limitation under the current ASTM practice.

Response:

The definition of good faith in the final rule is “the absence of any intention to seek an unfair advantage or to defraud another party; an honest and sincere intention to fulfill one’s obligations in the conduct or transaction concerned.” EPA believes that this sets a high standard for the limited exemption to the requirement to perform an on-site visual inspection of the subject property.

The final rule provides a limited exemption from the on-site visual inspection only in the unusual circumstances where the prospective property owner or environmental professional cannot gain access to the property due to physical limitations, remote and inaccessible location, or other inability to obtain access to the property. In such circumstances, a visual inspection must be conducted from an “off-site” vantage point. Documentation of efforts undertaken to obtain access and an explanation of why such efforts were unsuccessful should be noted in the written report. These requirements are similar to the requirements to document data gaps.

Commenter Organization Name: PIRG

Comment Number: 0258

Excerpt Number: 6

Excerpt Text:

2. Unauthorized Broad and Vague Exceptions to Site Inspection Requirements

Section 223 of the Brownfields law requires that AAI rules must include:

(VI) Visual inspections of the facility and of adjoining properties.

The 97 ASTM standards also requires visual inspections and sets forth detailed criteria on how those inspections are to be conducted. Limitations on site reconnaissance are limited to things like physical barriers, such as bodies of water or pavement.

The proposed final draft AAI rules in section 312.27 contain several different exceptions to the visual inspection requirement. These broad and vague exceptions are an invitation to abuse, and the exceptions include the inability to obtain access to the property provided good faith efforts

have been made to obtain such access. The mere refusal of a voluntary seller does not qualify for the exception-but this provides little protection. The Brownfields law does not authorize this exception, period.

These exceptions cut a hole in one of the most critical requirements in the Brownfields law. The site inspection is often one of the most important ways that the condition of a property can be assessed and information brought to light that may not have come to the attention of regulators. Providing broad and vague exceptions to the site inspection requirement make it much more likely sites will not be inspected. This would allow the seller to receive an inflated purchase price and potentially put those profits out of reach for cleanup costs. At the same time, the unsuspecting purchaser can end up with a contaminated property that may be difficult to manage. This property may be unusable for its planned purpose because of circumstances that may have been easily discoverable upon inspection.

At the same time, despite less than adequate investigation, the purchaser may obtain an exemption from liability without taking steps to address the contamination as is usually required in the Brownfields Law. A purchaser will simply claim it was not reasonable to expect such steps to be taken because they "did not know" about the problem. The result is that the taxpayer is more likely to be left to clean up the site.

Response:

EPA disagrees with the commenter. The final rule provides a very limited exemption from the requirement to perform an on-site visual inspection for unusual circumstances and only after all "good faith" efforts are made to gain access to a property. The limited exemption only exempts the prospective property owner (or grantee) and environmental professional from performing the visual inspection "on-site." In ALL cases, a visual inspection must be performed.

More explicitly, the final rule provides a limited exemption from the on-site visual inspection only in the unusual circumstances where the prospective property owner or environmental professional cannot gain access to the property due to physical limitations, remote and inaccessible location, or other inability to obtain access to the property. In such circumstances, a visual inspection must be conducted from an "off-site" vantage point. Documentation of efforts undertaken to obtain access and an explanation of why such efforts were unsuccessful should be noted in the written report. These requirements are similar to the requirements to document data gaps.

The definition of good faith in the final rule is "the absence of any intention to seek an unfair advantage or to defraud another party; an honest and sincere intention to fulfill one's obligations in the conduct or transaction concerned." EPA believes that this sets a high standard for the limited exemption to the requirement to perform an on-site visual inspection of the subject property.

EPA asserts that the commenter is incorrect in stating that "despite less than adequate investigation, the purchaser may obtain an exemption from liability without taking steps to address the contamination as is usually required in the Brownfields Amendments. The Small

Business Liability Relief and Brownfields Revitalization Act (the “Brownfields Amendments”) establishes many conditions with which a property owner must comply to obtain protection from CERCLA liability. The conduct of all appropriate inquiries is merely an initial, pre-acquisition, requirement for obtaining liability protection. Once a person owns a property, he or she must comply with continuing obligations, including stopping on-going releases and taking appropriate care to reduce exposure to releases and threatened releases of hazardous substances. A person cannot simply claim he or she is not responsible or did not know of the contamination. Innocent landowners and contiguous property owners must establish in a court that they did not know *and had no reason to know* of contamination. Bona fide prospective purchasers may buy property with the knowledge of contamination, but must identify the contamination prior to purchase.

Commenter Organization Name: Rose and Westra

Comment Number: 0320

Excerpt Number: 19

Excerpt Text:

The Pre-Amble states, "The mere refusal of a voluntary seller to provide access to the subject property does not constitute an unusual circumstance." While R&W acknowledges a voluntary seller should readily provide access, if this is not the case, does the EPA expect an EP to trespass and violate the law? R&W requests that the EPA eliminate this statement or provide clarification that trespassing is not the intent of this statement.

Response:

Prospective property owners and grantees should undertake additional steps, whenever possible, to gain access to a property to conduct all appropriate inquiries, if the current property owner initially refuses access. For example, prospective property owners and grantees should seek the assistance of local and state government officials.

Commenter Organization Name: Congressmen Dingell, Boxer, et al

Comment Number: 0332

Excerpt Number: 5

Excerpt Text:

Section 101(35)(B) of CERCLA as amended by section 223 of the Brownfields law also requires that the standards and practices established in the AAI rule shall include visual inspections of the facility and the adjoining properties. Under Section 312.27 of the proposed AAI rule, EPA proposes unauthorized and ill-advised exemptions to this requirement.

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

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

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

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

Response:

The final rule, as did the proposed rule, provides no exemption from the visual inspection requirement. In very limited circumstances, the final rule provides an exemption from the requirement to conduct the visual inspection on-site. The final rule provides a limited exemption from the on-site visual inspection only in the unusual circumstances where the prospective property owner or environmental professional cannot gain access to the property due to physical limitations, remote and inaccessible location, or other inability to obtain access to the property. In such circumstances, a visual inspection must be conducted from an "off-site" vantage point. Documentation of efforts undertaken to obtain access and an explanation of why such efforts were unsuccessful should be noted in the written report. These requirements are similar to the requirements to document data gaps.

The commenter is incorrect in asserting that the conduct of all appropriate inquiries (with or without an on-site visual inspection) results in waiver from liability. The Small Business Liability Relief and Brownfields Revitalization Act (the "Brownfields Amendments") establishes

many conditions with which a property owner must comply to obtain protection from CERCLA liability. The conduct of all appropriate inquiries is merely an initial, pre-acquisition, requirement for obtaining liability protection. Once a person owns a property, he or she must comply with continuing obligations, including stopping on-going releases and taking appropriate care to reduce exposure to releases and threatened releases of hazardous substances. A person cannot simply claim he or she is not responsible or did not know of the contamination. Innocent landowners and contiguous property owners must establish in a court that they did not know *and had no reason to know* of contamination. Bona fide prospective purchasers may buy property with the knowledge of contamination, but must identify the contamination prior to purchase. In addition, the Brownfields Amendments provides no liability protections for sellers of contaminated properties.

Commenter Organization Name: USWAG

Comment Number: 0367

Excerpt Number: 10

Excerpt Text:

Inability to Gain Access to the Subject Property to Conduct Visual Inspection of the Subject Property Prior to Acquisition. We are generally in agreement with EPA's resolution of the unusual circumstance where the purchaser is unable to gain access to the property prior to acquisition. See proposed section 312.27(c); 69 Fed. Reg. at 52564-65. US WAG believes that once the purchaser has made reasonable efforts to gain access, embodied in the phrase "good faith (as defined in § 312.10) efforts", the purchaser should not lose his eligibility for CERCLA liability protections.

Response:

If, after taking all good faith efforts, a prospective landowner or grantee cannot gain access to a property, then the environmental professional must conduct the visual inspection from another vantage point. In addition, documentation of efforts undertaken to obtain access and an explanation of why such efforts were unsuccessful must be noted in the written report. Also, if data gaps result because access could not be gained, the data gaps and their significance must be noted in the written report. EPA notes that the mere failure to gain access to a property to conduct an on-site visual inspection should not result in a purchaser (or grantee) losing his or her eligibility for the CERCLA liability protections, as long as he or she is in compliance with the other statutory requirements for obtaining protection from liability.

Commenter Organization Name: Intertox

Comment Number: 0396

Excerpt Number: 15

Excerpt Text:

-The proposed requirements for conducting visual inspections of the subject property and adjoining properties, including the limited exemption from conducting an on-site inspection when good faith efforts result in an inability to obtain access to a property.

--The proposed requirement echoes existing standards for conducting a visual reconnaissance of a subject property. However, Intertox disagrees that the onsite inspection can provide the best source of information. At best the onsite inspection reveals indications of environmental conditions on a specific day and point in time and may, provided the environmental professional makes inquiries, reveal documents of interest. But more generally, the on-site inspection is a "snap-shot-in-time" and must be supplemented with historical resources such as fire insurance maps, city directories, and aerial photographs. It is critical that good faith efforts be made to visually inspect the subject property, however, Intertox recognizes certain limitations (i.e., weather, violent animals, and disgruntled property owners, operators, and occupants) may prevent this. Therefore, we disagree that the mere refusal of a property owner does not constitute an unusual circumstance. It is our experience that the personal safety of the assessors is more important than the outcome of the all appropriate inquiry and we support refusal to allow entry as an unusual circumstance.

Response:

Prospective property owners and grantees should undertake additional steps, whenever possible, to gain access to a property to conduct all appropriate inquiries, if the current property owner initially refuses access. For example, prospective property owners and grantees should seek the assistance of local and state government officials.

Commenter Organization Name: Sierra Club & NET

Comment Number: 0419

Excerpt Number: 3

Excerpt Text:

--The Proposed AAI Rule Contains Loopholes That Allow Site Inspections to Be Avoided Altogether Before Sale Or Transfer Of A Property

Section 312.27 of the proposed AAI rule contains several vague exceptions to the visual inspection requirements in Section 223 of the Brownfields Law. The Brownfields Law contains no such exceptions. Visual inspection is at the very heart of any environmental inquiry. Without a site inspection by qualified personnel, environmental problems can remain undiscovered - allowing the seller to get a higher purchase price and potentially keeping the purchaser in the dark on the condition of a property which may grow worse overtime.

The proposed AAI rule will encourage purchasers to argue they have no duty to mitigate contamination that is not documented in the AAI inquiry while retaining a liability exemption and making it less likely that contamination will be identified or mitigated by the purchaser as anticipated by the Brownfields Law.

Response:

The final rule, as did the proposed rule, provides no exemption from the visual inspection requirement. In very limited circumstances, the final rule provides an exemption from the requirement to conduct the visual inspection on-site. The final rule provides a limited exemption from the on-site visual inspection only in the unusual circumstances where the prospective

property owner or environmental professional cannot gain access to the property due to physical limitations, remote and inaccessible location, or other inability to obtain access to the property. In such circumstances, a visual inspection must be conducted from an “off-site” vantage point. Documentation of efforts undertaken to obtain access and an explanation of why such efforts were unsuccessful should be noted in the written report. These requirements are similar to the requirements to document data gaps.

The commenter is incorrect in asserting that the conduct of all appropriate inquiries (with or without an on-site visual inspection) results in encouraging purchasers to argue they have no duty to mitigate contamination while retaining a liability exemption. Purchasers must stop on-going releases regardless of whether they are documented in the all appropriate inquiries report. The Small Business Liability Relief and Brownfields Revitalization Act (the “Brownfields Amendments”) establishes many conditions with which a property owner must comply to obtain protection from CERCLA liability. The conduct of all appropriate inquiries is merely an initial, pre-acquisition, requirement for obtaining liability protection. Once a person owns a property, he or she must comply with continuing obligations, including stopping on-going releases and taking appropriate care to reduce exposure to releases and threatened releases of hazardous substances. A person cannot simply claim he or she is not responsible or did not know of the contamination. Innocent landowners and contiguous property owners must establish in a court that they did not know *and had no reason to know* of contamination. Bona fide prospective purchasers may buy property with the knowledge of contamination, but must identify the contamination prior to purchase. In addition, the Brownfields Amendments provides no liability protections for sellers of contaminated properties.

3.6.2.1 *Physical Limitations*

Commenter Organization Name: Beaver, Christine

Comment Number: 0074

Excerpt Number: 1

Excerpt Text:

With regard to the proposed requirement for visual inspection of the subject property, it should be noted that physical limitations could include a building that is in structurally poor condition making it unsafe for the environmental professional to gain access (as per OSHA regulations). It is my opinion that the exemption from conducting on site inspection when good faith efforts result in inability to obtain access to the property should also apply to a property where the building is in structurally poor condition.

Response:

The final rule does not require environmental professionals to enter unsafe buildings. If an environmental professional concludes that the on-site visual inspection cannot be completed because of unsafe conditions, the environmental professional should document the limitations and the data gaps associated with the limited access. In addition, the significance of any data gaps on the environmental professional's ability to render an opinion regarding conditions indicative of releases or threatened releases of hazardous substances must be noted in the written report.

Commenter Organization Name: Westward Environmental

Comment Number: 0429

Excerpt Number: 4

Excerpt Text:

Regarding the heading of What Are the Proposed Requirements for Visual Inspections of the Subject Property and Adjoining Properties? on page 52564 of the proposed rule:

-it states "...on-site inspection of the subject property be conducted in all but a few very limited cases and that physical limitations...be documented."

-If the EPA has ideas if which properties fall into the "very limited cases" they should be listed to avoid suppositions.

-Regarding the issue of documenting physical limitations (such as snow cover, locked doors, flooding, etc.), how do these limitations come into play with the statement that "[I, We] have developed and performed the all appropriate inquiries in conformance with the standards and practices set forth in 40 CFR Part 312." Notwithstanding the economic considerations, would not a prudent EP make another attempt to overcome these physical limitations?

Response:

Examples of limited circumstances that could result in an ability to claim the exemption from

conducting an on-site visual inspection are provided in the final rule, and were provided in the proposed rule. These limited circumstances include physical limitations, remote and inaccessible location, or other inability to obtain access to the property.

When an environmental professional signs a written report indicating "[I, We] have developed and performed the all appropriate inquiries in conformance with the standards and practices set forth in 40 CFR Part 312," conformance includes conforming with any applicable exemptions and the conditions for qualifying for the exemptions.

EPA agrees with the commenter that it would be prudent for an environmental professional to make more than one attempt to gain access to a property to conduct a visual on-site inspection.

3.6.3 Visual Inspection of Adjoining Properties

Commenter Organization Name: PBS & J

Comment Number: 0270

Excerpt Number: 4

Excerpt Text:

Adjacent property inspections should only be performed from inside the boundary of subject tract or public rights-of-way. Visual inspection of adjacent properties can be hindered by those landowners not being willing to grant access. Additionally, this can become extremely expensive because it is time consuming, both in the field and in the office, report writing.

Response:

The final rule does not require the visual inspection of adjoining properties to be conducted on-site. Inspections of adjoining properties may be conducted from off-site vantage points, including the property boundaries and public rights-of-way.

Commenter Organization Name: FAA

Comment Number: 0334

Excerpt Number: 22

Excerpt Text:

VISUAL INSPECTIONS OF NEIGHBORING PROPERTIES

1) FAA agrees that allowing visual inspections of neighboring properties from the shared property line or public right-of-ways is a good idea. Requiring an on-site inspection of adjoining properties is a very bad idea - especially at potentially dangerous property (e.g., bad neighborhoods, hostile neighbors, construction sites).

Response:

The statute (at §101(35)(B)(iii)(VI)) clearly requires that all appropriate inquiries include inspections of adjoining properties. The final rule does not require the visual inspection of adjoining properties to be conducted on-site. Inspections of adjoining properties may be conducted from off-site vantage points, including the property boundaries and public rights-of-way.

Commenter Organization Name: McKerr, Thomas

Comment Number: 0347

Excerpt Number: 16

Excerpt Text:

-Adjoining property: Why does it have to be a public thoroughfare? Railroads are not public thoroughfares. Delete "public" or change to "public and private thoroughfares."

Response:

“Public” rights-of-way or thoroughfares were provided as an example of an alternative vantage point. Environmental professionals may know of other vantage points and may make use of them.

Commenter Organization Name: Greenlining Institute

Comment Number: 0354

Excerpt Number: 15

Excerpt Text:

-Visual Inspections of Adjoining Properties

The criteria provided by Congress in the Brownfields Revitalization Act 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. In the proposed rule, the committee 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. The committee also 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 see no reason why existing ASTM practice and the wording of ASTM section 8.4.1.3 does not fulfill the statutory criteria of including visual inspections of adjoining properties.

To the extent EPA desires additional comfort 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.

Response:

EPA appreciates the commenter’s input. The statute (at §101(35)(B)(iii)(VI)) clearly requires that all appropriate inquiries include inspections of adjoining properties. EPA’s point, in the preamble to the proposed rule, was that the ASTM E1527-2000 does not explicitly require the inspection of adjoining properties in all circumstances.

Commenter Organization Name: USWAG

Comment Number: 0367

Excerpt Number: 6

Excerpt Text:

EPA is mistaken when it states that "ASTM E-1527-2000 does not mandate visual inspections of adjoining properties." Ibid. Section 8.4.1.3 of the ASTM standard requires visual inspections of adjoining properties. In addition, section 8.4.1.5 requires identification of property uses beyond adjoining properties if in the environmental professional's judgment the uses are likely to

indicate recognized environmental conditions on the subject property. The standard also requires that 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." ASTM E1527-00 § 8.4.1.4.

Response:

EPA appreciates the commenter's input. The statute (at §101(35)(B)(iii)(VI)) clearly requires that all appropriate inquiries include inspections of adjoining properties. EPA's point, in the preamble to the proposed rule, was that the ASTM E1527-2000 does not explicitly require the inspection of adjoining properties in all circumstances.

Commenter Organization Name: SCANA

Comment Number: 0373

Excerpt Number: 10

Excerpt Text:

The current wording requires a visual inspection of adjoining properties, from the subject property line, public rights-of-way, or other vantage point (such as aerial photography). The Agency is urged to consider the following points:

There is potential for trespass to occur in an effort to meet this requirement, regardless of the Agency's intentions

Visibility can be obstructed at available vantage points, due to woodlands, topographic features, and size of the adjoining property

Aerial photography is frequently of insufficient detail to allow proper observation of the adjoining property to meet the intent, and is typically only useful in confirming likely conditions

The size of the adjoining property could dictate an unusually time consuming process of trying to guess where hazardous substances may have been utilized/stored on an aerial photograph - this approach has very little benefit for the effort involved and could likely raise needless questions rather than establishing a better picture of the adjoining property.

Based on these facts, it is suggested that the Agency retain this as a suggested approach (rather than required), and allow the environmental professional the discretion to make appropriate determinations for the performance of the inquiry. We do concur that past and present uses of adjoining properties should always be considered in the AAI process. We disagree with the Agency that specific standards are necessary for an environmental professional to complete the inquiry in this regard. As stated previously in our comments, please note that the environmental professional and the purchaser have the burden of, and the potential liability from, performing AAIs.

Response:

The statute (at §101(35)(B)(iii)(VI)) clearly requires that all appropriate inquiries include inspections of adjoining properties. The final rule does not require the visual inspection of adjoining properties to be conducted on-site. Inspections of adjoining properties may be conducted from off-site vantage points, including the property boundaries and public rights-of-

way. If, due to circumstances beyond the control of the environmental professional, an inspection of adjoining properties cannot be completed, the environmental professional should consider whether or not data gaps will result. If the inability to visually inspect adjoining properties results in data gaps, they should be noted in the written report, as well as the significance of such data gaps upon the environmental professional's ability to render an opinion regarding conditions indicative of releases or threatened releases at the property.

Commenter Organization Name: NPCA

Comment Number: 0403

Excerpt Number: 4

Other Sections: NEW - 3.1.2 - Interview of the past owners, occupants, employees, and/or managers of the subject property

Excerpt Text:

The Proposed Rule notably increases the content requirements under Phase I ESAs. An environmental professional (EP) must interview past owners, operators and occupants of the property, not just the current owner, and if the property is abandoned, the EP must interview owners or occupants of adjacent properties. What if the adjacent property is abandoned? How far must the EP go to track down past owners, operators and occupants? How far back in a line of owners, operators and occupants must the EP go?

Response:

Prospective property owners, grantees, and environmental professionals must complete the all appropriate inquiries activities in compliance with the provisions of the final rule while seeking to meet the objectives and performance factors of §312.20(e) and (f). Past owners and occupants of the subject property must be interviewed if necessary to meet the objectives and performance factors.

If all properties neighboring an abandoned property are abandoned and there is no chance of the environmental professional locating a neighboring property owner, the inability to fulfill the requirement should be noted in the final rule and all data gaps that result from the environmental professional not being able to either interview an owner or operator of the property or interview a neighboring property owner and the significance of all data gaps should be noted in the written report.

Commenter Organization Name: NPCA

Comment Number: 0403

Excerpt Number: 5

Excerpt Text:

In addition, the EP must visually inspect not only the subject property, but adjacent properties as well. How is this to be accomplished if physical or visual access to the adjacent properties is restricted? The inability of an EP to find such persons or gain such access must be identified in the AAI report as a data gap.

Response:

Prospective property owners, grantees, and environmental professionals must complete the all appropriate inquiries activities in compliance with the provisions of the final rule while seeking to meet the objectives and performance factors of §312.20(e) and (f).

If there is no opportunity to view adjacent properties to conduct a visual inspection, the obstacles should be noted in the written report and all data gaps that result and their significance also should be noted.

If all properties neighboring an abandoned property are abandoned and there is no chance of the environmental professional locating a neighboring property owner, the inability to fulfill the requirement should be noted in the final rule and all data gaps that result from the environmental professional not being able to either interview an owner or operator of the property or interview a neighboring property owner and the significance of all data gaps should be noted in the written report.

Commenter Organization Name: Thornhill, James

Comment Number: 0414

Excerpt Number: 3

Excerpt Text:

Visual inspection of adjoining properties should be limited as in Section 312.27(a)(2) of the proposed rule, and should not include even a good faith effort requirement to conduct on site visual inspections of adjoining properties. The proposed rule requests comments on this component on page 52,565 of the preamble. Physically inspecting adjoining properties would require increased time and expense to negotiate terms of access for multiple sites. This is simply impractical in completing due diligence in a timely manner.

Use of aerial photography to satisfy the review of adjoining properties needs clarification in Section 312.37(a)(2). The rule should be clarified to provide that recent aerial photography (e.g. last 2 to 5 years) could be used to satisfy the component. As written, it is unclear whether the prospective purchaser is to have the property flown to obtain current aerial photographs.

Response:

The final rule does not require the visual inspection of adjoining properties to be conducted on-site. The use of aerial photography is allowed as long as the use of the photography allows the environmental professional to perform the inquiries in compliance with the objectives and performance factors of §312.20(e) and (f).

Commenter Organization Name: Georgia Power

Comment Number: 0423

Excerpt Number: 12

Excerpt Text:

In §312.27 "Visual inspections of the facility and of adjoining properties" (a) (2), the

requirement for visual inspections of adjoining properties to include "...a visual inspection of areas where hazardous substances may be or may have been stored, treated, handled, or disposed" is often not possible to accomplish without obtaining access from the adjoining property owners. We recommend striking this concept entirely.

Rationale:

-Because it is not EPA's intent to create a regulation that requires the EP to attempt to gain access to adjoining properties in order to inspect areas of where hazardous substances may be or may have been stored, treated, handled, or disposed, such a requirement will often result in the documentation of a data gap. Further, how would the EP be able to determine which areas within adjacent properties contain or may have contained hazardous substances without conducting interviews or other intrusive analyses of the adjacent properties (e.g., an area within a storage shed on an adjacent property could not be visually inspected from off site)?

-This requirement seems to be a major deviation from current ASTM practices and could result in a significant cost increase per assessment.

Response:

The statute (at §101(35)(B)(iii)(VI)) clearly requires that all appropriate inquiries include inspections of adjoining properties. The final rule does not require the visual inspection of adjoining properties to be conducted on-site. Inspections of adjoining properties may be conducted from off-site vantage points, including the property boundaries and public rights-of-way. If, due to circumstances beyond the control of the environmental professional, an inspection of adjoining properties cannot be completed, the environmental professional should consider whether or not data gaps will result. If the inability to visually inspect adjoining properties results in data gaps, they should be noted in the written report, as well as the significance of such data gaps upon the environmental professional's ability to render an opinion regarding conditions indicative of releases or threatened releases at the property.

3.7 Inclusion of Specialized Knowledge or Experience

Commenter Organization Name: Koch, Donald

Comment Number: 0234

Excerpt Number: 1

Other Sections: NEW - 3.4 - Recorded environmental cleanup liens searches
NEW - 3.8 - Considering the relationship of the purchase price to the value of the property
NEW - 3.9 - Considering commonly known or reasonably ascertainable information about the property

Excerpt Text:

I would like to comment on proposed 40 CFR 312.22. 40 CFR 312.21 defines the results of an inquiry by an environmental professional. 40 CFR 312.22 defines four additional requirements of an all appropriate inquiry and requires that this information must be provided to the environmental professional responsible for the inquiry. The mandatory provision of these criteria is inappropriate. The four criteria of an all appropriate inquiry mentioned in proposed 40 CFR 312.22 do not require the judgement of an environmental professional to interpret.

I recommend the following change in 40 CFR 312.22.

312.11 Additional Inquiries

(a)-Persons identified under 312.1(b) may provide the following information to the environmental responsible for conducting the activities listed in 312.21.

Response:

EPA agrees with the commenter. The final rule does not require the prospective landowner or grantee to provide the results of inquiries for which he or she is responsible to the environmental professional.

Commenter Organization Name: Koch, Donald

Comment Number: 0234

Excerpt Number: 2

Excerpt Text:

There are immense practical difficulties implementing the mandatory provision of "specialized knowledge or experience of the defendant" (proposed 312.22 (a)(2)) to the environmental professional. What should I do? Give my client a short test on environmental science. Claim my client is dumber than dirt to improve their chances of being found an "innocent landowner". I would interview my client to find out what they know about the property and include the results of this interview in my report but that interview should not be the basis of the "innocent landowner" defense. The environmental professional has no way of ascertaining the truthfulness of what they are being told by their client (I am assuming that the purchaser is the client of the environmental professional, which is typically, but not always, the case). The statute (CERCLA 101(35)(B)(iii)) requires that the "Specialized knowledge or experience on the part of the defendant (101(35)(B)(iii)(VII))" is an essential part of the all appropriate inquiry criteria, but

the statute does not mandate that this criteria is part of the report of the environmental professional. In fact, "The results of an inquiry by an environmental professional (101(35)(B)(iii)(I))" is listed at the same level as the "Specialized knowledge or experience on the part of the defendant (101(35)(B)(iii)(VII))". There was clearly no statutory mandate to include this criterion in the report of the environmental professional.

Response:

The final rule does not require the prospective landowner or grantee to provide information regarding his or her specialized knowledge to the environmental professional. However, any specialized knowledge held by the prospective landowner, grantee, and environmental professional remains relevant to the all appropriate inquiries investigation.

Commenter Organization Name: Anthony, Tony, et.al.

Comment Number: 0292

Excerpt Number: 12

Excerpt Text:

312.28 Specialized knowledge or experience on the part of the defendant

We support this section.

Response:

EPA thanks the commenter for the stated support of this provision.

Commenter Organization Name: Intertox

Comment Number: 0396

Excerpt Number: 16

Excerpt Text:

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

--Specialized knowledge or experience is one of the things that separate the marketability of one environmental professional over another. Their ability to tout special knowledge or experience means that the all appropriate inquiry playing field is not level. Therefore, we support the use of specialized knowledge and/or experience by the environmental professional provided that it is documented in the all appropriate inquiry report.

Response:

EPA thanks the commenter for the stated support of this provision.

Commenter Organization Name: Rybak, John Thomas

Comment Number: 0412

Excerpt Number: 8

Excerpt Text:

Prospective purchaser governing including of specialized knowledge.

a) Page # 52580

b)View: This should not be part of a Phase I report. The EP should not be required to obtain specialized knowledge from the purchaser and/or prospective purchaser, as their communications may be limited or non-existent with the purchaser.

c) Assumptions: The purchaser should be willing to provide any information pertaining to a site that could be negatively affected. They should not withhold specialized knowledge. However the EP cannot force them to reveal such information, and therefore this should not be a performance standard of the AAI Phase I report.

d) Burden: Including this section would create an unreasonable burden on the EP, in an area they have no expertise, and in a situation they may not have complete information. It is not reasonable to require the EP to comment on this topic in their Phase I process.

e) Alternative: AAI is intended to preserve certain CERCLA defenses of a purchaser. The purchaser should be educated that specialized knowledge is one consideration in the application of these defenses. The Phase I 'could' have a narrative paragraph in the Executive Summary discussion the Purchaser's responsibility to seek legal counsel to preserve their CERCLA defenses in the event Purchaser Specialized Knowledge would indicate a potential concern.

Response:

The final rule does not require the prospective landowner or grantee to provide information regarding his or her specialized knowledge to the environmental professional. However, any specialized knowledge held by the prospective landowner, grantee, and environmental professional remains relevant to the all appropriate inquiries investigation.

Commenter Organization Name: Georgia Power

Comment Number: 0423

Excerpt Number: 13

Other Sections: NEW - 3.9 - Considering commonly known or reasonably ascertainable information about the property
NEW - 3.10 - Considering the degree of obviousness of the presence or likely presence of contamination at the property

Excerpt Text:

§312.28, §312.30 and §312.31, the term "person"

Please consider including the need to define the term "Persons" in §312.1 (b)(1), should be further defined, either in the preamble or in §312.10 Definitions. Under §312.28, §312.30 and §312.31, the term "person" should not include every individual in a firm, corporation, association, partnership, consortium, joint venture, commercial entity, United States Government, State, Tribe, municipality, commission, political subdivision of a State, or any

interstate body, but should be limited to those persons directly involved with conducting the AAI for the purpose of §312.28, §312.30 and §312.31. For example, specialized knowledge or experience cannot mean the specialized knowledge or experience of every employee in a corporation of 25,000 employees. Clarifying language and instructive examples in the preamble will ensure that the applicability of these sections is practical.

Response:

The term “person” is defined in CERCLA at section 101(21) as “an individual, firm, corporation, association, partnership, consortium, joint venture, commercial entity, United States Government, State, municipality, commission, political subdivision of a State, or any interstate body.”

It is difficult for EPA to predict how a court would interpret the term “person” or who a court may define as “the defendant” in cases involving a corporation.

3.7.1 Specialized Knowledge of the Current Owner(s) of the Subject Property

Commenter Organization Name: Tweedale, Tony

Comment Number: 0045

Excerpt Number: 2

Excerpt Text:

Proposed Sec. 312.29, Requirements for Inclusion of Specialized Knowledge. I am a CERCLA law neophyte, but it is worth my asking you why your preamble (and therefore the rule language) doesn't seem to require the inclusion of any specialized knowledge on the part of the current owner(s) of a property.

Response:

The prospective purchaser or the grantee is the party who would be seeking liability protection and who would be conducting the all appropriate inquiries investigation.

Commenter Organization Name: NSPE

Comment Number: 0230

Excerpt Number: 13

Excerpt Text:

The proposed provisions governing the inclusion of specialized knowledge or experience on the part of the purchaser and the environmental professional (page 52566).

NSPE agrees with EPA's perspective as it relates to the specialized knowledge of the defendant. In this rule, it appears that the prospective purchaser has an affirmative duty to update the inquiries and include any relevant specialized knowledge held by the current purchaser and the environmental professional. However, it seems somewhat inconsistent for the innocent purchaser defense to be made available to some, but not others, even if both parties conducted the same research under the same conditions and with the same degree of diligence. Holding a purchaser to a higher standard just because the purchaser may, or may not, have some specialized knowledge would seem to be counterintuitive as it pertains to CERCLA liability. If a party, who had no role in the creation of the environmental situation, possesses some specialized and valuable knowledge that is not in the possession of another, it would seem appropriate for that individual to be able to use that knowledge for his benefit without penalty or liability. On the contrary, if another person possesses little, if any, specialized knowledge and performed all appropriate inquiries, that person would be held to a lower standard of care. While it may seem unfair to have a single objective standard, regardless of specialized knowledge, it likewise seems incongruous to have inconsistencies in the standards as they apply to prospective purchasers' knowledge. Some uniformity is needed and the information required under all appropriate inquiries is adequate without application of a subjective knowledge based standard.

Response:

The final rule requires that the prospective purchaser or grantee and the environmental professional account for their specialized knowledge of the subject property, the area

surrounding the subject property, the conditions of adjoining properties, and any other experience relevant to the inquiry, for the purpose of identifying conditions indicative of releases or threatened releases at the subject property. If an individual has specialized knowledge about the circumstances of a property that should lead him or her to conclude that there may be releases or threatened releases at or to the property, such information should not be ignored by the parties conducting the inquiry. If the parties do not have any specialized knowledge regarding the property or its potential conditions, they obviously could not apply such knowledge.

In the SARA amendments to Superfund in 1986, Congress directed courts evaluating a defendant's showing of all appropriate inquiries to take into account, among other things, "any specialized knowledge or experience on the part of the defendant." Nothing in today's rule changes the nature or intent of this requirement as it has existed in the statute since 1986. As provided in the preamble to the proposed rule, existing case law related to the innocent landowner defense shows that courts appear to have interpreted the "specialized knowledge" factor to mean that the professional or personal experience of the defendant may be taken into account when analyzing whether the defendant made all appropriate inquiries.

3.8 Considering the Relationship of the Purchase Price to the Value of the Property

Commenter Organization Name: Appraisal Institute

Comment Number: 0212

Excerpt Number: 3

Excerpt Text:

Concerns Regarding Appraisal Costs Halting Brownfield Development

Representatives of the Negotiated Rulemaking Committee have stated that they feared hundreds of thousands of appraisals would be needed and would "halt" brownfield redevelopment. We disagree with this position.

The vast majority of commercial real estate transactions utilize financing. In virtually all lending transactions, an appraisal is being prepared to substantiate the loan while the All Appropriate Inquiry is being conducted. Rather than avoid the appraisal issue, we suggest the EPA utilize this opportunity to encourage a link between environmental issues and valuation issues. This is a reasonable and productive approach to protecting the public good.

Underwriters at financial institutions tell our members that they often review appraisals disclaiming any environmental issues; while at the same time they review other reports describing contamination issues at the property. If the lender were to simply subtract remediation costs from the "unimpaired value," the true market value impact of environmental conditions may not be accurately addressed. An environmental appraisal considers not only remediation costs, but also ongoing costs, responsibilities and stigma (market resistance).

Competent appraisers understand the valuation effects of environmental issues and can render opinions of value for the property as if "unimpaired" as well as an opinion of value in consideration of the environmental impairment. USPAP actually provides that the "impaired" value is the actual base value. The "unimpaired" value must invoke a hypothetical condition, meaning the state of appraised condition is not true, but is assumed to be true for the appraisal. This kind of information can assist prospective purchasers in making the market value/purchase price determination.

Linkage of the appraisal being prepared for other purposes to All Appropriate Inquiry is simple, reasonable and cost efficient. Generally, only a slight change in the scope of work would be needed to effect this change. Our organizations have a large body of knowledge on this subject and can help establish a coordinated solution. Our organizations stand committed to assist you in this endeavor, and we recommend the EPA encourage this inter-communication in its Final Rule.

Response:

Please note that the negotiated rulemaking committee was assembled from a diverse group of stakeholders. The Agency went to great lengths to be inclusive in this process so industry professionals, environmental justice groups, and federal government partners could all be adequately represented and have voices in this rulemaking process. Further, the recommendation of the rulemaking committee was to not require that an appraisal be performed as part of all

appropriate inquiries. However an appraisal conducted for the subject property may include valuable information regarding the market value and conditions of the property that contribute to the all appropriate inquiries investigation. The evaluation of the relationship between the purchase price and the fair market value of the property, if it were not contaminated, is left to the discretion of the prospective property owner or grantee. The evaluation may or may not need in depth research or benefit from a formal appraisal, depending on the property.

EPA agrees with commenter that there is an opportunity to coordinate appraisal activities in a better organized fashion. It is the Agency's hope that the appraisal industry will be recognized by environmental professionals and owners/grantees of property as valuable partners in many instances. However, we reiterate, using an appraisal is within the discretion of the prospective property owner or grantee and in some instances, the environmental professional, where this duty has been delegated by the owner and accepted by the EP.

Commenter Organization Name: Koch, Donald

Comment Number: 0234

Excerpt Number: 1

Other Sections: NEW - 3.4 - Recorded environmental cleanup liens searches
NEW - 3.7 - Inclusion of specialized knowledge or experience
NEW - 3.9 - Considering commonly known or reasonably ascertainable information about the property

Excerpt Text:

I would like to comment on proposed 40 CFR 312.22. 40 CFR 312.21 defines the results of an inquiry by an environmental professional. 40 CFR 312.22 defines four additional requirements of an all appropriate inquiry and requires that this information must be provided to the environmental professional responsible for the inquiry. The mandatory provision of these criteria is inappropriate. The four criteria of an all appropriate inquiry mentioned in proposed 40 CFR 312.22 do not require the judgement of an environmental professional to interpret.

I recommend the following change in 40 CFR 312.22.

312.11 Additional Inquiries

(a)-Persons identified under 312.1(b) may provide the following information to the environmental responsible for conducting the activities listed in 312.21.

Response:

The Agency agrees with the commenter. The final rule does not require the prospective landowner or grantee to provide the results of inquiries for which he or she is responsible to the environmental professional.

Commenter Organization Name: Maloy, Richard

Comment Number: 0255

Excerpt Number: 2

Excerpt Text:

Concerns Regarding Appraisal Costs Halting Brownfield Development

Representatives of the Negotiated Rulemaking Committee have stated that they feared hundreds of thousands of appraisals would be needed and would "half Brownfield redevelopment. We believe that this could not be further than the truth.

The vast majority of commercial real estate transactions utilize financing. In virtually all lending transactions, an appraisal is being prepared to substantiate the loan, at the same time the all appropriate inquiry is being conducted. Rather than avoid the appraisal issue, we suggest the EPA utilize this opportunity to encourage a link between environmental issues and valuation issues. This is a reasonable and productive approach to protecting the public good.

Lending underwriters tell me that they often review appraisals disclaiming any environmental issues; while at the same time they review other reports describing contamination issues at the property when an appraisal is being performed on a property with contamination and the appraisal has disclaimed any environmental issues, the fails to consider important details of remediation costs, ongoing costs and stigma (market resistance).

In contrast, competent appraisers understand the valuation effects of environmental issues and can render opinions of value for the property as if "unimpaired" as well as an opinion of value in consideration of the environmental impairment. The Uniform Standards of Professional Appraisal Practice actually provides that the "impaired" value is the actual value. The "unimpaired" value must invoke the hypothetical condition rule, meaning the state of appraised condition is not true, but is assumed to be true for the appraisal.

Linkage of the appraisal being prepared to all appropriate inquiry is simple, reasonable and cost efficient. Generally, only a slight change in the scope of work would be needed to affect this change.

The Appraisal Institute is the most respected depository of knowledge on this subject and can help establish a coordinated solution.

Response:

Please see response to comment 0212, excerpt 3.

Commenter Organization Name: FAA

Comment Number: 0334

Excerpt Number: 23

Excerpt Text:

PROPERTY VALUE DETERMINATION

1) The requirement to analyze the significance of the relationship of the purchase price to the value of the property if the property weren't contaminated is a questionable parameter in the overall data analysis. If the subject property has a lower price than similar properties nearby, should the EP automatically assume that the property is contaminated? Similarly, should the EP or purchaser take a slightly higher price as an indication that the property must be clean and

therefore the investigations may be less rigorous? FAA believes that the regulations should not allow the purchase price of the property to enter into the EPs considerations until the EP is satisfied that AAI do not reveal a threatened or actual release at the subject property.

Response:

A great strength of the performance based inquiry is its flexibility. The comparison of the purchase price and the fair market value of a property provides a flexible indicator of possible environmental contamination. EPA understands that a discrepancy is not determinative, however, it may indicate that further investigation is necessary.

Commenter Organization Name: Greenlining Institute

Comment Number: 0354

Excerpt Number: 9

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

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:

“Good commercial and customary standards and practices” are not exclusive to the ASTM E1527 standard. That is to say that there is not just one method that satisfies this standard. However, that is not the only charge of Congress. In addition to implementing such standards and practices, EPA must comply with Congressional intent which is more consistent with eliminating the limiting nature of the ASTM standard’s “actual knowledge” criteria. Again, the Agency went to every effort to include industry leaders in its development of the proposed rule, in part to allow EPA to rely on professional’s judgment regarding “good commercial and customary standards and practices.” EPA reiterates that the requirement in the final rule to consider the relationship of the purchase price of the property to the fair market value of the property, if the property was not contaminated, is consistent with the statute in that it is not limited to “actual knowledge,” and some amount of research or evaluation may be necessary to meet the requirement. However, the activities and level of effort necessary to evaluate the relationship of the purchase price to the fair market value of the property, if it were not contaminated, are not beyond good commercial and customary practice. Many prospective property owners conduct property appraisals or evaluate the market value of a property by way of another commercial or customary practice. The ASTM E1527 standard is not the only commercial practice that would meet the Congressional standard.

Commenter Organization Name: USWAG

Comment Number: 0367

Excerpt Number: 7

Excerpt Text:

EPA faults the ASTM standard for limiting the inquiry of the "relationship of the purchase price to the value of the property, if the property was not contaminated" to actual knowledge on the part of the property owner. 69 Fed. Reg. at 52575 (quoting CERCLA § 101(35)(B)(iii)(IV) (internal quotes omitted). Proposed section 312.29(a) simply requires the property owner to "consider whether the purchase price of the subject property reasonably reflects the fair market value of the property, if the property is not contaminated." The regulatory obligation to "consider" the relationship of the purchase price to the value of the property cannot be achieved in the absence of "actual knowledge" of this relationship. EPA's criticism of the ASTM standard appears to be an unreasonable stretch. Nevertheless, we understand that the ASTM task group has proposed to modify the language in a way that removes the "actual knowledge" phrase. If this language change wins approval in the ASTM consensus process, that should remove EPA's objection to this provision.

Response:

Although EPA found ASTM E1527-2000 noncompliant with Congress’ mandate to establish All Appropriate Inquiries, 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: Monger, Chris

Comment Number: 0448

Excerpt Number: 1

Excerpt Text:

Reducing the rqmts to eliminate appraisals is probably a good practice in many instances.

However, complicated and high value impact situations should still involve an appraisal to establish a good framework and to greatly reduce potential for fraud and other questionable practices.

Response:

EPA agrees that there are instances, especially in transactions that are complicated and consist of high value property, where an appraisal is very appropriate. This tool is always available and the Agency anticipates that it will be used often. Information gained during an appraisal regarding the fair market value of the property and the environmental conditions of the property may provide valuable information for use in the all appropriate inquiries investigation.

3.8.1 The EP Should Not Be Required to Consider the Relationship of the Purchase Price to the Value of the Property

Commenter Organization Name: Marshtein, Nina G

Comment Number: 0031

Excerpt Number: 1

Excerpt Text:

I disagree with requiring environmental professionals to determine the "relationship of the purchase price to the value of the property, if the property was not contaminated," We are not appraisers and we don't have the qualifications to determine the value of land based on your definition of what a qualified site assessor is. I feel that this should be struck from the proposed regulation.

Response:

Please note that the evaluation of the relationship of the purchase price to the fair market value of the property, if the property were not contaminated need not be performed by the environmental professional. Sections 312.22(a)(3) and 312.29 of the final rule designates that this activity is the responsibility of the prospective property owner or grantee.

Commenter Organization Name: None

Comment Number: 0050

Excerpt Number: 1

Excerpt Text:

In regard to 312.29 (the relationship of the purchase price to the value of the property, if the property was not contaminated), I do not feel that the majority of persons that meet the proposed definition of an Environmental Professional are qualified to determine the value of a property. I do not think 312.29 should be included in the rule.

Response:

Please see response to comment number 0031, excerpt 1.

Commenter Organization Name: Souther, Timothy G

Comment Number: 0058

Excerpt Number: 1

Excerpt Text:

The Thursday August 26, 2004 proposed regulations include one provision that is a dramatic departure from typical environmental site assessment (ESA) practice: proposed "Section 312.29 - The Relationship of the Purchase Price to the Value of the Property, if the Property was not Contaminated."

(a) persons to whom this part is applicable per Section 312.1(b) must consider whether the

purchase price of the subject property reasonably reflects the fair market value of the property, if the property were not contaminated...

This provision presumes that the fair market value, the purchase price, and the actual presence of property contamination have been determined prior to completion of the all appropriate inquiry (AAI) document the proposed replacement for the existing ESA document. For most ESAs I have been involved with, these determinations are not necessarily completed at the time of the ESA. Many ESAs are conducted in advance of listing the property for sale, in advance of completing an assessment of property value, and in advance of determining if there is actual contamination on the property. Theoretically, the AAI could await completion of these steps in a property transaction. Awaiting completion of these determination is impractical because it puts the AAI report at the very end of the due diligence process of property transactions and prevents it from being an effective planning tool for the seller, buyer, and lender. From my experience, the earlier in the transaction process the due diligence environmental assessment documentation is completed, the more time is available for environmental sampling to verify the presence of suspected releases and potentially for negotiating actions to remedy any verified releases.

The late timing of the AAI report would not be a problem for properties that the qualified environmental professional was able to determine there is no contamination of the property. However, it is unlikely that a qualified environmental professional can determine that there is no contamination on the property based solely on an AAI scope of work. The AAI process will only identify visual or recorded evidence of releases and cannot determine the actual existence of or lack of releases on the property. Appropriate site characterization based on environmental sampling/analysis completed subsequent to the environmental site assessment is typically the basis for a finding of no contamination on property. As such, I would expect this AAI requirement to be a significant timing problem for all transaction that do not have a comprehensive site characterization completed prior to initiation the AAI process.

Based on this provision, the AAI report cannot be prepared in advance of the purchase price negotiation because the AAI report has to evaluate the purchase price against the fair market value. This again is a timing problem because the results of the AAI cannot be used in negotiating the purchase price, if that is appropriate for the buyer, seller, and lender. Not all property transactions involve CERCAL liability and imposing this CERCAL requirement at all non-residential property transactions will again delay the AAI report until late in the transaction, where its non-CERCAL benefits of the report would be difficult to consider or resolve late in the transaction.

In addition to the timing problem, the proposed regulation assumes that the property is being transferred as a single property with a single price. Many property transactions involve purchase of the property, the property improvements, personal property on the premises (such as inventory), and may include intangibles such as the reputation (goodwill) of the business. These transactions will not necessarily have a purchase price solely for the contaminated property, as envisioned in the regulation. Some transactions involve a single purchase price for several properties some of which may include contamination. Again, this transaction would not involve a single purchase price solely for the contaminated property(s). Some transactions involve

trading property for other non-cash assets such as another property or other personal property. Such transactions may not have an established purchase value for either property. In each of these cases, it will be very difficult and much more costly than estimated by EPA to determine a purchase price for these property properties. If AAI timing and AAI costs are consideration in the transaction, establishing a purchase price for these transactions would likely be found a "data gap" by the environmental professional pursuant to Section 312.21 of the proposed regulation.

Based on this provision, the AAI report cannot be prepared until the fair market value is determined. California governmental assessed valuation for taxation purposes is not necessarily representative of fair market value (Assessor's Handbook, California Board of Equalization). Assessed valuation does not provide fair market valuation for tax-exempt or tax-immune properties and does not use the fair market value standard for valuation of some properties. Many "federally related property transactions" will have a determination of the fair market value for the property by a State-licensed Appraiser as part of the due diligence process. However, the appraisal is typically completed concurrent with environmental site assessment and which would require that the AAI report be delayed until late in the transaction after the appraisal is completed. Some transactions do not require determination of the fair market value by an Appraiser and no valuation of the fair market value will be available to the qualified environmental professional in that case. For example, the State of California has a long-standing Appraiser licensing process (California Business and Professions Code, Division 4, Part 3, Sections 11300 et seq.) administered by the California Office of Real Estate Appraisers. In some cases, the licensing program may prevent the qualified environmental professional from providing a determination of fair market value, which would automatically result in this provision being found a data gap by the environmental professional. Because of this limitation, fair market value determinations should be prepared for "federally related property transaction" by State licensed Appraisers as a routine. I would argue that such evaluation should be prepared for any contaminated property by a State licensed Appraiser in accordance with established professional appraiser standards.

EPA indicates that determination of the fair market value of the property can be made by comparing the "price paid for other similar properties located in the area" or by contracting with "a real estate expert familiar with properties in the general area...to provide a comparability analysis." This would not be determination of fair market value, but merely a rough estimate of potential property value. This also assumes that there are other similar properties in the area that have sold recently, that the purchase price for those properties is based solely on a cash transaction, and that the information is readily available. This information may be available for some transactions, but not all. For some transactions, some or all of this information may not be available to the environmental professional to evaluate the applicability of similar property transaction. There are some properties that are sufficiently unique (right-of-ways, for example) that there will be no similar property transactions to compare with.

If the EPA is serious about including a professional opinion of the whether the purchase price of the subject property reasonably reflects the fair market value of the property, the EPA needs to identify in the AAI regulation, the tasks necessary to: determine if the property is currently contaminated using environmental testing or other definitive means, determine the purchase

price under many transaction scenarios, such as described above, and determine the fair-market value of the property in accordance with State Appraiser licensing requirements.

EPA also needs to accurately estimate the potential costs of these tasks and discuss the cost-benefits of the delay this requirement would result in typical transactions (those with no evidence of contamination) and in some less typical transactions, as described above. The estimate of incremental costs relative to the typical ESA, as described in the preamble to the proposed regulation, appears inadequate for that purpose. I do not believe that EPA can justify this AAI requirement on a cost-benefit basis. Because of the delay aspects of this requirement, I believe this requirement is inappropriate for many, if not most, property transactions.

Alternatively, I would suggest that this provision be more properly addressed as a subsequent phase of environmental site assessment. If the property is determined to be contaminated by the environmental professional based on previous assessment, comparison of purchase price with fair market value could be identified as "additional appropriate investigation" in the AAI under proposed Section 312.31. As described above, I believe a legally supportable comparison of purchase price and fair market value should be prepared by a State licensed Appraiser.

Response:

At the onset of this response we note from the preamble of the proposed rule that “§312.29 would require that the purchaser of the property consider whether or not the purchase price paid for the property reflects the fair market value of the property, *assuming that the property is not contaminated.*” (69 FR 52567).

A proper reading of this language should make it easy to address the commentor’s timing concerns. The comparison in prices here is made between the purchase price and the fair market value of the property, *assuming that the property is not contaminated.* This means that the comparison can take place at any time, and doesn’t require any amount of contamination to be detected. The purpose of this comparison is to look at the difference between the price paid and the market value of the property as an indicator of possible contamination. If the prices are significantly different, this should indicate to the purchaser that additional inquiry should be done if liability protection is desired.

“Market Value” is defined by Barron’s Legal Guides Law Dictionary as “the price that goods or property would bring in a market of willing buyers and willing sellers in the ordinary course of trade...Market value is generally established on the basis of sales of similar goods or property in the same locality, but where there have been no such prior sales, there is no single measure of value, and other evidence of value must be considered.” (Gifis, Steven H., Law Dictionary, Third Edition, 1991.) Fair market value is generally synonymous with market value.

The preamble of the proposed rule suggests, “Such a determination may be made by comparing the price paid for a particular property to prices paid for similar properties located in the same vicinity as the subject property, or by consulting a real estate expert familiar with properties in the general locality and who may be able to provide a comparability analysis.” (69 FR at 52567).

The commenter correctly states that the local assessor's office's determination as to the value of the property for tax purposes often will not suffice. The Agency cautions the use of this tool in many instances. In certain circumstances this information is nonexistent, or outdated and hence inaccurate. However, when this information is available, it may be used as an accurate gauge in some instances and as a useful indicator in others. But, as the above quoted law dictionary states, often times "there is no single measure of value, and other evidence must be considered." We leave this issue to the discretion of those performing the inquiry.

Commenter Organization Name: Goodman, J. Dwight

Comment Number: 0097

Excerpt Number: 3

Excerpt Text:

Any data which involves the comparison of the "actual taxable property value" versus the "actual sale price" is not a reasonable criteria in the private sector. Perhaps in the government sector those prices are well known, but private markets that I have experienced would often times not divulge that cost data. Clients giving public knowledge of private markets is not often well received, and may be data which is hard, if not impossible, to obtain.

Response:

The all appropriate inquiry rule does not require a comparison between "actual taxable property value" and "actual sale price." The comparison is between the purchase price and the fair market value of the property, *assuming that the property is not contaminated*. Also, please note that the evaluation of the relationship of the purchase price to the fair market value of the property, if the property were not contaminated need not be performed by the environmental professional. Sections 312.22(a)(3) and 312.29 of the final rule designates that this activity is the responsibility of the prospective property owner or grantee. Therefore, the prospective property owner does not need to make information regarding the price paid for the property or its value available to the environmental professional or the public if he or she chooses not to.

Commenter Organization Name: Scalise, Frederick W, et al

Comment Number: 0105

Excerpt Number: 6

Excerpt Text:

This section should clearly indicate that it is NOT the responsibility of the Environmental Professional to evaluate the relationship between the purchase price and the fair market price of the subject property. Such evaluations are not within the scope of expertise of an Environmental Professional, and, and in many states, requires possession of a real estate appraisers license. Analysis of property valuation should be conducted by a real estate appraiser. It should be solely the responsibility of the person defined in §312.1 to provide any information regarding property valuation, as prepared by a qualified real estate appraiser, to the Environmental Professional.

Response:

Please note that the evaluation of the relationship of the purchase price to the fair market value of the property, if the property were not contaminated need not be performed by the environmental professional. Sections 312.22(a)(3) and 312.29 of the final rule designates that this activity is the responsibility of the prospective property owner or grantee.

Commenter Organization Name: Koch, Donald

Comment Number: 0234

Excerpt Number: 3

Excerpt Text:

Similarly, the provision of "the relationship of the purchase price to the fair market value of the property to the market value of the property, if the property was not contaminated" (proposed 312.22 (a)(3)) to the environmental professional is problematical. Most environmental professionals are not real estate appraisers. I do not see how this information can be evaluated by the environmental professional. Certainly if the property is being purchased far below market value, I should be suspicious as to the reason, which certainly could be environmental contamination. There are many reasons, however, that a property does not sell at market value. The job of the environmental professional is to ascertain whether a release (as defined under CERCLA) has occurred. I really have no use for the market value comparison, because I am already suspicious. I was hired to be suspicious and to perform a site assessment. Sharing the appraisal and purchase price with me, the environmental professional, will not help me do my job. My client will not want to share this information with me either. I foresee many clients not wanting to share appraisal and purchase price information with the environmental professional and being asked to identify this information as a "data gap" on advice of the client's counsel. I believe the statute makes this a criteria of an "all appropriate inquiry" to be used in court to establish an "innocent landowner" defense. In the situation where the purchaser paid a small fraction of the market value and the environmental professional failed to find evidence of a release, there would be a conundrum to be unraveled in court. The environmental professional is in no position to evaluate this information when there is no indication of a release. The environmental professional is able to estimate remediation costs when there is evidence of a release, but in absence of that data, the purchase price of the property and its market value in the absence of contamination is extraneous information. The statute (CERCLA 101(35)(B)(iii)) requires that the "The relationship of the purchase price to the fair market value of the property to the market value of the property, if the property was not contaminated (101(35)(B)(iii)(VIII))" is an essential part of the all appropriate inquiry criteria, but the statute does not mandate that this criteria is part of the report of the environmental professional. In fact, "The results of an inquiry by an environmental professional (101(35)(B)(iii)(I))" is listed at the same level as the "The relationship of the purchase price to the fair market value of the property to the market value of the property, if the property was not contaminated (101(35)(B)(iii)(VIII))". There was clearly no statutory mandate to include this criterion in the report of the environmental professional.

Response:

As stated in the preamble, the assessment of the relationship of the purchase price to the fair market value is the responsibility of the prospective landowner or grantee. The information may

be provided to the environmental professional overseeing the all appropriate inquiries investigation if it has any bearing on the investigation (that is to say that it sheds some light on the environmental conditions of the property). If the owner or grantee does not communicate this information to the environmental professional or does not otherwise reach an agreement with the EP to conduct such an analysis on his or her behalf, this should be reported as a data gap.

A great strength of the performance based inquiry is its flexibility. The comparison of the purchase price and the fair market value of a property provides a flexible indicator of possible environmental contamination. EPA understands that a discrepancy is not determinative, however, it may require further investigation above and beyond what would normally occur.

Commenter Organization Name: Anthony, Tony, et.al.

Comment Number: 0292

Excerpt Number: 4

Excerpt Text:

The difference between purchase price verses regular market value could be affected by other factors. It seems unreasonable to require purchase information to be disclosed to the environmental professional performing the all appropriate inquiry.

We suggest the following text addition:

-Purchaser is required to inform environmental professional if the purchase price is lower than fair market value because of contamination concerns.

Or

REMOVE THIS SECTION FROM THE STANDARD ENTIRELY.

Response:

As stated in the preamble, the assessment of the relationship of the purchase price to the fair market value is the responsibility of the prospective landowner or grantee. The information may be provided to the environmental professional overseeing the all appropriate inquiries investigation if it has any bearing on the investigation (that is to say that it sheds some light on the environmental conditions of the property). If the owner or grantee does not communicate this information to the environmental professional or does not otherwise reach an agreement with the EP to conduct such an analysis on his or her behalf, this should be reported as a data gap.

Commenter Organization Name: Anthony, Tony, et.al.

Comment Number: 0292

Excerpt Number: 13

Excerpt Text:

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

This section should clearly state that it is the responsibility of the purchaser to evaluate the relationship between fair market value of the property, if the property were not contaminated, to the purchase price.

Or

THIS SECTION SHOULD BE OMITTED FROM ALL APPROPRIATE INQUIRY.

Environmental professionals are not qualified to evaluate fair market value of the property. It is unreasonable to impose the role of real estate market professional on to the environmental professional.

Response:

As stated in the preamble, the assessment of the relationship of the purchase price to the fair market value is the responsibility of the prospective landowner or grantee. The information may be provided to the environmental professional overseeing the all appropriate inquiries investigation if it has any bearing on the investigation (that is to say that it sheds some light on the environmental conditions of the property). If the owner or grantee does not communicate this information to the environmental professional or does not otherwise reach an agreement with the EP to conduct such an analysis on his or her behalf, this should be reported as a data gap.

Commenter Organization Name: Anonymous

Comment Number: 0294

Excerpt Number: 2

Excerpt Text:

312.29 The requirement to assess the fair market value of the property may be in conflict with USPAP appraisal regulations for financial institutions.

Response:

The all appropriate inquires final rule does not require that an appraisal be conducted and has no effect on requirements imposed by lenders on borrowers.

Commenter Organization Name: ENSR International

Comment Number: 0314

Excerpt Number: 10

Excerpt Text:

The proposed rule § 312.29 (a) states that the AAI 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. This section (b) goes on to state that if this is not the case, there is a need to consider whether the differential is due to the presence of releases or threatened releases.

Comment: There are several potential reasons why a purchase price may not reflect fair market value. These include a highly motivated seller (needs to relocate, needs cash flow, seeking to avoid bankruptcy, trying to sell before the market dips, stock holder-driven sale, etc.), structural issues with the existing building, other development constraints at the site (i.e. presence of wetlands), an uninformed seller (doesn't realize that the property may be worth more to the buyer) or any number of reasons. Asking a buyer to include in a report that the seller may see a statement as to whether they are getting "too good of a deal" on the site, is counterproductive to

the pricing negotiations which would be underway. In addition, because of the many reasons possible for the selling price to be below fair market value, it would be nearly impossible for the buyer to evaluate whether the reason behind this lower price is because of potential releases. If the price decrease is due to known releases, there is still no value in this evaluation, as the releases are already known to exist (and disclosure is required under most jurisdictions), without the benefit of the price comparison. It also should be noted that an EP would have no basis or qualifications to judge the veracity of the buyer's evaluation of this pricing issue.

Response:

The Agency understands this is not a bright-line test and that it is merely an indicator of potential environmental issues affecting the subject property. There is no requirement for the purchaser or the environmental professional to share the all appropriate inquiry report with the seller.

It is not the EPA's prerogative to judge the veracity of the buyer's evaluation of this pricing issue. Any evaluation of the veracity would be conducted by a court in an attempt to determine if the buyer qualifies for liability protection. This provides an incentive for an accurate, thorough analysis.

As stated in the preamble, the assessment of the relationship of the purchase price to the fair market value is the responsibility of the prospective landowner or grantee. The information may be provided to the environmental professional overseeing the all appropriate inquiries investigation if it has any bearing on the investigation (that is to say that it sheds some light on the environmental conditions of the property). If the owner or grantee does not communicate this information to the environmental professional or does not otherwise reach an agreement with the EP to conduct such an analysis on his or her behalf, this should be reported as a data gap.

Commenter Organization Name: Kane Environmental

Comment Number: 0317

Excerpt Number: 5

Other Sections: NEW - 3.8.4 - The rule should require a commercial appraisal by a real estate expert/appraiser

Excerpt Text:

Section 312.29 needs to be completely eliminated. Trained and licensed appraisers should be the only ones to provide property market value analysis

Response:

Section 101(35)(B)(iii)(VIII) requires that the relationship of the purchase price to the value of the property, if the property was not contaminated, be included in all appropriate inquiries federal regulations. The final regulations includes this requirement within the responsibilities for the prospective landowner or grantee (see §312.22 and §312.29). This activity does not have to be conducted by the environmental professional. A prospective landowner or grantee may hire the services of a licensed appraiser if he or she determines that such expertise is necessary to fulfill the requirement.

Commenter Organization Name: Mille Lacs Ojibwe

Comment Number: 0330

Excerpt Number: 12

Excerpt Text:

The Mille Lacs Band does not agree with the proposed requirement in this section in its entirety as to providing the purchase price and fair market value and their relationship of those properties not contaminated.

If a property is not contaminated, the Band does not see a valid reason for why both dollar values must be indicated in an all appropriate inquiry. In the Band's opinion, there are numerous variables that may affect a purchase price, whether that purchase price is above or below a market value price. For instance, factors that may affect a purchase price include, but are not limited to, appraisal, negotiations with a seller, condition of structures on a property, and so forth.

The Band will look at the relationship between the purchase price and the fair market value through the use of a cost analysis, and will provide all necessary documentation as to the reasons for a property's purchase price (whether above or below a fair market value).

Response:

A great strength of the performance based inquiry is its flexibility. The comparison of the purchase price and the fair market value of a property provides a flexible indicator of possible environmental contamination. EPA understands that a discrepancy is not determinative, however, it may require further investigation above and beyond what would normally occur. This is not designed to be a bright-line test.

Commenter Organization Name: Mille Lacs Ojibwe

Comment Number: 0330

Excerpt Number: 17

Excerpt Text:

The Mille Lacs Band does not agree with the proposed requirement in this section in its entirety as to providing the purchase price and fair market value and their relationship of those properties not contaminated.

If a property is not contaminated, the Band does not see a valid reason for why both dollar values must be indicated in an all appropriate inquiry. In the Band's opinion, there are numerous variables that may affect a purchase price, whether that purchase price is above or below a market value price. For instance, factors that may affect a purchase price include, but are not limited to, appraisal, negotiations with a seller, condition of structures on a property, and so forth.

The Band will look at the relationship between the purchase price and the fair market value through the use of a cost analysis, and will provide all necessary documentation as to the

reasons for a property's purchase price (whether above or below a fair market value).

For properties that are contaminated, the Mille Lacs Band supports providing a cost analysis of the relationship and a list of reasons of why there may be a discrepancy between a purchase price and a fair market value, but not the actual dollar values. Again, the reason is that tribal acquisition plans could be adversely affected.

These concerns are raised because it is uncertain whether the all appropriate inquiry reports are confidential or not. Without assurances that the reports are confidential, the Mille Lacs Band is extremely reluctant to provide information that may jeopardize our interests and ability to acquire more lands. If confidentiality is assured, the Band is willing to provide all relevant information necessary to comply with federal laws and regulations.

Response:

A great strength of the performance based inquiry is its flexibility. The comparison of the purchase price and the fair market value of a property provides a flexible indicator of possible environmental contamination. EPA understands that a discrepancy is not determinative, however, it may require further investigation above and beyond what would normally occur. This is not designed to be a bright-line test.

Section 101(35)(B)(iii)(VIII) requires that the relationship of the purchase price to the value of the property , if the property was not contaminated be included in all appropriate inquiries federal regulations. The final regulations includes this requirement within the responsibilities for the prospective landowner or grantee (see §312.22 and §312.29). This activity does not have to be conducted by the environmental professional and the information collected in carrying out the activity does not have to be provided to the environmental professional if the prospective property owner or grantee does not wish to disclose the information. Documentation of reasons for discrepancies between the purchase price and the value of the property should be noted in the written report. In addition, there is no requirement in the final rule to disclose the contents of the written report to any party.

Commenter Organization Name: CBPA

Comment Number: 0344

Excerpt Number: 5

Other Sections: NEW - 4.1 - The impact of the rule is underestimated

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 E1 527. ASTM E1 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 E1527-00 § 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:

Section 101(35)(B)(iii)(VIII) requires that the relationship of the purchase price to the value of the property, if the property was not contaminated be included in all appropriate inquiries federal regulations. The final regulations includes this requirement within the responsibilities for the prospective landowner or grantee (see §312.22 and §312.29). This activity does not have to be conducted by the environmental professional. The requirement goes beyond an assessment of "actual knowledge." The relationship between the purchase price and the value of the property must be determined, regardless of the level of knowledge held by the prospective purchaser or the grantee prior to conducting the all appropriate inquiries.

The commenter accurately points out that the preamble of the proposed rule explains that an appraisal is not necessary to fulfill this requirement of an all appropriate inquiry. Because this is a flexible, performance based approach, there very well may be times when an appraisal is warranted, but in most cases information regarding the relationship between the price paid for a property and the market value of the property should be available from other sources. The final rule does not dictate that any particular methodology be used to fulfill the requirement.

The Agency disagrees with the commenter's assertion that non-appraisal market valuation will not differ much in the scope or cost of a formal appraisal. In many instances any discrepancy between price and market value will be readily apparent. In others it may take some review. Whatever the case, the Agency believes that this is a variable that a prudent environmental

professional would take account of in determining the possibility or extent of environmental risk of a property.

Commenter Organization Name: Greenlining Institute

Comment Number: 0354

Excerpt Number: 8

Excerpt Text:

--a. The new valuation requirement is inconsistent with customary practice, imposes substantial costs, and inappropriately 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 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." It is often difficult to ascertain market value without making various adjustments to comparable sales, such as size, 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 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 it is ranging rather far afield for EPA to require purchasers 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. 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 believe that the new rule imposes substantial costs and improperly intrudes into private market transactions.

Response:

Section 101(35)(B)(iii)(VIII) requires that the relationship of the purchase price to the value of the property, if the property was not contaminated, be included in all appropriate inquiries federal regulations. The final regulations includes this requirement within the responsibilities for the prospective landowner or grantee (see §312.22 and §312.29). This activity does not have to

be conducted by the environmental professional.

The commenter is incorrect in asserting that “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.” The criterion to consider the relationship of the purchase price of the property to the fair market value of the property, if not contaminated has been part of the statutory provisions governing all appropriate inquiries since the 1986 SARA amendments. Today’s final rule does nothing to alter the original statutory requirement and represents no change from current practice. The Agency does not advocate, and the final rule does not require, commissioning an elaborate market analysis for every property. In addition, as explained in the preamble to the proposed rule, the regulation does not require that a formal appraisal of a property be conducted. As noted in the preamble of the proposed rule, “The objective is not to ascertain the exact value of the property, but to determine whether or not the purchase price paid for the property is reflective of its market value.” (69 FR at p. 52567).

If there is a price discrepancy between the purchase price and the market value, the Agency notes that the rule merely requires that the purchaser consider whether the difference is due to the presence of contamination at the property or note that the difference is due to other factors or circumstances.

Commenter Organization Name: EAA

Comment Number: 0366

Excerpt Number: 4

Excerpt Text:

From 312.29 regarding: the relationship of purchase price to the value of the property...

The EAA objects to the fact that both directly and indirectly, the EC is being placed into a position that he/she is neither qualified or licensed to certify. Specifically, this proposed rule places the EC into the position of a property appraiser. In many states, a license is required to value a property in any way. By Certifying, even what the proposed purchaser disseminates to the EC places him/her into the appraisal position, which is a clear violation of the law in most states.

The EAA feels this section should be revisited in the spirit of keeping specialized professions within the scope of their service and to prevent them from being forced to break the law.

Our membership at the Environmental Assessment Association is pleased that legal standards and clear rules and techniques are being developed for our profession. The EPA is commended for that effort. We at EAA wish to be a part of this process, and pray that you will strongly consider our objections in the spirit of preserving a well in entrenched industry manned by productive and diligent professionals.

Response:

Section 101(35)(B)(iii)(VIII) requires that the relationship of the purchase price to the value of the property, if the property was not contaminated, be included in all appropriate inquiries federal regulations. The final regulations includes this requirement within the responsibilities for the prospective landowner or grantee (see §312.22 and §312.29). This activity does not have to be conducted by the environmental professional. A prospective landowner or grantee may hire the services of a licensed appraiser if he or she determines that such expertise is necessary to fulfill the requirement.

Commenter Organization Name: Intertox

Comment Number: 0396

Excerpt Number: 17

Excerpt Text:

-The proposed requirements for considering the relationship of the purchase price to the value of a property, if the property was not contaminated.

--Intertox is opposed to any requirement to consider the relationship of purchase price to property value. This is the purview of real estate, land valuation, and appraisers and has no place in the environmental site assessment process. Engineers, geologists, and other environmental professional are neither trained nor should be involved in assessing property value. To do so could sway or impact the findings of an all appropriate inquiry.

Response:

Section 101(35)(B)(iii)(VIII) requires that the relationship of the purchase price to the value of the property, if the property was not contaminated, be included in all appropriate inquiries federal regulations. The final regulations includes this requirement within the responsibilities for the prospective landowner or grantee (see §312.22 and §312.29). This activity does not have to be conducted by the environmental professional. A prospective landowner or grantee may hire the services of a licensed appraiser if he or she determines that such expertise is necessary to fulfill the requirement.

Commenter Organization Name: Dean, Frank

Comment Number: 0411

Excerpt Number: 1

Excerpt Text:

First, in Section 312.29 regarding the "relationship of the purchase price to the value of the property". If this goes through as written, you are requiring that I break the law in Ohio. In Ohio, and many other states, in order to legally comment upon the valuation of real property one must be a State-licensed Appraiser. Section 312.29, as written, would require that I break the law in Ohio, unless I also become a licensed Appraiser. This creates an obvious "Catch-22" situation with competing laws. It will also mean that you will have NO providers in states requiring that Appraisers be licensed. This untenable situation must be re-visited and modified or eliminated to remove this conflict or my Clients will suffer severe economic hardship until

either Appraisers get science degrees, or geologists can be licensed as Appraisers.

Response:

Section 101(35)(B)(iii)(VIII) requires that the relationship of the purchase price to the value of the property, if the property was not contaminated, be included in all appropriate inquiries federal regulations. The final regulations includes this requirement within the responsibilities for the prospective landowner or grantee (see §312.22 and §312.29). This activity does not have to be conducted by the environmental professional. A prospective landowner or grantee may hire the services of a licensed appraiser if he or she determines that such expertise is necessary to fulfill the requirement. However, the rule does not require an appraisal. If an owner/grantee must consult an appraiser, there is no conflict with the all appropriate inquiries final rule. The Agency has left the decision of whether or not to perform a formal appraisal to the discretion of the prospective landowner or grantee.

Commenter Organization Name: Rybak, John Thomas

Comment Number: 0412

Excerpt Number: 9

Excerpt Text:

Proposed requirement for considering the relationship of the purchase price to the value of non-contaminated.

a) Page # 52580

b) View: This should not be part of a Phase I report. The EP is not qualified to evaluate and identify a material difference between the Purchase Price and Appraised Value. Furthermore this level of information is often not provided to the EP. It therefore should not be a requirement of the EP's Phase I report to evaluate this issue.

c) Assumptions: The seller and/or buyer should be willing to provide any information pertaining to a site that could be negatively affected. They should not withhold specialized knowledge. However the EP cannot force them to reveal such information, and therefore this should not be a performance standard of the AAI Phase I report.

d) Burden: Including this section would create an unreasonable burden on the EP, in an area they have no expertise, and in a situation they may not have complete information. It is not reasonable to require the EP to comment on this topic in their Phase I process.

e)Alternative: AAI is intended to preserve certain CERCLA defenses of a purchaser. The purchaser should be educated that price vs. appraised value is one consideration in the application of these defenses. The Phase I 'could' have a narrative paragraph in the Executive Summary discussion the Purchaser's responsibility to seek legal counsel to preserve their CERCLA defenses in the event purchase price is significantly lower then the Appraised Value.

Response:

Section 101(35)(B)(iii)(VIII) requires that the relationship of the purchase price to the value of the property, if the property was not contaminated, be included in all appropriate inquiries federal regulations. The final regulations includes this requirement within the responsibilities for the prospective landowner or grantee (see §312.22 and §312.29). This activity does not have to be conducted by the environmental professional. A prospective landowner or grantee may hire the services of a licensed appraiser if he or she determines that such expertise is necessary to fulfill the requirement.

Commenter Organization Name: Freeman & Giler

Comment Number: 0417

Excerpt Number: 4

Excerpt Text:

Proposed Rule §312.29(a) requires that the User, and not the EP, evaluate whether the purchase price of the property reasonably reflects the market value of the property in an uncontaminated condition. Given the fact that the EPs are not required to have any education, training or experience in property valuation and are not necessarily familiar with the local real estate market, we agree that the price versus value determination should be made by the User. The User ultimately negotiates the purchase price or agrees to finance the project at the purchase price; thus, the User is in the best position to assess the relationship between the purchase price and the market value at the time of purchase.

Response:

The Agency agrees with the commenter. The final regulations includes this requirement within the responsibilities for the prospective landowner or grantee (see §312.22 and §312.29). This activity does not have to be conducted by the environmental professional.

Commenter Organization Name: Westward Environmental

Comment Number: 0429

Excerpt Number: 5

Excerpt Text:

Regarding the heading of What Are the Proposed Requirements for the Relationship of the Purchase Price to the Value of the Property, if the Property Was Not Contaminated? on page 52567 of the proposed rule:

- The question itself makes an initial assumption that any significant discrepancy in the purchase price to the perceived value of the property is due to contamination issues. This may or may not be the case.
- The EP is oftentimes not in contact with the person(s) that have knowledge of the purchase price and thus this information may not be available.
- Thirdly, there may be many circumstances why the purchaser may be reluctant to provide reasons for a price vs. value discrepancies (such as how the real estate vs. physical assets are valued). This disclosure could be of particular concern when it becomes "documented" in a

report.

Response:

If there is a price discrepancy between the purchase price and the market value, the Agency notes that the rule merely requires that the purchaser *consider* whether the difference is due to the presence of contamination at the property or note that the difference is due to other factors or circumstances. The final regulations includes this requirement within the responsibilities for the prospective landowner or grantee (see §312.22 and §312.29). This activity does not have to be conducted by the environmental professional and the information collected in carrying out the activity does not have to be provided to the environmental professional if the prospective property owner or grantee does not wish to disclose the information. Documentation of reasons for discrepancies between the purchase price and the value of the property should be noted in the written report. In addition, there is no requirement in the final rule to disclose the contents of the written report to any party.

Commenter Organization Name: Geomatrix Consultants

Comment Number: 0433

Excerpt Number: 4

Excerpt Text:

One provision in the proposed AAI rule is to establish whether the property is selling at significantly less than fair market value, presumably due to an environmental impairment deduction. When an ESA is commissioned, the fair market value may not be known; often real estate appraisals are occurring concurrently. In a commercial or industrial area, where the majority of ESA's are conducted, appraisals can vary significantly between professional appraisers, depending on the comparables found and the experience of the appraiser. It is not uncommon to have two or three appraisals conducted by various firms to establish a property value. Although we understand and agree with the intent of this requirement, as a practical matter the fair market value is often not known, and the potential deduction for environmental impairment is never clear until an RI/FS is complete. We recommend that this is removed as a requirement for AAI.

Response:

A great strength of the performance based inquiry is its flexibility. The comparison of the purchase price and the fair market value of a property provides a flexible indicator of possible environmental contamination. EPA understands that a discrepancy is not determinative, however, it may require further investigation above and beyond what would normally occur. This is not designed to be a bright-line test.

Section 101(35)(B)(iii)(VIII) requires that the relationship of the purchase price to the value of the property , if the property was not contaminated be included in all appropriate inquiries federal regulations. The final regulations includes this requirement within the responsibilities for the prospective landowner or grantee (see §312.22 and §312.29). This activity does not have to be conducted by the environmental professional and the information collected in carrying out the activity does not have to be provided to the environmental professional if the prospective

property owner or grantee does not wish to disclose the information. Documentation of reasons for discrepancies between the purchase price and the value of the property should be noted in the written report. In addition, there is no requirement in the final rule to disclose the contents of the written report to any party.

Commenter Organization Name: Hearn, J Clark

Comment Number: 0434

Excerpt Number: 3

Other Sections: NEW - 4.1 - The impact of the rule is underestimated

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 EP 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:

Section 101(35)(B)(iii)(VIII) requires that the relationship of the purchase price to the value of the property, if the property was not contaminated, be included in all appropriate inquiries federal regulations. The final regulations includes this requirement within the responsibilities for the prospective landowner or grantee (see §312.22 and §312.29). This activity does not have to be conducted by the environmental professional and the information collected in carrying out the activity does not have to be provided to the environmental professional if the prospective property owner or grantee does not wish to disclose the information. Documentation of reasons for discrepancies between the purchase price and the value of the property should be noted in the written report. In addition, there is no requirement in the final rule to disclose the contents of the written report to any party.

The cost of conducting this activity was not accounted for in the economic analysis for the proposed rule because this does not constitute a change over the interim standard or statutory requirements. The criterion to consider the relationship of the purchase price of the property to the fair market value of the property, if not contaminated, has been part of the statutory provisions governing all appropriate inquiries since the 1986 SARA amendments. Today's final rule does nothing to alter the original statutory requirement and represents no change from current practice.

Commenter Organization Name: Wohlers Environ Svcs

Comment Number: 0435

Excerpt Number: 2

Excerpt Text:

The proposed rule revision language appears to place the onus of consideration of the relationship between purchase price and value of the property on the potential buyer. Does the EPA expect that the EP and/or firm conducting the AAI investigation should be involved in this task?

Response:

Section 101(35)(B)(iii)(VIII) requires that the relationship of the purchase price to the value of the property, if the property was not contaminated, be included in all appropriate inquiries federal regulations. The final regulations includes this requirement within the responsibilities for the prospective landowner or grantee (see §312.22 and §312.29). This activity does not have to be conducted by the environmental professional and the information collected in carrying out the activity does not have to be provided to the environmental professional if the prospective property owner or grantee does not wish to disclose the information. Documentation of reasons for discrepancies between the purchase price and the value of the property should be noted in the written report. In addition, there is no requirement in the final rule to disclose the contents of the written report to any party.

Commenter Organization Name: McLeod, Jeff

Comment Number: 0444

Excerpt Number: 6

Excerpt Text:

It is not clear from either the preamble or proposed rule why the relationship between the purchase price to the fair market value of the property should be a consideration in the AAI. The objective of the AAI as stated in 312.20 (d) is to identify conditions indicative of releases and threatened releases of hazardous substances. While we agree that contamination of a property will effect the purchase price, it is not reasonable to require that this relationship be part of the AAI report. Persons meeting the definition of an EP are not likely to have knowledge of real estate prices and the impact of contamination on them. While the regulation does not require the EP to make this determination, the determination is required to be included in the report. It would seem that someone knowledgeable in real estate pricing would be involved in the

transaction and they should be required to address costs issues. Issues of cost are not a component of determining if a property is contaminated and should not be part of a report addressing such.

Response:

A great strength of the performance based inquiry is its flexibility. The comparison of the purchase price and the fair market value of a property provides a flexible indicator of possible environmental contamination. EPA understands that a discrepancy is not determinative, however, it may require further investigation above and beyond what would normally occur. This is not designed to be a bright-line test.

Section 101(35)(B)(iii)(VIII) requires that the relationship of the purchase price to the value of the property, if the property was not contaminated, be included in all appropriate inquiries federal regulations. The final regulations includes this requirement within the responsibilities for the prospective landowner or grantee (see §312.22 and §312.29). This activity does not have to be conducted by the environmental professional and the information collected in carrying out the activity does not have to be provided to the environmental professional if the prospective property owner or grantee does not wish to disclose the information. Documentation of reasons for discrepancies between the purchase price and the value of the property should be noted in the written report. In addition, there is no requirement in the final rule to disclose the contents of the written report to any party.

Commenter Organization Name: Jerose, Dave

Comment Number: PM-0127-0010

Excerpt Number: 1

Excerpt Text:

I have kind of taken exception to 312.29, the relationship of the purchase price to the value of the property, if the property was not contaminated.

Most environmental professionals aren't really qualified to comment on fair market pricing for properties. I would like to see that removed from all appropriate inquiries, and that issue should be handled under a separate letter. I don't really see where it implies to this proposed legislation.

Response:

Section 101(35)(B)(iii)(VIII) requires that the relationship of the purchase price to the value of the property, if the property was not contaminated, be included in all appropriate inquiries federal regulations. The final regulations includes this requirement within the responsibilities for the prospective landowner or grantee (see §312.22 and §312.29). This activity does not have to be conducted by the environmental professional and the information collected in carrying out the activity does not have to be provided to the environmental professional if the prospective property owner or grantee does not wish to disclose the information. Documentation of reasons for discrepancies between the purchase price and the value of the property should be noted in the written report. In addition, there is no requirement in the final rule to disclose the contents of the written report to any party.

Commenter Organization Name: Dillman, Malcolm

Comment Number: PM-0359-0001

Excerpt Number: 2

Excerpt Text:

Another concern that I have is with 312.29, the relationship of the purchase price to the value of the property if the property was not contaminated. This section is asking for expertise outside the area of an Environmental Professional, and require the services of a certified and licensed appraiser, which, in my opinion, will increase substantially the cost of the investigation.

Response:

Section 101(35)(B)(iii)(VIII) requires that the relationship of the purchase price to the value of the property, if the property was not contaminated, be included in all appropriate inquiries federal regulations. The final regulations includes this requirement within the responsibilities for the prospective landowner or grantee (see §312.22 and §312.29). This activity does not have to be conducted by the environmental professional and the information collected in carrying out the activity does not have to be provided to the environmental professional if the prospective property owner or grantee does not wish to disclose the information. Documentation of reasons for discrepancies between the purchase price and the value of the property should be noted in the written report. In addition, there is no requirement in the final rule to disclose the contents of the written report to any party.

3.8.2 Explanation of the Assessment Process Provided in the Preamble/Rule is Inadequate

Commenter Organization Name: Appraisal Institute

Comment Number: 0212

Excerpt Number: 2

Excerpt Text:

The application of the sales comparison approach is simply more complicated than described in the Preamble. It is frequently difficult to find highly similar property sales (or comparable sales), and thus the services of a professional appraiser are required. Professional appraisers analyze details of verified comparable sales and know how to make adjustments to the sales or expand the search to other, similar areas. Public policy and case law have well outlined what is needed to produce a credible opinion of market value.

In many cases, the sales comparison approach is not the primary approach utilized by the marketplace. The "cost approach" and "income approach" sometimes provide the definitive value for a property. Thus, the Preamble provision specifying consultation by a real estate expert who can perform a "comparability analysis" is confusing because of its vagueness.

Because of this, we believe the proposed rule provides deficient appraisal methodology advice without adequately explaining the valuation process, which could come to haunt a property owner (or the EPA) in the future. That being said, it is not our intent to inject additional expenses to the transaction process. Our goal is to caution the EPA that the issue should not be avoided or taken lightly, and that a ready solution is available to address this confusion.

Suggested Modification

We suggest a minor clarification in the Preamble, Section III, M, Paragraph 2, would help provide better direction to the public and prospective purchasers. We believe this recommendation will require little or no additional cost to the prospective purchaser if incorporated correctly.

We request EPA amend Section III, M, of the Preamble to read as follows:

The comparison of purchase price to Fair Market Value required to meet Section 312.29 of the Act may be accomplished in several ways. While the proposed rule does not require that a real estate appraisal be conducted to achieve compliance with this criterion, the prospective purchaser should make the decision regarding scope of this study in light of a potential need to defend against liability as a prospective purchaser. An informal assessment of the property may be conducted using acceptable valuation methodology. The Prospective Purchaser must decide if the informal assessment is sustainable in a later action. But, it should be noted that in most transactions, a formal appraisal is being prepared for lending or other purposes. The intended use section of the appraisal can include its utilization for AAI compliance. Appraisals are prepared to meet the Uniform Standards of Appraisal Practice (USPAP). USPAP requires that appraisers analyze the details of the current transaction. This analysis can and should include a study of the relationship of the price being paid to market value.

The objective is to determine whether or not the purchase price to be paid for the property is reflective of the environmental conditions present at the site. Significant differences between the Market Value of the property "as if unimpaired" and the purchase price provide a basis for this observation. Reasons for any differences between unimpaired market value and sales price should be noted.

Response:

The preamble to the proposed rule states, "The objective is not to ascertain the exact value of the property, but to determine whether or not the purchase price paid for the property is reflective of its market value" (69 FR at 52567). The preamble also notes that an appraisal is not required in this comparison. The Agency disagrees with the commenter as to the complicated nature of this comparison. In the preamble to the final rule, EPA states that if an appraisal is conducted for the property, the results of the appraisal may provide valuable information for the all appropriate inquiries investigation. The final rule does not dictate how the prospective property owner or grantee must undertake this analysis. This type of comparison has been included in the statutory provisions governing all appropriate inquiries since the 1986 SARA amendments to CERCLA. Today's final rule does nothing to alter the original statutory requirement and represents no change from current practice.

Commenter Organization Name: Myers, Steve

Comment Number: 0242

Excerpt Number: 9

Excerpt Text:

9 Steve Myers Property Value Determination 312.22(a)(3), 312.29(a) Who should determine the fair market value if the property isn't contaminated? Will there be qualifications required? Should the value come from the Assessor's office?

Response:

Section 101(35)(B)(iii)(VIII) requires that the relationship of the purchase price to the value of the property, if the property was not contaminated be included in all appropriate inquiries federal regulations. The final regulations includes this requirement within the responsibilities for the prospective landowner or grantee (see §312.22 and §312.29). This activity does not have to be conducted by the environmental professional. A prospective landowner or grantee may hire the services of a licensed appraiser if he or she determines that such expertise is necessary to fulfill the requirement.

Commenter Organization Name: Myers, Steve

Comment Number: 0242

Excerpt Number: 10

Excerpt Text:

10 Steve Myers Property Value Determination 312.22(a)(3) and 312.29(b) How do you determine the fair market value of the contaminated property without doing a complete site characterization? It is my understanding that these reports are due the time the title changes

hands. Without a site characterization, who should determine the fair market value if the property is contaminated? Will there be qualifications required for this person?

Response:

At the onset of this response we note from the preamble of the proposed rule that “§312.29 would require that the purchaser of the property consider whether or not the purchase price paid for the property reflects the fair market value of the property, *assuming that the property is not contaminated*” (69 FR 52567).

A proper reading of this language should make it easy to address the commentor’s timing concerns. The comparison in prices here is made between the purchase price and the fair market value of the property, *assuming that the property is not contaminated*. This means that the comparison can take place at any time, and doesn’t require any amount of contamination to be detected. The purpose of this comparison is to look at the difference between the price paid and the market value of the property as an indicator of possible contamination. If the prices are significantly different, this should indicate to the purchaser that additional inquiry should be done if liability protection is desired.

The preamble to the proposed rule states, “The objective is not to ascertain the exact value of the property, but to determine whether or not the purchase price paid for the property is reflective of its market value” (69 FR at 52567). The preamble also notes that an appraisal is not required in this comparison. The Agency disagrees with the commenter as to the complicated nature of this comparison. In the preamble to the final rule, EPA states that if an appraisal is conducted for the property, the results of the appraisal may provide valuable information for the all appropriate inquiries investigation. The final rule does not dictate how the prospective property owner of grantee must undertake this analysis. This type of comparison has been included in the statutory provisions governing all appropriate inquiries since the 1986 SARA amendments to CERCLA. Today’s final rule does nothing to alter the original statutory requirement and represents no change from current practice.

Commenter Organization Name: Maloy, Richard

Comment Number: 0255

Excerpt Number: 1

Excerpt Text:

I am concerned that the Congressional mandate for comparison of fair market value of the property to the purchase price was not sufficiently addressed by the Negotiated Rule Making Committee and in the proposed rule. If left unaddressed, we believe Section 312.29 will leave prospective purchasers (and EPA) in a precarious position, and that vagaries in the proposed rule will continue to dissuade the purchase of contaminated or potentially contaminated properties.

Environmental Litigation and Market Value

Market value, or "fair market value," is one of the most understood and recognized legal and public policy terms in use today. Fair market value is defined and mandated to be used throughout federal law, our judicial system, interstate and international commerce, and

throughout the financial services communities. Federal Agencies which utilize market value in their regulations include: the Department of Transportation, Department of Interior, General Services Administration, Office of Management and Budget and the federal financial institution regulatory agencies.

I am not aware of a case where a federal agency requires the consideration of market value yet states in its regulations that "an appraisal need not be utilized". To the contrary, most federal agencies seek to promote the most accurate estimate of market value by a competent appraisal professional.

Similarly, to ensure the quality of compliance with public policy, all state governments regulate appraisers and a majority have adopted "mandatory appraiser licensing" requirements that require market value be estimated by licensed or certified appraisers (see attachment for mandatory appraiser licensing states). In these states, all opinions of market value must be performed by a licensed or certified appraiser and in compliance with the Uniform Standards of Professional Appraisal Practice, the accepted standards of the appraisal profession. It does not appear that the proposed rule has taken this into consideration, or else this would have been discussed in the proposed rule. As it is, the proposed rule may be advising prospective purchasers to violate appraiser licensing laws in mandatory appraiser licensing states.

I along with other appraisers who testify in environmental litigation regarding property market value before and after contamination in conjunction work with other qualified environmental professionals. My experience is that opinions of market value "affected" and "unaffected", by professional appraisers are given far stronger weight. I believe it is unlikely that a competent attorney would prepare a defense for a client in federal court utilizing the concepts in the proposed rule, which contradict the law itself.

To provide a sustainable defense, a proper baseline, must be established. This baseline is market value. Market value is established through the appraisal process. Unfortunately, the procedures outlined in Section 111, M, Paragraph 2, fall short of providing a sustainable baseline (market value).

Throughout most of the proposed rule, EPA is careful to require that research be conducted in a competent manner. The Preamble does not state that specific types of research methodology are acceptable or unacceptable. For example, it does not state that a history of ownership achieves compliance by using Sanborn Maps or tax records.

Yet in Section III M, Paragraph 2, of the Preamble, EPA defines a specific on how to comply with regard to the purchase price-market value comparison. In Section III M, Paragraph 2, EPA loses its standard of referral to competency and provides its own version of valuation methodology. Valuation methodology noted is, inconsistent with accepted appraisal methodology, public policy and case law.

The application of the Sales Comparison Approach is simply more complicated than described in the Preamble. It is frequently difficult to find highly similar property sales (or comparable sales), and thus the services of a professional appraiser are required. Professional appraisers analyze

details of verified comparable sales and know how to make adjustments to the sales or expand the search to other, similar areas. Public policy and case law have well outlined what is needed to produce a credible opinion of market value.

In many cases, the sales comparison approach is not the primary approach utilized by the marketplace. The "Cost Approach" and "Income Approach" sometimes provide the definitive value for a property. Thus, the Preamble provision specifying consultation by a real estate expert who can perform a "comparability analysis" is confusing because of its vagueness.

Because of this, I believe the proposed rule provides deficient appraisal methodology advice without adequately explaining the valuation process, which could come to haunt a property owner (or EPA) in the future. That being said, it is not our intent to inject additional expenses than will be added into the transaction process by the new all appropriate inquiry. Our goal is to caution EPA that the issue should not be avoided or taken lightly, and that a ready solution is available to address this confusion.

Suggested Modification

I suggest a minor clarification in the Preamble, Section III M paragraph 2 would help provide better direction to the public and prospective purchasers. I believe this recommendation will require little or no additional cost to the prospective purchaser if incorporated correctly.

I request EPA amend Section III M of the Preamble to read as follows:

The comparison of purchase price to Fair Market Value required to meet Section 312.29 of the Act may be accomplished in a several ways. While the proposed rule does not require that a real estate appraisal be conducted to achieve compliance with this criterion, the prospective purchaser should make the decision regarding scope of this study in light of a potential need to defend against liability as a prospective purchaser. An informal valuation may be made using acceptable valuation methodology. The Prospective Purchaser must decide if the informal value opinion is sustainable in a later action. But, it should be noted that in most transactions, a formal appraisal is being prepared for lending or other purposes. The intended use section of the appraisal can include its utilization for AAI compliance. Appraisals are prepared to meet the Uniform Standards of Appraisal Practice (USPAP). USPAP requires that appraisers analyze the details of the current transaction. This analysis can and should include a study of the relationship of the price being paid to market value.

The objective is to determine whether or not the purchase price to be paid for the property is reflective of the environmental conditions present at the site. Significant differences between the Market Value of the property "as if unimpaired" and the purchase price provide a basis for this observation. Reasons for any differences between unimpaired market value and sales price should be noted.

Response:

EPA thanks the commenter for the information on appraisals and the assessment of market value. We remind the commenter that the statutory requirement is to consider the *relationship* between the purchase price and the value of the property, if the property were not contaminated. Although the Agency sees the value in conducting formal assessments and appreciates the

commenter's concerns, EPA emphasizes that the purpose of the all appropriate inquiries investigation is not to attain an exact assessment of the financial value of the property, but to determine whether or not there are conditions at the property that are indicative of releases or threatened releases of hazardous substances. The results of a formal appraisal may be helpful for making this determination, but in many cases not essential.

EPA notes that the final rule does not dictate how the prospective property owner or grantee must undertake this analysis. This type of comparison has been included in the statutory provisions governing all appropriate inquiries since the 1986 SARA amendments to CERCLA. Today's final rule does nothing to alter the original statutory requirement and represents no change from current practice.

Commenter Organization Name: Fewel, Chris

Comment Number: 0370

Excerpt Number: 2

Excerpt Text:

Because of this, I believe the proposed rule provides deficient appraisal methodology advice without adequately explaining the valuation process, which could come to haunt a property owner (or EPA) in the future.

I support a minor clarification to the Preamble, Section III M paragraph 2 to help provide better direction to the public and prospective purchasers. Section III M of the Preamble should read as follows:

"The comparison of purchase price to Fair Market Value required to meet Section 312.29 of the Act may be accomplished in several ways. While the proposed rule does not require that a real estate appraisal be conducted to achieve compliance with this criterion, the prospective purchaser should make the decision regarding scope of this study in light of a potential need to defend against liability as a prospective purchaser. An informal assessment of the property may be conducted using acceptable valuation methodology. The Prospective Purchaser must decide if the informal assessment is sustainable in a later action. But, it should be noted that in most transactions, a formal appraisal is being prepared for lending or other purposes. The intended use section of the appraisal can include its utilization for AAI compliance. Appraisals are prepared to meet the Uniform Standards of Appraisal Practice (USPAP). USPAP requires that appraisers analyze the details of the current transaction. This analysis can and should include a study of the relationship of the price being paid to market value.

The objective is to determine whether or not the purchase price to be paid for the property is reflective of the environmental conditions present at the site. Significant differences between the Market Value of the property "as if unimpaired" and the purchase price provide a basis for this observation. Reasons for any differences between unimpaired market value and sales price should be noted."

Response:

EPA thanks the commenter for the information on appraisals and the assessment of market value. We remind the commenter that the statutory requirement is to consider the *relationship* between the purchase price and the value of the property, if the property were not contaminated. Although the Agency sees the value in conducting formal assessments and appreciates the commenter's concerns, EPA emphasizes that the purpose of the all appropriate inquiries investigation is not to attain an exact assessment of the financial value of the property, but to determine whether or not there are conditions at the property that are indicative of releases or threatened releases of hazardous substances. The results of a formal appraisal may be helpful for making this determination, but in many cases not essential.

EPA notes that the final rule does not dictate how the prospective property owner of grantee must undertake this analysis. This type of comparison has been included in the statutory provisions governing all appropriate inquiries since the 1986 SARA amendments to CERCLA. Today's final rule does nothing to alter the original statutory requirement and represents no change from current practice.

Commenter Organization Name: Tucker, Noble

Comment Number: 0442

Excerpt Number: 1

Excerpt Text:

Market value, or "fair market value," is one of the most understood and recognized legal and public policy terms in use today. I am not aware of a case where a federal agency requires the consideration of market value yet states in its regulations that "an appraisal need not be utilized". To the contrary, most federal agencies seek to promote the most accurate opinion of market value by a competent appraisal professional.

Similarly, to ensure the quality of compliance with public policy, all state governments regulate appraisers and a majority of states have adopted "mandatory appraiser licensing" requirements that require opinions of market value to be estimated by licensed or certified appraisers. In these states, all opinions of market value must be performed by a licensed or certified appraiser and in compliance with the Uniform Standards of Professional Appraisal Practice (USPAP), the accepted standards of the appraisal profession.

Because of this, I believe the proposed rule provides deficient appraisal methodology advice without adequately explaining the valuation process, which could come to haunt a property owner (or EPA) in the future.

I support a minor clarification to the Preamble, Section III M paragraph 2 to help provide better direction to the public and prospective purchasers. Section III M of the Preamble should read as follows:

"The comparison of purchase price to Fair Market Value required to meet Section 312.29 of the Act may be accomplished in several ways. While the proposed rule does not require that a real

estate appraisal be conducted to achieve compliance with this criterion, the prospective purchaser should make the decision regarding scope of this study in light of a potential need to defend against liability as a prospective purchaser. An informal assessment of the property may be conducted using acceptable valuation methodology. The Prospective Purchaser must decide if the informal assessment is sustainable in a later action. But, it should be noted that in most transactions, a formal appraisal is being prepared for lending or other purposes. The intended use section of the appraisal can include its utilization for AAI compliance. Appraisals are prepared to meet the Uniform Standards of Appraisal Practice (USPAP). USPAP requires that appraisers analyze the details of the current transaction. This analysis can and should include a study of the relationship of the price being paid to market value.

The objective is to determine whether or not the purchase price to be paid for the property is reflective of the environmental conditions present at the site. Significant differences between the Market Value of the property "as if unimpaired" and the purchase price provide a basis for this observation. Reasons for any differences between unimpaired market value and sales price should be noted."

Response:

Please see response to comment number 0370, excerpt 2.

Commenter Organization Name: Emanuels, Dean

Comment Number: 0447

Excerpt Number: 1

Excerpt Text:

I am the Chief Appraiser of a regional bank and also in charge of Environmental Policy within the bank. Yesterday, I attended a meeting overviewing the new AAI standards put on by a leading environmental services company (EDR) and it was unclear to the environmental site assessment professionals how they can even begin to comment on or address the issues of market value. They wanted to comply with AAI but had no idea where to start with this issue.

I don't have the answers but the EPA really needs to enlist the help of the Appraisal Foundation Members (Appraisal Institute, ASA, ASFMRA). If an USPAP compliant appraisal is needed then great, appraisers are the best at providing that service.

AAI is extremely important, let's get it right the first time. Good Luck.

Response:

The preamble to the proposed rule states, "The objective is not to ascertain the exact value of the property, but to determine whether or not the purchase price paid for the property is reflective of its market value" (69 FR at 52567). The preamble also notes that an appraisal is not required in this comparison. The Agency disagrees with the commenter as to the complicated nature of this comparison. In the preamble to the final rule, EPA states that if an appraisal is conducted for the property, the results of the appraisal may provide valuable information for the all appropriate inquiries investigation. The final rule does not dictate how the prospective property owner of

grantee must undertake this analysis. This type of comparison has been included in the statutory provisions governing all appropriate inquiries since the 1986 SARA amendments to CERCLA. Today's final rule does nothing to alter the original statutory requirement and represents no change from current practice.

Commenter Organization Name: Brinegar, Carl

Comment Number: 0449

Excerpt Number: 2

Excerpt Text:

Because of this, I believe the proposed rule provides deficient appraisal methodology advice without adequately explaining the valuation process, which could come back to haunt a property owner (or EPA) in the future.

I support a minor clarification to the Preamble, Section III M paragraph 2 to help provide better direction to the public and prospective purchasers. Section III M of the Preamble should read as follows:

"The comparison of purchase price to Fair Market Value required to meet Section 312.29 of the Act may be accomplished in several ways. While the proposed rule does not require that a real estate appraisal be conducted to achieve compliance with this criterion, the prospective purchaser should make the decision regarding scope of this study in light of a potential need to defend against liability as a prospective purchaser. An informal assessment of the property may be conducted using acceptable valuation methodology. The Prospective Purchaser must decide if the informal assessment is sustainable in a later action. But, it should be noted that in most transactions, a formal appraisal is being prepared for lending or other purposes. The intended use section of the appraisal can include its utilization for AAI compliance. Appraisals are prepared to meet the Uniform Standards of Appraisal Practice (USPAP). USPAP requires that appraisers analyze the details of the current transaction. This analysis can and should include a study of the relationship of the price being paid to market value.

The objective is to determine whether or not the purchase price to be paid for the property is reflective of the environmental conditions present at the site. Significant differences between the Market Value of the property "as if unimpaired" and the purchase price provide a basis for this observation. Reasons for any differences between unimpaired market value and sales price should be noted."

Response:

Please see response to comment number 0370, excerpt 2.

Commenter Organization Name: Lisle, Dareyl

Comment Number: 0450

Excerpt Number: 1

Excerpt Text:

As an appraiser and an environmental engineer and a real estate broker, and having been on the E-50 committee in the past I strongly urge you to reconsider the current proposal of a Congressional mandate for comparison of fair market value of the property to the purchase price as it was not sufficiently addressed by the Negotiated Rule Making Committee and in the proposed rule. This requirement of a component of All Appropriate Inquiry (AAI) be a comparison of the property's sales price to its Fair Market Value can not work. The only persons educated on determining Market Value are appraisers-period. Anyone else would be making an unsubstantiated opinion of value toward a property. The proposal that the market value can be estimated by comparison of similar nearby sales or by consulting a real estate expert familiar with properties in the general locality who may provide a comparability analysis which is called a CMA or Comparative Market Analysis does not take into consideration two very valid appraisal methods- The Replacement Cost Approach and the Income Approach. A real estate expert (Real Estate Sales person or Broker) is not familiar with these methods and under the definition of Market Value all appropriate methods need to be utilized. I work in the commercial real estate arena doing sales, appraisals, P1,2,3 ESA's, and consulting and I have not met a "real estate expert" with the knowledge or the understanding of how to determine Market Value as accomplished by an appraiser to date. To consider, pick and compare a Real Estate Sales person or Brokers CMA to the actual sales price vs an appraisal of the same property to record the difference.

Real Estate Sales Persons and Brokers provide CMA and expertise with respects to sales, or purchase and leasing.

Environmental Specialist provide expertise in determining the environmental status of property.

Appraisers provide the expertise in determining Market Value or Fair market Value.

Do not convolute the definition of these professions and professionals. To do so will have long reaching consequences in the Real Estate and banking/lending markets. I support a minor clarification to the Preamble, Section III M paragraph 2 to help provide better direction to the public and prospective purchasers. Section III M of the Preamble should read as follows:

"The comparison of purchase price to Fair Market Value required to meet Section 312.29 of the Act may be accomplished in several ways. While the proposed rule does not require that a real estate appraisal be conducted to achieve compliance with this criterion, the prospective purchaser should make the decision regarding scope of this study in light of a potential need to defend against liability as a prospective purchaser. An informal assessment of the property may be conducted using acceptable valuation methodology. The Prospective Purchaser must decide if the informal assessment is sustainable in a later action. But, it should be noted that in most transactions, a formal appraisal is being prepared for lending or other purposes. The intended use section of the appraisal can include its utilization for AAI compliance. Appraisals are prepared to meet the Uniform Standards of Appraisal Practice (USPAP). USPAP requires that appraisers analyze the details of the current transaction. This analysis can and should include a study of the relationship of the price being paid to market value.

Case studies showing the diminution of value are typically done by appraisers or persons with appraisal knowledge. These should be made available to expert appraisers providing Market Value on properties having environmental conditions that have the potential to change the value of a property whether it be real or perceived.

Response:

Please see response to comment number 0370, excerpt 2.

Commenter Organization Name: Sullivan, Timothy

Comment Number: 0451

Excerpt Number: 2

Excerpt Text:

I believe the proposed rule provides deficient appraisal methodology advice without adequately explaining the valuation process, which could come to haunt a property owner (or EPA) in the future.

I support a minor clarification to the Preamble, Section III M paragraph 2 to help provide better direction to the public and prospective purchasers. Section III M of the Preamble should read as follows:

"The comparison of purchase price to Fair Market Value required to meet Section 312.29 of the Act may be accomplished in several ways. While the proposed rule does not require that a real estate appraisal be conducted to achieve compliance with this criterion, the prospective purchaser should make the decision regarding scope of this study in light of a potential need to defend against liability as a prospective purchaser. An informal assessment of the property may be conducted using acceptable valuation methodology. The Prospective Purchaser must decide if the informal assessment is sustainable in a later action. But, it should be noted that in most transactions, a formal appraisal is being prepared for lending or other purposes. The intended use section of the appraisal can include its utilization for AAI compliance. Appraisals are prepared to meet the Uniform Standards of Appraisal Practice (USPAP). USPAP requires that appraisers analyze the details of the current transaction. This analysis can and should include a study of the relationship of the price being paid to market value.

The objective is to determine whether or not the purchase price to be paid for the property is reflective of the environmental conditions present at the site. Significant differences between the Market Value of the property "as if unimpaired" and the purchase price provide a basis for this observation. Reasons for any differences between unimpaired market value and sales price should be noted."

Response:

Please see response to comment number 0370, excerpt 2.

3.8.3 The Agency Should Clarify the Definition of Fair Market Value

Commenter Organization Name: Arnon Environmental & Geoscience, LLC

Comment Number: 0227

Excerpt Number: 1

Excerpt Text:

As the Environmental Professional must consider the Purchase Price vs. the Fair Market Value of a piece of real property, please clarify what EPA considers to be the definition of Fair Market Value. Would this be the same as the value of the real estate used for determining property taxes by the local assessor's office?

Response:

Please see response to comment number 0058, excerpt 1.

3.8.4 The Rule Should Require a Commercial Appraisal by a Real Estate Expert/Appraiser

Commenter Organization Name: Appraisal Institute

Comment Number: 0212

Excerpt Number: 1

Excerpt Text:

We are concerned that the Congressional mandate for comparison of the fair market value of the property to the purchase price was not sufficiently addressed by the Negotiated Rulemaking Committee and in the proposed rule. If left unaddressed, we believe Section 312.29 will leave prospective purchasers (and the EPA) in a precarious position, and that vagaries in the proposed rule will continue to dissuade the purchase of contaminated or potentially contaminated properties.

Environmental Litigation and Market Value

Market value, or "fair market value," is one of the most understood and recognized legal and public policy terms in use today. Fair market value is defined and mandated to be used throughout federal law, our judicial system, interstate and international commerce and the financial services sector. Federal agencies utilizing market value in their regulations include: the Department of Transportation, Department of Interior, Department of Housing and Urban Development, General Services Administration and Office of Management and Budget as well as the five federal financial institution regulatory agencies.

We are not aware of any case where a federal agency requires the consideration of market value yet states in its regulations that "an appraisal need not be utilized." To the contrary, most federal agencies seek to promote the acquisition of the most accurate opinion of market value by using the services of a competent appraisal professional.

Similarly, to ensure the quality of compliance with public policy, all state governments regulate real estate appraisers and a majority of states have adopted "mandatory appraiser licensing" requirements that require opinions of market value to be estimated by licensed or certified appraisers (see attachment for mandatory appraiser licensing states). In these states, all opinions of market value must be performed by a licensed or certified appraiser and in compliance with the Uniform Standards of Professional Appraisal Practice (USPAP), the accepted standards of the appraisal profession. It does not appear that the proposed rule has taken this into consideration, or else this would have been discussed in the proposed rule. As it is, the proposed rule may be advising prospective purchasers to violate appraiser licensing laws in mandatory appraiser licensing states.

Additionally, many of our members testify in environmental litigation regarding property market value before and after contamination in conjunction with other qualified environmental professionals, and their experiences tell us that opinions by professional appraisers of the market value of properties "affected" and "unaffected" by contamination are given strong weight. We believe it is unlikely that a competent attorney would prepare a defense for a client in federal

court utilizing the concepts in the proposed rule, which contradict the law itself.

To provide a sustainable defense, a proper baseline must be established. This baseline is market value. Market value is established through the appraisal process. Unfortunately, the procedures outlined in Section III, M, Paragraph 2, fall short of providing a sustainable baseline (market value).

Response:

Please see responses to comment numbers 0212 (excerpt 3), 0058 (excerpt 1), and 0234 (excerpt 3).

Commenter Organization Name: Harris, M

Comment Number: 0236

Excerpt Number: 1

Excerpt Text:

In the last two years of working with appraisals after my college graduation, I believe appraisals and phase I offer beneficial viewpoints that are both equally valuable. Commercial appraisals should be viewed as valuations as if the property was not contaminated. Appraisers are experts in real estate functionality, not educated environmentalists. Personally, I am intent on becoming an "environmental appraiser" that speaks the lingo to environmental toxicology and commercial appraisals. This is a rare breed. Commercial appraisals of brownfields and such should be only reviewed by those educated in both fields of research. Ultimately, the sale of the property will determine the amount of damage caused by the stigma associated with environmental clean-up costs. Appraisers are certainly needed for their financial concerns, as well as Planners. The severity of the contamination and actual size of the acreage should determine the amount money spent to estimate the value - as well as the "foreseen value" that can be used by local city planners. A holistic approach would be most beneficial in these reclamation of brownfields - although it will take more time and red-tape, the empirical need to determine the economic feasibility for a private business to rebuild a contaminated site should be the appraised value on the appraisal. JUST as wetlands delineations are sub-contracted out in many environmental reports, an approach to value which includes cost estimates and Phase I should be added and reconciled in the commercial appraisal. That should be required. From my vantage point, most commercial appraisals lack sufficient environmental analysis but provide very accurate approaches to probable market value as seen by real estate experts.

Response:

At the onset of this response we note from the preamble of the proposed rule that “§312.29 would require that the purchaser of the property consider whether or not the purchase price paid for the property reflects the fair market value of the property, *assuming that the property is not contaminated*” (69 FR 52567).

The comparison is made between the purchase price and the fair market value of the property, *assuming that the property is not contaminated*. This means that the comparison can take place at any time, and does not require any amount of contamination to be detected. The purpose of

this comparison is to look at the difference between the price and market value as an indicator of possible contamination. If the prices are significantly different, this should indicate to the purchaser or grantee that additional inquiry should be done if liability protection is desired.

Commenter Organization Name: Kane Environmental

Comment Number: 0317

Excerpt Number: 5

Other Sections: NEW - 3.8.1 - The EP should not be required to consider the relationship of the purchase price to the value of the property

Excerpt Text:

Section 312.29 needs to be completely eliminated. Trained and licensed appraisers should be the only ones to provide property market value analysis

Response:

The preamble to the proposed rule states, "The objective is not to ascertain the exact value of the property, but to determine whether or not the purchase price paid for the property is reflective of its market value" (69 FR at 52567). The preamble also notes that an appraisal is not required in this comparison. The Agency disagrees with the commenter as to the complicated nature of this comparison. In the preamble to the final rule, EPA states that if an appraisal is conducted for the property, the results of the appraisal may provide valuable information for the all appropriate inquiries investigation. The final rule does not dictate how the prospective property owner or grantee must undertake this analysis. This type of comparison has been included in the statutory provisions governing all appropriate inquiries since the 1986 SARA amendments to CERCLA. Today's final rule does nothing to alter the original statutory requirement and represents no change from current practice.

Commenter Organization Name: Fewel, Chris

Comment Number: 0370

Excerpt Number: 1

Excerpt Text:

Congress required that a component of All Appropriate Inquiry (AAI) be a comparison of the property's sales price to its Fair Market Value. Yet EPA's proposed regulations state that an appraisal need not be utilized and that the market value can be estimated by comparison of similar nearby sales or by consulting a real estate expert familiar with properties in the general locality who may provide a comparability analysis.

Market value, or "fair market value," is one of the most understood and recognized legal and public policy terms in use today. I am not aware of a case where a federal agency requires the consideration of market value yet states in its regulations that "an appraisal need not be utilized". To the contrary, most federal agencies seek to promote the most accurate opinion of market value by a competent appraisal professional.

Similarly, to ensure the quality of compliance with public policy, all state governments regulate

appraisers and a majority of states have adopted "mandatory appraiser licensing" requirements that require opinions of market value to be estimated by licensed or certified appraisers. In these states, all opinions of market value must be performed by a licensed or certified appraiser and in compliance with the Uniform Standards of Professional Appraisal Practice (USPAP), the accepted standards of the appraisal profession.

Response:

Please see responses to comment numbers 0212 (excerpt 3), 0058 (excerpt 1), and 0234 (excerpt 3).

Commenter Organization Name: RT Environmental Services

Comment Number: 0406

Excerpt Number: 4

Excerpt Text:

In addition, it should be noted that environmental site assessors are not trained to be property appraisers, and separate qualifications should be established for such appraisers. In general, appraisals should be an attachment to an environmental site assessment report, and not part of it, because the appraisals will virtually always be prepared by a separate professional.

Response:

Section 101(35)(B)(iii)(VIII) requires that the relationship of the purchase price to the value of the property, if the property was not contaminated be included in all appropriate inquiries federal regulations. The final regulations includes this requirement within the responsibilities for the prospective landowner or grantee (see §312.22 and §312.29). This activity does not have to be conducted by the environmental professional. A prospective landowner or grantee may hire the services of a licensed appraiser if he or she determines that such expertise is necessary to fulfill the requirement.

EPA reminds the commenter that the statutory requirement is to consider the *relationship* between the purchase price and the value of the property, if the property were not contaminated. Although the Agency sees the value in conducting formal assessments and appreciates the commenter's concerns, EPA emphasizes that the purpose of the all appropriate inquiries investigation is not to attain an exact assessment of the financial value of the property, but to determine whether or not there are conditions at the property that are indicative of releases or threatened releases of hazardous substances. The results of a formal appraisal may be helpful for making this determination, but in many cases not essential.

EPA notes that the final rule does not dictate how the prospective property owner or grantee must undertake this analysis. This type of comparison has been included in the statutory provisions governing all appropriate inquiries since the 1986 SARA amendments to CERCLA. Today's final rule does nothing to alter the original statutory requirement and represents no change from current practice.

Commenter Organization Name: Wohlers Environ Svcs

Comment Number: 0435

Excerpt Number: 3

Excerpt Text:

Regardless of the answer to the above question, does the EPA expect that the AAI report (i.e., the Phase I Environmental Site Assessment) should include information regarding comparison of the purchase price of the property to the value of the property? Based on our experience, real estate appraisal experts with the required knowledge and training for real estate valuation opinions are more appropriate for this task than the EP.

Response:

Section 101(35)(B)(iii)(VIII) requires that the relationship of the purchase price to the value of the property, if the property was not contaminated be included in all appropriate inquiries federal regulations. The final regulations includes this requirement within the responsibilities for the prospective landowner or grantee (see §312.22 and §312.29). This activity does not have to be conducted by the environmental professional and the information collected in carrying out the activity does not have to be provided to the environmental professional if the prospective property owner or grantee does not wish to disclose the information. Documentation of reasons for discrepancies between the purchase price and the value of the property should be noted in the written report.

Commenter Organization Name: Wilson, Shawn

Comment Number: 0440

Excerpt Number: 2

Excerpt Text:

Do not be tempted to complete real estate transactions involving public money without thorough, substantive, real estate appraisals. We really don't need an "EPA Bailout Bill" in the future to go along with the "S&L Bailout Bill."

Just as with land surveys, environmental assessments, and other components of most real estate transactions: YOU NEED A REAL APPRAISAL BY A REAL APPRAISER TO MAKE SURE THAT THE MONEY IS BEING SPENT CORRECTLY.

Kindly do not adapt rules which circumvent this process of checks and balances.

Response:

The Agency is fully aware that appraisals in real estate deals are very valuable in several regards. EPA takes no position for or against appraisals for the land and thus the use of such appraisals should not change. The Agency's position is merely that *for the purposes of completing an all appropriate inquiry* a formal appraisal is not required. EPA is aware of the benefits of appraisals and believes that they will be used to complete some all appropriate inquiries, at the discretion of the prospective landowner or grantee.

EPA reminds the commenter that the statutory requirement is to consider the *relationship*

between the purchase price and the value of the property, if the property were not contaminated. Although the Agency sees the value in conducting formal assessments and appreciates the commenter's concerns, EPA emphasizes that the purpose of the all appropriate inquiries investigation is not to attain an exact assessment of the financial value of the property, but to determine whether or not there are conditions at the property that are indicative of releases or threatened releases of hazardous substances. The results of a formal appraisal may be helpful for making this determination, but in many cases not essential.

EPA notes that the final rule does not dictate how the prospective property owner or grantee must undertake this analysis. This type of comparison has been included in the statutory provisions governing all appropriate inquiries since the 1986 SARA amendments to CERCLA. Today's final rule does nothing to alter the original statutory requirement and represents no change from current practice.

Commenter Organization Name: Swanson, Eric

Comment Number: 0441

Excerpt Number: 1

Excerpt Text:

I am concerned that the Congressional mandate for comparison of fair market value of the property to the purchase price was not sufficiently addressed by the Negotiated Rule Making Committee and in the proposed rule.

Congress required that a component of All Appropriate Inquiry (AAI) be a comparison of the property's sales price to its Fair Market Value. Yet EPA's proposed regulations state that an appraisal need not be utilized and that the market value can be estimated by comparison of similar nearby sales or by consulting a real estate expert familiar with properties in the general locality who may provide a comparability analysis.

Response:

EPA believes that the proposed rule effectuates congressional intent. EPA reminds the commenter that the statutory requirement is to consider the *relationship* between the purchase price and the value of the property, if the property were not contaminated. Although the Agency sees the value in conducting formal assessments and appreciates the commenter's concerns, EPA emphasizes that the purpose of the all appropriate inquiries investigation is not to attain an exact assessment of the financial value of the property, but to determine whether or not there are conditions at the property that are indicative of releases or threatened releases of hazardous substances. The results of a formal appraisal may be helpful for making this determination, but in many cases not essential.

EPA notes that the final rule does not dictate how the prospective property owner or grantee must undertake this analysis. This type of comparison has been included in the statutory provisions governing all appropriate inquiries since the 1986 SARA amendments to CERCLA. Today's final rule does nothing to alter the original statutory requirement and represents no change from current practice.

Commenter Organization Name: Swanson, Eric

Comment Number: 0441

Excerpt Number: 2

Excerpt Text:

Just who in the hell would you hire as a "real estate expert" that would work for less than what I make as an appraiser?

As an appraiser, I know first hand how difficult it is to accurately determine market value of a property when all factors are carefully analyzed. The mere suggestion that you could achieve the same result without doing the required analysis is, frankly, idiotic.

I recognize the motivation behind this move, and I've seen the same cut throat corner-cutting in the mortgage industry many times. Every time it's allowed to slip into practice, it blows up in somebody's face. The people responsible for the debacle are rarely held accountable. I will see to it that changes this time.

THERE ARE NO SHORTCUTS TO QUALITY! MY ONLY CONCLUSION FROM YOUR INITIATIVE IS THAT QUALITY IS NOT IMPORTANT TO YOU.

Response:

Please see responses to comment 0440 (excerpt 2) and comment 0441 (excerpt 1).

Commenter Organization Name: Tucker, Noble

Comment Number: 0442

Excerpt Number: 2

Excerpt Text:

As an appraiser of numerous petroleum related properties, service stations, car washes, lube centers, and automotive repair facilities I feel that this rule is another example of governmental oversight and lack of knowledge regarding the appraisal profession. I am far more competent to render an opinion of value on properties of this nature than a "competent real estate expert" As appraisers we are bound by requirements by our state, USPAP, and The Appraisal Institute. The federal government, other governmental agencies, states, appraisers, and their organizations have spent millions and millions of dollars trying to take the confusion out of appraising by creating the UNIFORM STANDARDS OF PROFESSIONAL APPRAISAL PRACTICE and now some governmental agency wants to change the rules. This will cause unfair valuations to the owners of these properties.

Many of these properties, especially service stations, have first rights of refusals in the lease contracts. The station dealer needs a fair unbiased opinion of value in order to logically determine whether or not to exercise these options. By enabling an "All Appropriate Inquiry (AAI) as a comparison of the property's sales price to its Fair Market Value this congressional mandate will cause harm to the dealers and put more control in the hands of the large corporations who already have "oligopolistic" and nearly "monopolistic" characteristics.

Response:

Please see responses to comment 0440 (excerpt 2) and comment 0441 (excerpt 1).

Commenter Organization Name: Husij, Michael

Comment Number: 0445

Excerpt Number: 1

Excerpt Text:

If the purpose is "to determine whether or not the purchase price for the property is reflective of market value", then a complete appraisal is required. A simple "comparative analysis" is incomplete and could be misleading.

Response:

As the preamble states, "The objective is not to ascertain the exact value of the property, but to determine whether or not the purchase price paid for the property is reflective of its market value" 69 FR at 52567. An appraisal may be useful in some circumstances, but need not be used in every circumstance.

EPA reminds the commenter that the statutory requirement is to consider the *relationship* between the purchase price and the value of the property, if the property were not contaminated. Although the Agency sees the value in conducting formal assessments and appreciates the commenter's concerns, EPA emphasizes that the purpose of the all appropriate inquiries investigation is not to attain an exact assessment of the financial value of the property, but to determine whether or not there are conditions at the property that are indicative of releases or threatened releases of hazardous substances. The results of a formal appraisal may be helpful for making this determination, but in many cases not essential.

EPA notes that the final rule does not dictate how the prospective property owner or grantee must undertake this analysis. This type of comparison has been included in the statutory provisions governing all appropriate inquiries since the 1986 SARA amendments to CERCLA. Today's final rule does nothing to alter the original statutory requirement and represents no change from current practice.

Commenter Organization Name: Johnson, Noel

Comment Number: 0446

Excerpt Number: 1

Excerpt Text:

The EPA's proposed regulations state that an appraisal need not be utilized and that the market value can be estimated by comparison of similar nearby sales or by consulting a real estate expert familiar with properties in the general locality who may provide a comparability analysis.

The valuation of such properties as those dealt with in these cases are tremendously complex. Doing away with the requirement to have a properly trained and experienced consultant value a

parcel in favor of a what is proposed brings the real estate industry into dangerous situation. Please reconsider this aspect of the proposed rule.

Response:

Please see responses to comment 0440 (excerpt 2) and comment 0441 (excerpt 1).

Commenter Organization Name: Brinegar, Carl

Comment Number: 0449

Excerpt Number: 1

Excerpt Text:

I do not believe that the congressional mandate for comparison of fair market value of the property to the purchase price was sufficiently addressed by the Negotiated Rule Making Committee and in the proposed rule.

Congress required that a component of All Appropriate Inquiry (AAI) be a comparison of the property's sales price to its Fair Market Value. Yet EPA's proposed regulations state that an appraisal need not be utilized and that the market value can be estimated by comparison of similar nearby sales or by consulting a real estate expert familiar with properties in the general locality who may provide a comparability analysis.

Market value, or "fair market value," is one of the most understood and recognized legal and public policy terms in use today. I am not aware of a case where a federal agency requires the consideration of market value yet states in its regulations that "an appraisal need not be utilized". To the contrary, most federal agencies seek to promote the most accurate opinion of market value by a trained, independent, competent real estate appraiser.

Similarly, to ensure the quality of compliance with public policy, all state governments regulate appraisers and a majority of states, including Texas, have adopted "mandatory appraiser licensing" requirements that require opinions of market value to be estimated by state licensed or certified appraisers. In these states, all opinions of market value must be performed by a licensed or certified appraiser and in compliance with the Uniform Standards of Professional Appraisal Practice (USPAP), the accepted standards of the appraisal profession.

For example, I am a Texas Certified Real Estate Appraiser with over 39 years of experience, including a substantial amount of experience as a professional witness in courts of law. By personal experience, I am an expert on the serious errors that are made by untrained individuals relying on raw data or on the use of untrained "Experts" in real estate transactions, and the losses suffered as a consequence of those errors.

First, the use of raw data from the market, with no--or limited--knowledge of its origin and proper use by one with no--or limited--knowledge of good research and appraisal techniques, and/or by one who is not trained to understand and maintain independence from the transaction, is dangerous to all involved and can lead to significant losses.

Second, in my experience "Real Estate Experts" that have not been required by any agency or ruling authority to acquire or demonstrate knowledge and expertise in real estate "Comparability Analysis", often have scarcely enough training or knowledge to be anything but dangerous to themselves and those they represent. This is the stuff of which lawsuits are made.

Finally, who is a better qualified as a "Real Estate Expert" than a trained, qualified, independent, certified or licensed real estate appraiser that has proven his or her expertise and competence to state licensing authorities?

Response:

Please see responses to comment 0440 (excerpt 2) and comment 0441 (excerpt 1).

Commenter Organization Name: Sullivan, Timothy

Comment Number: 0451

Excerpt Number: 1

Excerpt Text:

I am concerned that the Congressional mandate for comparison of fair market value of the property to the purchase price was not sufficiently addressed by the Negotiated Rule Making Committee and in the proposed rule.

Congress required that a component of All Appropriate Inquiry (AAI) be a comparison of the property's sales price to its Fair Market Value. Yet EPA's proposed regulations state that an appraisal need not be utilized and that the market value can be estimated by comparison of similar nearby sales or by consulting a real estate expert familiar with properties in the general locality who may provide a comparability analysis.

Market value, or "fair market value" is one of the most understood and recognized legal and public policy terms in use today. I am not aware of a case where a federal agency requires the consideration of market value yet states in its regulations that "an appraisal need not be utilized". To the contrary, most federal agencies seek to promote the most accurate opinion of market value by a competent appraisal professional.

You go to great lengths to define who is competent in other areas, but fail to define the appraiser as the recognized professional in estimating market value.

As with engineering, to ensure the quality of compliance with public policy, all state governments regulate appraisers and a majority of states have adopted "mandatory appraiser licensing" requirements that require opinions of market value to be estimated by licensed or certified appraisers. In these states, all opinions of market value must be performed by a licensed or certified appraiser and in compliance with the Uniform Standards of Professional Appraisal Practice (USPAP), the accepted standards of the appraisal profession.

Response:

Please see responses to comment 0440 (excerpt 2) and comment 0441 (excerpt 1).

Commenter Organization Name: Moss, JR

Comment Number: 0452

Excerpt Number: 1

Excerpt Text:

Congress required that a component of All Appropriate Inquiry (AAI) be a comparison of the property's sales price to its Fair Market Value. Yet EPA's proposed regulations state that an appraisal need not be utilized and that the market value can be estimated by comparison of similar nearby sales or by consulting a real estate expert familiar with properties in the general locality who may provide a comparability analysis.

Market value, or "fair market value," is one of the most understood and recognized legal and public policy terms in use today. I am not aware of a case where a federal agency requires the consideration of market value yet states in its regulations that "an appraisal need not be utilized". To the contrary, most federal agencies seek to promote the most accurate opinion of market value by a competent appraisal professional.

Similarly, to ensure the quality of compliance with public policy, all state governments regulate appraisers and a majority of states have adopted mandatory appraiser licensing requirements that require opinions of market value to be estimated by licensed or certified appraisers. In these states, all opinions of market value must be performed by a licensed or certified appraiser and in compliance with the Uniform Standards of Professional Appraisal Practice (USPAP), the accepted standards of the appraisal profession.

Response:

Please see responses to comment 0440 (excerpt 2) and comment 0441 (excerpt 1).

Commenter Organization Name: Moss, JR

Comment Number: 0452

Excerpt Number: 2

Excerpt Text:

The Market will still determine the value of the property. How does one determine the market value with a knowledge of the market place where the property is located. How do you tell if a refurbished house was once a meth lab. There is work to be done for any property to determine market value and appraisers who do their home work most often know how to do this.

Response:

At the onset of this response we note from the preamble of the proposed rule that “§312.29 would require that the purchaser of the property consider whether or not the purchase price paid for the property reflects the fair market value of the property, *assuming that the property is not contaminated*” (69 FR 52567).

The comparison is made between the purchase price and the fair market value of the property, *assuming that the property is not contaminated*. This means that the comparison can take place

at any time, and does not require any amount of contamination to be detected. The purpose of this comparison is to look at the difference between the price and market value as an indicator of possible contamination. If the prices are significantly different, this should indicate to the purchaser or grantee that additional inquiry should be done if liability protection is desired.

Also, please see response to comment number 0440, excerpt 2.

Commenter Organization Name: Shaw, James

Comment Number: 0453

Excerpt Number: 1

Excerpt Text:

In these times, low ethical business practices are rampant and an unbiased opinion as rendered by a professional appraisal is more crucial than ever.

Response:

Please see responses to comment 0440 (excerpt 2) and comment 0441 (excerpt 1).

3.9 Considering Commonly Known or Reasonably Ascertainable Information about the Property

Commenter Organization Name: Koch, Donald

Comment Number: 0234

Excerpt Number: 1

Other Sections: NEW - 3.4 - Recorded environmental cleanup liens searches
NEW - 3.7 - Inclusion of specialized knowledge or experience
NEW - 3.8 - Considering the relationship of the purchase price to the value of the property

Excerpt Text:

I would like to comment on proposed 40 CFR 312.22. 40 CFR 312.21 defines the results of an inquiry by an environmental professional. 40 CFR 312.22 defines four additional requirements of an all appropriate inquiry and requires that this information must be provided to the environmental professional responsible for the inquiry. The mandatory provision of these criteria is inappropriate. The four criteria of an all appropriate inquiry mentioned in proposed 40 CFR 312.22 do not require the judgement of an environmental professional to interpret.

I recommend the following change in 40 CFR 312.22.

312.11 Additional Inquiries

(a)-Persons identified under 312.1(b) may provide the following information to the environmental responsible for conducting the activities listed in 312.21.

Response:

The Agency agrees with the commenter. The final rule does not require the prospective landowner or grantee to provide the results of inquiries for which he or she is responsible to the environmental professional.

Commenter Organization Name: Koch, Donald

Comment Number: 0234

Excerpt Number: 4

Excerpt Text:

The requirement of proposed 312.22 (a)(4), providing "commonly known or reasonably ascertainable information about the subject property" is implicit in the "all appropriate inquiries" rule. The regulations require the environmental professional to use their judgement. Clearly, the consideration of commonly known or reasonably ascertainable information about the subject property is well within the requirements of proposed 312.21. This requirement, while mandated by the statute, has no practical impact on the report generated by an environmental professional.

Response:

The Agency agrees with the commenter. The final rule does not require the prospective landowner or grantee to provide the results of inquiries for which he or she is responsible to the environmental professional.

Commenter Organization Name: McKerr, Thomas

Comment Number: 0347

Excerpt Number: 14

Excerpt Text:

Requirements for Commonly Known or Reasonably Ascertainable Information. I agree that this is an area to be included but my experience is that it depends on whom one interviews, even within, for example, a city planning department. Asking a counter clerk about a property is not the same as asking a senior planner. A public works official may be familiar with a property but a planner may not.

Response:

Commonly known or reasonably ascertainable information about a property may be ascertained from the owner or occupant of a property, members of the local community, including owners or occupants of neighboring properties to the subject property, local or state government officials, local media sources, and local libraries and historical societies. In many cases, this information may be incidental to other information collected during the inquiries, and separate or distinct efforts to collect the information may not be necessary

The collection and use of commonly known information about a property may be done in connection with the collection of all other required information for the purposes of achieving the objectives and performance factors contained in §312.20. Persons undertaking the all appropriate inquiries may collect commonly known or reasonably ascertainable information on the subject property from a variety of sources, including sources located in the community in which the property is located. The opinion provided by an environmental professional regarding the environmental conditions of a property and included in the all appropriate inquiries report should be based upon a balance of all information collected, including commonly known or reasonably ascertainable information about the property. The potential sources of commonly known or reasonably ascertainable information provided in the proposed rule and retained in the final rule are provided as suggestions for where such information may be found and the list provided is not meant as an exhaustive list of sources that must be consulted. Commonly known information may be collected from other sources, based upon the professional judgment of the environmental professional and the prospective landowner or grantee, and may be most easily collected during the conduct of other aspects of the all appropriate inquiries investigation (*e.g.*, interviews, reviews of historical sources of information, reviews of governmental records).

Commenter Organization Name: McKerr, Thomas

Comment Number: 0347

Excerpt Number: 21

Excerpt Text:

312.21(b): change "(commonly known or reasonably attainable...)" to "(commonly known and reasonably attainable...").

Response:

In the final rule, EPA retains the statutory language for the criterion.

Commenter Organization Name: Greenlining Institute

Comment Number: 0354

Excerpt Number: 10

Excerpt Text:

-ii. Proposed § 312.30 "Commonly Known or Reasonably Ascertainable Information About the Property" imposes extraordinarily open-ended search requirements on developers and invites courtroom second guessing.

Proposed § 312.30 requires that "[t]hroughout the inquiries," purchasers "must take into account commonly known or reasonably ascertainable information within the local community about the subject property." Sources of commonly known information are defined to include unenumerated "others" with knowledge of the property, unspecified "other" sources of information, as well as websites, local libraries, and newspapers. The requirement appears to make the purchaser responsible for any information about the property that might exist anywhere in the community. Although generally qualified by constraints such as reasonable time and cost, who is to say that one more phone call to the local librarian shouldn't have been made? In short, it is an open invitation to courtroom second guessing.

The committee may have believed that this section assigning liability to the purchaser for commonly known information is required by the Brownfields Revitalization Act, which does include the statutory criteria "commonly known or reasonably ascertainable information." 42 U.S.C. § 9601(B)(iii)(IX). However, like the "relationship of purchase price" element discussed above, 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 directly addressed by ASTM E1527. ASTM E1527 properly limits "reasonably ascertainable" records to "standard sources." ASTM E1527-00 § 7.1.4. There is no open ended catchall requirement to scour the community. For example, the historical use inquiry ends with the enumerated standard historical sources: "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." ASTM E1527-00 § 7.3.2.3. Moreover, ASTM E1527 explicitly relieves purchasers of the responsibility to consult "other historical sources," such as newspaper archives and other miscellaneous sources. ASTM E1527 § 7.3.2.3.

We hope you will reconsider, and decide, in light of the information presented here that this section of the new rule should be deleted.

Response:

The final rule retains the proposed provisions requiring that prospective landowners and environmental professionals consider commonly known or reasonably ascertainable information about a property when conducting all appropriate inquiries. This provision has been part of the all appropriate inquiries requirements under CERCLA since the 1986 SARA amendments. The final rule points out that this information may not have to be collected independently if such information is gathered during the course of conducting the other information collection activities included in the rule and collected in compliance with the objectives and performance factors. The requirement is not so much “open ended” as it is a condition to not miss or ignore the obvious information or easily attained information that may be well known throughout a community in which a property is located.

Commonly known or reasonably ascertainable information be ascertained from the owner or occupant of a property, members of the local community, including owners or occupants of neighboring properties to the subject property, local or state government officials, local media sources, and local libraries and historical societies. In many cases, this information may be incidental to other information collected during the inquiries, and separate or distinct efforts to collect the information may not be necessary. Information about a property, including its ownership and uses, that is commonly known or reasonably attainable within the community or neighborhood in which a property is located may be valuable to identifying conditions indicative of releases or threatened releases at the subject property. Such information, if not collected during the course of collecting other information necessary to complete the all appropriate inquiries investigation, may be obtained by interviewing community officials and other residents of the locality. For example, neighboring property owners and local community members may have information regarding undocumented uses of a property during periods when the property was idle or abandoned. Local community sources may be good (*i.e.*, reasonably attainable) sources of commonly known information on uses of a property and activities conducted at a property, particularly in the case of abandoned properties.

The collection and use of commonly known information about a property may be done in connection with the collection of all other required information for the purposes of achieving the objectives and performance factors contained in §312.20. Persons undertaking the all appropriate inquiries may collect commonly known or reasonably ascertainable information on the subject property from a variety of sources, including sources located in the community in which the property is located. The opinion provided by an environmental professional regarding the environmental conditions of a property and included in the all appropriate inquiries report should be based upon a balance of all information collected, including commonly known or reasonably ascertainable information about the property. The potential sources of commonly known or reasonably ascertainable information provided in the proposed rule and retained in the final rule are provided as suggestions for where such information may be found and the list provided is not meant as an exhaustive list of sources that must be consulted. Commonly known information may be collected from other sources and may be most easily collected during the conduct of other aspects of the all appropriate inquiries investigation (*e.g.*, interviews, reviews of historical sources of information, reviews of governmental records).

Commenter Organization Name: Rybak, John Thomas

Comment Number: 0412

Excerpt Number: 10

Excerpt Text:

Proposed requirement for Commonly Known or Reasonably Ascertainable Information.

a) Page # 52580

b)View: This proposal is supported, and should be included into the AAI Phase I performance standards. Information that may be commonly known to individuals about the property (current and former owners, employees, and/or local government officials), may not be commonly know to others. Specifically this information may not be available through a standard government records review, site inspection and historical research. The Interview Process should include questioning such individuals of Commonly Known or Reasonably Ascertainable Information.

c) Assumption: Certain property conditions from past operations and use of the site or surrounding area may be relevant to persons and government officials familiar with the site/area that may not be obvious to the EP unless the follow up on all commonly known or reasonably ascertainable information. Too often the consultant tries to gain pertinent information only once, does not get an answer; therefore, it is excluded from the report.

d) Burden: The EP may have to follow up more than once with persons that may have the relevant information, which may take longer than expected.

Response:

Please see response to comment number 0354, excerpt 10.

Commenter Organization Name: Georgia Power

Comment Number: 0423

Excerpt Number: 13

Other Sections: NEW - 3.7 - Inclusion of specialized knowledge or experience

NEW - 3.10 - Considering the degree of obviousness of the presence or likely presence of contamination at the property

Excerpt Text:

§312.28, §312.30 and §312,31, the term "person"

Please consider including the need to define the term "Persons" in §312.1 (b)(1), should be further defined, either in the preamble or in §312.10 Definitions. Under §312.28, §312.30 and §312,31, the term "person" should not include every individual in a firm, corporation, association, partnership, consortium, joint venture, commercial entity, United States Government, State, Tribe, municipality, commission, political subdivision of a State, or any interstate body, but should be limited to those persons directly involved with conducting the AAI for the purpose of §312.28, §312.30 and §312.31. For example, specialized knowledge or

experience cannot mean the specialized knowledge or experience of every employee in a corporation of 25,000 employees. Clarifying language and instructive examples in the preamble will ensure that the applicability of these sections is practical.

Response:

The term “person” is defined in Section 101(21) of CERCLA. “Person” means an individual, firm, corporation, association, partnership, consortium, joint venture, commercial entity, United States Government, State, municipality, commission, political subdivision of a State, or any interstate body. Since firms, corporations, associations, partnerships, etc. may purchase potentially contaminated property and may want to attain protection from CERCLA liability, as provided under the statute, EPA is uncertain why the commenter is suggesting that the term person be limited or changed from its common legal definition and the definition provided under the CERCLA statute.

Commenter Organization Name: Small, Arthur

Comment Number: 0424

Excerpt Number: 2

Other Sections: NEW - 4 - Comments on the Economic Impact Analysis

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 unenumerated "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 final rule retains the proposed provisions requiring that prospective landowners and environmental professionals consider commonly known or reasonably ascertainable information about a property when conducting all appropriate inquiries. This provision has been part of the all appropriate inquiries requirements under CERCLA since the 1986 SARA amendments. The final rule does not change this provision. The final rule does point out that this information may not have to be collected independently if such information is gathered during the course of conducting the other information collection activities included in the rule and collected in compliance with the objectives and performance factors. The requirement is not so much "open ended" as it is a condition to not miss or ignore the obvious information or easily attained information that may be well known throughout a community in which a property is located.

Commonly known or reasonably ascertainable information be ascertained from the owner or occupant of a property, members of the local community, including owners or occupants of neighboring properties to the subject property, local or state government officials, local media sources, and local libraries and historical societies. In many cases, this information may be incidental to other information collected during the inquiries, and separate or distinct efforts to collect the information may not be necessary. Information about a property, including its ownership and uses, that is commonly known or reasonably attainable within the community or neighborhood in which a property is located may be valuable to identifying conditions indicative of releases or threatened releases at the subject property. Such information, if not collected during the course of collecting other information necessary to complete the all appropriate inquiries investigation, may be obtained by interviewing community officials and other residents of the locality. For example, neighboring property owners and local community members may have information regarding undocumented uses of a property during periods when the property was idle or abandoned. Local community sources may be good (*i.e.*, reasonably attainable) sources of commonly known information on uses of a property and activities conducted at a property, particularly in the case of abandoned properties.

The collection and use of commonly known information about a property may be done in connection with the collection of all other required information for the purposes of achieving the objectives and performance factors contained in §312.20. Persons undertaking the all appropriate inquiries may collect commonly known or reasonably ascertainable information on the subject property from a variety of sources, including sources located in the community in which the property is located. The opinion provided by an environmental professional regarding the environmental conditions of a property and included in the all appropriate inquiries report should be based upon a balance of all information collected, including commonly known or reasonably ascertainable information about the property. The potential sources of commonly known or reasonably ascertainable information provided in the proposed rule and retained in the final rule are provided as suggestions for where such information may be found and the list provided is not meant as an exhaustive list of sources that must be consulted. Commonly known information may be collected from other sources and may be most easily collected during the conduct of other aspects of the all appropriate inquiries investigation (*e.g.*, interviews, reviews of historical sources of information, reviews of governmental records).

3.9.1 Commonly Known or Reasonably Ascertainable Information Should Not Be Limited to Information Available in the Local Community

Commenter Organization Name: Tweedale, Tony

Comment Number: 0045

Excerpt Number: 1

Excerpt Text:

Proposed 40 CFR Sec. 312.30, Requirements to determine Commonly Known or Reasonably Ascertainable Information. Why limit this requirement to locally available information (eg the preamble says that this information is usually available in the local community. In fact many real estate transactions are between far-flung national or international parties; who may have "commonly known/ascertainable information" about contamination at the property being transacted.

Response:

The collection and use of commonly known information about a property may be done in connection with the collection of all other required information for the purposes of achieving the objectives and performance factors contained in §312.20. Persons undertaking the all appropriate inquiries may collect commonly known or reasonably ascertainable information on the subject property from a variety of sources, including sources located in the community in which the property is located. The opinion provided by an environmental professional regarding the environmental conditions of a property and included in the all appropriate inquiries report should be based upon a balance of all information collected, including commonly known or reasonably ascertainable information about the property. The potential sources of commonly known or reasonably ascertainable information provided in the proposed rule and retained in the final rule are provided as suggestions for where such information may be found and the list provided is not meant as an exhaustive list of sources that must be consulted. Commonly known information may be collected from other sources and may be most easily collected during the conduct of other aspects of the all appropriate inquiries investigation (*e.g.*, interviews, reviews of historical sources of information, reviews of governmental records).

3.9.2 The Agency Should Provide Additional Guidance

Commenter Organization Name: Worlund, John

Comment Number: 0256

Excerpt Number: 15

Other Sections: NEW - 3.10 - Considering the degree of obviousness of the presence or likely presence of contamination at the property

Excerpt Text:

The proposed requirement for commonly known or reasonably ascertainable information about the property.

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

These items, as pointed out, are carryovers from prior legislation. They have historically been at the core of the ASTM practice that has become standard commercial practice. In the AAI there is not sufficient detail to implement the guidance. Making reference to the appropriate ASTM document easily solves this.

Response:

EPA provides some guidance on the collection of this information in the preamble to the final rule. The ASTM E1527-2000 standard may provide additional guidance. Also, case law may provide guidance given that the Courts hold the ultimate responsibility for interpreting the statutory requirements.

The collection and use of commonly known information about a property may be done in connection with the collection of all other required information for the purposes of achieving the objectives and performance factors contained in §312.20. Persons undertaking the all appropriate inquiries may collect commonly known or reasonably ascertainable information on the subject property from a variety of sources, including sources located in the community in which the property is located. The opinion provided by an environmental professional regarding the environmental conditions of a property and included in the all appropriate inquiries report should be based upon a balance of all information collected, including commonly known or reasonably ascertainable information about the property. The potential sources of commonly known or reasonably ascertainable information provided in the proposed rule and retained in the final rule are provided as suggestions for where such information may be found and the list provided is not meant as an exhaustive list of sources that must be consulted. Commonly known information may be collected from other sources and may be most easily collected during the conduct of other aspects of the all appropriate inquiries investigation (*e.g.*, interviews, reviews of historical sources of information, reviews of governmental records).

Regarding the requirement to include within the all appropriate inquiries the degree of obviousness or the presence or likely presence of contamination at the property, and the ability to

detect the contamination by appropriate investigation, persons conducting all appropriate inquiries, following the collection of all required information, must assess whether or not an obvious conclusion may be drawn that there are conditions indicative of a release or threatened release of hazardous substances (or other pollutants, contaminants, petroleum or petroleum products, and controlled substances) on, at, in, or to the property. In addition, the rule requires parties to consider whether or not the totality of information collected prior to acquiring the property indicates that the parties should be able to detect a release or threatened release on, at, in, or to the property. The final rule also retains the proposed requirement that the environmental professional include as part of the results of his or her inquiry an opinion regarding additional appropriate investigation, if any may be necessary.

We interpret the statutory criterion to require consideration of information already obtained during the conduct of all appropriate inquiries investigation and not as a requirement to collect additional information. We do not agree with commenters who asserted that the criterion is open-ended. In fact, we see this criterion as providing direction on how all of the information collected while carrying out the other criteria and regulatory requirements must be viewed comprehensively. After collecting and considering all the information required to comply with the rule's objectives and performance standards, all the information should be considered in total to determine whether or not there are indications of releases or threatened releases of hazardous substances on, at, in, or to the property. In addition, the environmental professional should provide an opinion regarding whether or not additional investigation is necessary to detect potential contamination at the site, if in his or her opinion there are conditions indicative of releases or threatened releases of hazardous substances.

The previous innocent landowner defense (added to CERCLA in 1986) required a court to consider the degree of obviousness of the presence or likely presence of contamination at a property, and the ability of the defendant (*i.e.*, the landowner) to detect the contamination by appropriate investigation. Nothing in today's rule changes the nature or intent of this requirement as it has existed in the statute since 1986. Case law relevant to this criterion indicates that defendants may not be able to claim an innocent landowner defense if a preponderance of evidence available to a prospective landowner prior to acquiring the property indicates that the defendant should have concluded that there is a high likelihood of contamination at the site.

Commenter Organization Name: Rose and Westra

Comment Number: 0320

Excerpt Number: 20

Other Sections: NEW - 4.1 - The impact of the rule is underestimated

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 EP 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 collection and use of commonly known information about a property may be done in connection with the collection of all other required information for the purposes of achieving the objectives and performance factors contained in §312.20. Persons undertaking the all appropriate inquiries may collect commonly known or reasonably ascertainable information on the subject property from a variety of sources, including sources located in the community in which the property is located. The opinion provided by an environmental professional regarding the environmental conditions of a property and included in the all appropriate inquiries report should be based upon a balance of all information collected, including commonly known or reasonably ascertainable information about the property. The potential sources of commonly known or reasonably ascertainable information provided in the proposed rule and retained in the final rule are provided as suggestions for where such information may be found and the list provided is not meant as an exhaustive list of sources that must be consulted. Commonly known information may be collected from other sources and may be most easily collected during the conduct of other aspects of the all appropriate inquiries investigation (e.g., interviews, reviews of historical sources of information, reviews of governmental records).

Commenter Organization Name: FAA

Comment Number: 0334

Excerpt Number: 24

Excerpt Text:

COMMONLY KNOWN OR REASONABLY ASCERTAINABLE INFORMATION

- 1) Please provide more examples of the types of information included in the "commonly known or reasonably ascertainable" requirement, and how to obtain this information.

Response:

The collection and use of commonly known information about a property may be done in connection with the collection of all other required information for the purposes of achieving the objectives and performance factors contained in §312.20. Persons undertaking the all appropriate inquiries may collect commonly known or reasonably ascertainable information on the subject property from a variety of sources, including sources located in the community in which the property is located. The opinion provided by an environmental professional regarding

the environmental conditions of a property and included in the all appropriate inquiries report should be based upon a balance of all information collected, including commonly known or reasonably ascertainable information about the property. The potential sources of commonly known or reasonably ascertainable information provided in the proposed rule and retained in the final rule are provided as suggestions for where such information may be found and the list provided is not meant as an exhaustive list of sources that must be consulted. Commonly known information may be collected from other sources and may be most easily collected during the conduct of other aspects of the all appropriate inquiries investigation (*e.g.*, interviews, reviews of historical sources of information, reviews of governmental records).

Commenter Organization Name: SCANA

Comment Number: 0373

Excerpt Number: 5

Excerpt Text:

For clarification, it is recommended that the Agency define in §312.10 the terms "publicly available" and "reasonable time and cost constraints" as referenced in §312.20(e)(1) and the terms "commonly known" and "reasonably ascertainable" as referenced in §312.30. It would be beneficial to the regulated community to have these terms defined in the regulation to be readily available after the rule is finalized.

Response:

The final rule retains the proposed provisions requiring that prospective landowners and environmental professionals consider commonly known or reasonably ascertainable information about a property when conducting all appropriate inquiries. This provision has been part of the all appropriate inquiries requirements under CERCLA since the 1986 SARA amendments. The final rule does not change this provision. The final rule does point out that this information may not have to be collected independently if such information is gathered during the course of conducting the other information collection activities included in the rule and collected in compliance with the objectives and performance factors. The requirement is not so much "open ended" as it is a condition to not miss or ignore the obvious information or easily attained information that may be well known throughout a community in which a property is located. EPA is comfortable with the terms taking on their plain English definitions and does not believe that further defining the terms in the regulations will add meaningful guidance.

Commonly known or reasonably ascertainable information may be ascertained from the owner or occupant of a property, members of the local community, including owners or occupants of neighboring properties to the subject property, local or state government officials, local media sources, and local libraries and historical societies. In many cases, this information may be incidental to other information collected during the inquiries, and separate or distinct efforts to collect the information may not be necessary. Information about a property, including its ownership and uses, that is commonly known or reasonably attainable within the community or neighborhood in which a property is located may be valuable to identifying conditions indicative of releases or threatened releases at the subject property. Such information, if not collected during the course of collecting other information necessary to complete the all appropriate

inquiries investigation, may be obtained by interviewing community officials and other residents of the locality. For example, neighboring property owners and local community members may have information regarding undocumented uses of a property during periods when the property was idle or abandoned. Local community sources may be good (*i.e.*, reasonably attainable) sources of commonly known information on uses of a property and activities conducted at a property, particularly in the case of abandoned properties.

The collection and use of commonly known information about a property may be done in connection with the collection of all other required information for the purposes of achieving the objectives and performance factors contained in §312.20. Persons undertaking the all appropriate inquiries may collect commonly known or reasonably ascertainable information on the subject property from a variety of sources, including sources located in the community in which the property is located. The opinion provided by an environmental professional regarding the environmental conditions of a property and included in the all appropriate inquiries report should be based upon a balance of all information collected, including commonly known or reasonably ascertainable information about the property. The potential sources of commonly known or reasonably ascertainable information provided in the proposed rule and retained in the final rule are provided as suggestions for where such information may be found and the list provided is not meant as an exhaustive list of sources that must be consulted. Commonly known information may be collected from other sources and may be most easily collected during the conduct of other aspects of the all appropriate inquiries investigation (*e.g.*, interviews, reviews of historical sources of information, reviews of governmental records).

Commenter Organization Name: Intertox

Comment Number: 0396

Excerpt Number: 18

Excerpt Text:

-The proposed requirements for commonly known or reasonably ascertainable information about the property.

--While Intertox supports the use of commonly known and reasonably ascertainable information, they are not one and the same and we suggest a more reasonable definition be included in the final regulation. Indeed, the phrase "commonly known" can be construed to mean anecdotal rather than documented information. Also, reasonably obtainable information is different from commonly known information, meaning, that which is reasonably obtainable refers to the ability to obtain information easily, not its value or content.

Response:

Please see response to comment number 0373, excerpt 5.

Commenter Organization Name: Freeman & Giler

Comment Number: 0417

Excerpt Number: 8

Excerpt Text:

Proposed Rule §312.30 (a-b) includes a "catch-all" category that requires both the EP and the User to consider commonly known or reasonably ascertainable information about the property, as well as the degree of obviousness of the presence or likely presence of contamination. Proposed Rule §312.30(c) requires that, if any concerns fall into this category, then the User and/or EP must gather additional information "to the extent necessary" to satisfy the performance objectives by interviewing neighboring property owners, government officials and other sources of information. Absent further guidance, compliance with this aspect of the Rule may be difficult to assess and even more difficult to document, especially where the User and EP are not familiar with past and current local gossip.

USEPA should take this opportunity to establish clear regulations and reduce the ambiguity in this catch-all category, despite the Negotiated Rulemaking Committee's reluctance to do so. In light of USEPA's clear direction from Congress to make rules for AAI, it is inappropriate for USEPA intentionally to avoid this issue and to leave these terms for the courts to define. Moreover, by "punting" this issue to the courts, USEPA is passing up the opportunity to provide a consistent, uniform standard and is instead inviting different judicial interpretations by different jurisdictions. Such an approach is at variance with the purpose of the AAI Rule, which is to establish both clear inquiry obligations and a safe harbor for those who follow them.

Response:

Please see response to comment number 0256, excerpt 15.

Commenter Organization Name: McLeod, Jeff

Comment Number: 0444

Excerpt Number: 7

Excerpt Text:

The term reasonably ascertainable should be defined. The definition should include a time period, after which documents/interviews are judged not to be reasonably ascertainable. While not included in the current rule, the term practically reviewable should be added, defined and referenced in Parts 312.24, 312.25, 312.26 and 312.30.

Response:

Please see response to comment number 0373, excerpt 5.

3.9.3 Commonly Known or Reasonably Ascertainable Information Should Be Limited to State or Local Governments

Commenter Organization Name: Anthony, Tony, et.al.

Comment Number: 0292

Excerpt Number: 14

Excerpt Text:

312.30 Commonly known or reasonably ascertainable information about the property.

The sources for commonly known information should be limited to the local and state government. Information from newspapers, websites, and neighbors are unreliable and vulnerable to rumors. Information from these sources may be "hear-say" or sensationalized. All appropriate inquiry reports become technical documents to support a legal argument. Therefore, sources of information that are potentially "hear-say" or unreliable should be omitted.

SOURCES OF COMMONLY KNOWN INFORMATION SHOULD BE LIMITED TO "LOCAL AND STATE GOVERNMENTS."

Response:

EPA disagrees with the commenter. Commonly known or reasonably ascertainable information may be available from sources other than local and state governments. EPA sees no reason to limit the collection of such information in this manner.

The final rule retains the proposed provisions requiring that prospective landowners and environmental professionals consider commonly known or reasonably ascertainable information about a property when conducting all appropriate inquiries. This provision has been part of the all appropriate inquiries requirements under CERCLA since the 1986 SARA amendments. The final rule does not change this provision. The final rule does point out that this information may not have to be collected independently if such information is gathered during the course of conducting the other information collection activities included in the rule and collected in compliance with the objectives and performance factors. The requirement is not so much "open ended" as it is a condition to not miss or ignore the obvious information or easily attained information that may be well known throughout a community in which a property is located. EPA is comfortable with the terms taking on their plain English definitions and does not believe that further defining the terms in the regulations will add meaningful guidance.

Commonly known or reasonably ascertainable information may be ascertained from the owner or occupant of a property, members of the local community, including owners or occupants of neighboring properties to the subject property, local or state government officials, local media sources, and local libraries and historical societies. In many cases, this information may be incidental to other information collected during the inquiries, and separate or distinct efforts to collect the information may not be necessary. Information about a property, including its ownership and uses, that is commonly known or reasonably attainable within the community or neighborhood in which a property is located may be valuable to identifying conditions indicative

of releases or threatened releases at the subject property. Such information, if not collected during the course of collecting other information necessary to complete the all appropriate inquiries investigation, may be obtained by interviewing community officials and other residents of the locality. For example, neighboring property owners and local community members may have information regarding undocumented uses of a property during periods when the property was idle or abandoned. Local community sources may be good (*i.e.*, reasonably attainable) sources of commonly known information on uses of a property and activities conducted at a property, particularly in the case of abandoned properties.

The collection and use of commonly known information about a property may be done in connection with the collection of all other required information for the purposes of achieving the objectives and performance factors contained in §312.20. Persons undertaking the all appropriate inquiries may collect commonly known or reasonably ascertainable information on the subject property from a variety of sources, including sources located in the community in which the property is located. The opinion provided by an environmental professional regarding the environmental conditions of a property and included in the all appropriate inquiries report should be based upon a balance of all information collected, including commonly known or reasonably ascertainable information about the property. The potential sources of commonly known or reasonably ascertainable information provided in the proposed rule and retained in the final rule are provided as suggestions for where such information may be found and the list provided is not meant as an exhaustive list of sources that must be consulted. Commonly known information may be collected from other sources and may be most easily collected during the conduct of other aspects of the all appropriate inquiries investigation (*e.g.*, interviews, reviews of historical sources of information, reviews of governmental records).

Commenter Organization Name: CBPA

Comment Number: 0344

Excerpt Number: 4

Excerpt Text:

-Proposed § 312.30 "Commonly Known or Reasonably Ascertainable Information About the Property" Imposes Extraordinarily Open-Ended Search Requirements On Prospective Purchasers and Invites Courtroom Second Guessing

Proposed § 312.30 requires that "[throughout the inquiries," purchasers " must take into account commonly known or reasonably ascertainable information within the local community about the subject property." Sources of commonly known information are defined to include unenumerated "others" with knowledge of the property, unspecified "other" sources of information, as well as websites, local libraries, and newspapers. The requirement appears to make the purchaser responsible for any information about the property that might exist anywhere in the community. Although generally qualified by constraints such as reasonable time and cost, given the performance based approach of the new rule who is to say that one more phone call to the local librarian shouldn't have been made? In short, it is an open invitation to courtroom second guessing.

The rulemaking committee may believe that this section assigning liability to the purchaser for commonly known information is required by the Brownfields Act of 2002, which does recite the phrase "commonly known or reasonably ascertainable information." However, this element of All Appropriate Inquiry remains unchanged since 1986 and to the extent that it is a statutorily required element of future All Appropriate Inquiries, it is already covered by ASTM E1527. ASTM E1527 properly limits "reasonably ascertainable" records to "standard sources." ASTM E1527-00 § 7.1.4. There is no open ended catch-all requirement to scour the community. For example, the historical use inquiry ends with the enumerated standard historical sources: "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." ASTM E1527-00 § 7.3.2.3. Moreover, ASTM E1527 explicitly relieves purchasers of the responsibility to consult "other historical sources," such as newspaper archives and other miscellaneous sources. ASTM E1527 § 7.3.2.3.

Response:

Please see response to comment number 0292, excerpt 14.

Commenter Organization Name: Eden Housing

Comment Number: 0380

Excerpt Number: 5

Excerpt Text:

Proposed § 312.30 "Commonly Known or Reasonably Ascertainable Information About the Property" Imposes Extraordinarily Open-Ended Search Requirements
On Prospective Purchasers and Invites Courtroom Second Guessing

Proposed § 312.30 requires that "[t]hroughout the inquiries," purchasers" must take into account commonly known or reasonably ascertainable information within the local community about the subject property." Sources of commonly known information are defined to include unenumerated "others" with knowledge of the property, unspecified "other" sources of information, as well as websites, local libraries, and newspapers. The requirement appears to make the purchaser responsible for any information about the property that might exist anywhere in the community. Although generally qualified by constraints such as reasonable time and cost, given the performance-based approach of the new rule, who is to say that one more phone call to the local librarian shouldn't have been made? In short, it is an open invitation to courtroom second guessing.

The rulemaking committee may believe that this section assigning liability to the purchaser for commonly known information is required by the Brownfields Act of 2002, which does recite the phrase "commonly known or reasonably ascertainable information." However, this element of All Appropriate Inquiry remains unchanged since 1986 and to the extent that it is a statutorily required element of future All Appropriate Inquiries, it is already covered by ASTM E1527. ASTM E1527 properly limits "reasonably ascertainable" records to "standard sources." ASTM E1527-00 § 7.1.4. There is no open ended catch-all requirement to scour the community. For example, the historical use inquiry ends with the enumerated standard historical sources:

"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." ASTM E1527-00 § 7.3.2.3. Moreover, ASTM E1527 explicitly relieves purchasers of the responsibility to consult "other historical sources," such as newspaper archives and other miscellaneous sources. ASTM E1527 § 7.3.2.3.

At the former plant nursery site, Eden and its development partner Community Housing Development Corporation of North Richmond have been meeting regularly with the local neighborhood association. The City of Richmond relies on this group's advice on local land use and funding decisions. We have discussed the environmental investigation performed to date and have shared our proposed cleanup plan with this group. No one in the group has provided us with new information about the subject property. Someone in the community may know something we don't know, but it is impossible for us to say. We will never be able to talk to everyone who lives or lived in the community. It would be unreasonable and unfair to expect us to do so.

Response:

Please see response to comment number 0292, excerpt 14.

3.10 Considering the Degree of Obviousness of the Presence or Likely Presence of Contamination at the Property

Commenter Organization Name: City of Jacksonville, Florida

Comment Number: 0095

Excerpt Number: 9

Excerpt Text:

Sec. 312.31(b) says that "The inquiry of the environmental professional should include an opinion regarding additional appropriate investigation, if any." Read: sampling. This is an open invitation to EPs to move on to sampling. There are so many costly and time-consuming investigations an EP has to do to meet "all appropriate inquiry" that the only way to make sure the requirements of the regulation are satisfied is by sampling. As a practical matter, on small parcels, the wise developer would be well advised to skip the historic search back to the dawn of civilization, give up the effort to track down former owners running from their environmental, or tax or whatever responsibility, abandon the search through government records, and just do a thorough sampling for reasonably expected contaminants: the eight RCRA metals, petroleum compounds, and any specific chemicals an intelligent, but not exhaustive, investigation suggests.

Response:

The preamble to the proposed rule states, "The Agency notes that the proposed regulation does not require that sampling and analysis be conducted to comply with the all appropriate inquiries requirements. The proposal only notes that sampling and analysis may be conducted, where appropriate, to obtain information to address data gaps." 69 FR at 52560. At times sampling may be appropriate, however the rule does not require that sampling be conducted. Given that a property owner's ability to retain liability protection may hinge on his or her ability to comply with the statutorily imposed "continuing obligations," including the requirements to undertake appropriate care and stop on-going releases, EPA believes that it is very important the results of the all appropriate inquiries investigation include include an opinion regarding additional appropriate investigation, if any.

Commenter Organization Name: Worlund, John

Comment Number: 0256

Excerpt Number: 15

Other Sections: NEW - 3.9.2 - The Agency should provide additional guidance

Excerpt Text:

The proposed requirement for commonly known or reasonably ascertainable information about the property.

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

These items, as pointed out, are carryovers from prior legislation. They have historically been at

the core of the ASTM practice that has become standard commercial practice. In the AAI there is not sufficient detail to implement the guidance. Making reference to the appropriate ASTM document easily solves this.

Response:

EPA provides some guidance on the collection of this information in the preamble to the final rule. The ASTM E1527-2000 standard may provide additional guidance. Also, case law may provide guidance given that the Courts hold the ultimate responsibility for interpreting the statutory requirements.

The collection and use of commonly known information about a property may be done in connection with the collection of all other required information for the purposes of achieving the objectives and performance factors contained in §312.20. Persons undertaking the all appropriate inquiries may collect commonly known or reasonably ascertainable information on the subject property from a variety of sources, including sources located in the community in which the property is located. The opinion provided by an environmental professional regarding the environmental conditions of a property and included in the all appropriate inquiries report should be based upon a balance of all information collected, including commonly known or reasonably ascertainable information about the property. The potential sources of commonly known or reasonably ascertainable information provided in the proposed rule and retained in the final rule are provided as suggestions for where such information may be found and the list provided is not meant as an exhaustive list of sources that must be consulted. Commonly known information may be collected from other sources and may be most easily collected during the conduct of other aspects of the all appropriate inquiries investigation (*e.g.*, interviews, reviews of historical sources of information, reviews of governmental records).

Regarding the requirement to include within the all appropriate inquiries the degree of obviousness or the presence or likely presence of contamination at the property, and the ability to detect the contamination by appropriate investigation, persons conducting all appropriate inquiries, following the collection of all required information, must assess whether or not an obvious conclusion may be drawn that there are conditions indicative of a release or threatened release of hazardous substances (or other pollutants, contaminants, petroleum or petroleum products, and controlled substances) on, at, in, or to the property. In addition, the rule requires parties to consider whether or not the totality of information collected prior to acquiring the property indicates that the parties should be able to detect a release or threatened release on, at, in, or to the property. The final rule also retains the proposed requirement that the environmental professional include as part of the results of his or her inquiry an opinion regarding additional appropriate investigation, if any may be necessary.

We interpret the statutory criterion to require consideration of information already obtained during the conduct of all appropriate inquiries investigation and not as a requirement to collect additional information. We do not agree with commenters who asserted that the criterion is open-ended. In fact, we see this criterion as providing direction on how all of the information collected while carrying out the other criteria and regulatory requirements must be viewed comprehensively. After collecting and considering all the information required to comply with

the rule's objectives and performance standards, all the information should be considered in total to determine whether or not there are indications of releases or threatened releases of hazardous substances on, at, in, or to the property. In addition, the environmental professional should provide an opinion regarding whether or not additional investigation is necessary to detect potential contamination at the site, if in his or her opinion there are conditions indicative of releases or threatened releases of hazardous substances.

The previous innocent landowner defense (added to CERCLA in 1986) required a court to consider the degree of obviousness of the presence or likely presence of contamination at a property, and the ability of the defendant (*i.e.*, the landowner) to detect the contamination by appropriate investigation. Nothing in today's rule changes the nature or intent of this requirement as it has existed in the statute since 1986. Case law relevant to this criterion indicates that defendants may not be able to claim an innocent landowner defense if a preponderance of evidence available to a prospective landowner prior to acquiring the property indicates that the defendant should have concluded that there is a high likelihood of contamination at the site.

Commenter Organization Name: Anthony, Tony, et.al.

Comment Number: 0292

Excerpt Number: 15

Excerpt Text:

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

We support this section.

Response:

EPA thanks the commenter for the stated support of the requirements.

Commenter Organization Name: ENSR International

Comment Number: 0314

Excerpt Number: 8

Excerpt Text:

The proposed rule § 312.31 (a) indicates that the degree of obviousness of releases or threatened releases must be considered by the EP (and others).

Comment: While there are several discussions regarding "degree of obviousness" in the preamble, it is unclear how this requirement is intended to be addressed. If a release is found or known to exist, this requirement does not appear to have value, as it is "obvious enough" to have been identified. Is the intent that for each threatened release identified in the conclusions, the EP provides a statement as to how obvious it is that the release may have actually occurred? An example would be a conclusion about a steel UST containing hazardous materials on the site having been installed 25 years ago, with tightness tests passed as recently as the past year. The concern would be slow leaks, or overfills. In this case, does the EP add a sentence to the effect

that it is "moderately obvious" that a release from the tank may have occurred? The actual intent for how this requirement is to be applied in an AAI report is very unclear. What "degrees" of obviousness would you use in cases where the potential for impact is low, or perhaps high? Consistency in terminology, including meaning, is necessary. Otherwise, this issue will inconsistently be addressed.

Response:

Persons conducting all appropriate inquiries, following the collection of all required information, must assess whether or not an obvious conclusion may be drawn that there are conditions indicative of a release or threatened release of hazardous substances (or other pollutants, contaminants, petroleum or petroleum products, and controlled substances) on, at, in, or to the property. In addition, the rule requires parties to consider whether or not the totality of information collected prior to acquiring the property indicates that the parties should be able to detect a release or threatened release on, at, in, or to the property. The final rule also retains the proposed requirement that the environmental professional include as part of the results of his or her inquiry an opinion regarding additional appropriate investigation, if any may be necessary.

EPA interprets the statutory criterion to require consideration of information already obtained during the conduct of all appropriate inquiries investigation and not as a requirement to collect additional information. We do not agree with commenters who asserted that the criterion is open-ended. In fact, we see this criterion as providing direction on how all of the information collected while carrying out the other criteria and regulatory requirements must be viewed comprehensively. After collecting and considering all the information required to comply with the rule's objectives and performance standards, all the information should be considered in total to determine whether or not there are indications of releases or threatened releases of hazardous substances on, at, in, or to the property. In addition, the environmental professional should provide an opinion regarding whether or not additional investigation is necessary to detect potential contamination at the site, if in his or her opinion there are conditions indicative of releases or threatened releases of hazardous substances.

The previous innocent landowner defense (added to CERCLA in 1986) required a court to consider the degree of obviousness of the presence or likely presence of contamination at a property, and the ability of the defendant (*i.e.*, the landowner) to detect the contamination by appropriate investigation. Nothing in today's rule changes the nature or intent of this requirement as it has existed in the statute since 1986.

Case law relevant to this criterion indicates that defendants may not be able to claim an innocent landowner defense if a preponderance of evidence available to a prospective landowner prior to acquiring the property indicates that the defendant should have concluded that there is a high likelihood of contamination at the site. Please see section IV.X of the preamble to the final rule.

Commenter Organization Name: ENSR International
Comment Number: 0314
Excerpt Number: 9

Excerpt Text:

The proposed rule § 312.31 (b) states that the EP (and others) must consider the ability to detect contamination by appropriate investigation. This paragraph ends with a statement that the EP needs to include an opinion regarding additional appropriate investigation (recommendations).

Comment: As these reports may also be used for business reasons, such as in preparation for property financing or sale, with possible distribution of the reports to multiple parties, clients are often reluctant to have recommendations included within the text of the report. Instead, they prefer to have recommendations provided as a separate document. The proposed rule appears to require that recommendations be included in the report itself. We suggest that the option be presented that recommendations be able to be provided in either the report, or in a separate recommendations letter.

Response:

The rule does require that the environmental professional on behalf of the prospective landowner or grantee document the results of the all appropriate inquiries in a written report. For purposes of compliance with all appropriate inquiries it is required that recommendations be provided in the report. However, the final rule contains no requirements regarding the length, structure, or specific format of the written report. In addition, the rule does not require that a written report of any kind be submitted to EPA or any other government agency, or that a written report be maintained on-site at the subject property for any length of time. The purpose of the written report is merely to ensure that any person claiming one of the CERCLA landowner liability protections be able to show documentation that all appropriate inquiries were conducted in compliance with the federal regulations, should such documentation be required. The choice to distribute this report is a decision made by the owner/grantee and is outside the scope of this rule.

Commenter Organization Name: Intertox

Comment Number: 0396

Excerpt Number: 19

Excerpt Text:

-The proposed requirements for the degree of obviousness of the presence or likely presence of contamination at the property, and the ability to detect the contamination by appropriate investigation.

--This proposed requirement is nebulous and requires additional explanation. Of the hundreds of all appropriate inquiries we have conducted or reviewed since 1986, all have considered the totality of acquired information. We question then, why the environmental professional must assess whether an obvious conclusion must be drawn regarding actual or threatened releases of hazardous substances. We believe it is asking too much of the environmental professional to make this determination. Let the facts speak for themselves and allow the environmental professional to make a judgment as to potential environmental liabilities. This proposed requirement is too fine a line and trends to the nebulous in requiring adherence to "degree of obviousness."

Response:

Please see response to comment number 0314, excerpt 9.

Commenter Organization Name: Rybak, John Thomas

Comment Number: 0412

Excerpt Number: 11

Excerpt Text:

Proposed requirement for degree of obviousness of contamination

a) Page # 52581

b) View: It is mandatory that this be included in the Phase I AAI performance standards. It may seem intuitive that this be included, and even elementary to have it be a requirement. However practice in the field does not always follow logic.

c) Assumptions: Too often in practice consultant's are persuaded to exclude looking at certain risks by their client, and defined as 'not in the scope'.

d) Burden: None. The EP must narrate their observations, all their observations into the report. This is a primary purpose for the being contracted to perform a Phase I.

Response:

EPA thanks the commenter for the stated support of the provision.

Commenter Organization Name: Tryon, Bill

Comment Number: 0418

Excerpt Number: 5

Excerpt Text:

Objectives and Performance Factors - The term "threatened release" seems poorly-defined. For example, would the identification of high risk activities, e.g. a past dry cleaner, during completion of a phase I investigation be considered to be a threatened release or would direct evidence of a release be required.? I suggest inclusion of a more precise definition in order to avoid confusion in the industry.

Response:

The term "threatened release" is included in the definition of "release" in the National Contingency Plan (NCP) at 40 CFR 300.5. For the purposes of the NCP, "release also means threat of release." Under CERCLA, owners and operators of vessels and facilities may be found liable for both releases of hazardous substances and threatened releases of hazardous substances.

Commenter Organization Name: Georgia Power

Comment Number: 0423

Excerpt Number: 13

Other Sections: NEW - 3.7 - Inclusion of specialized knowledge or experience

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

Excerpt Text:

§312.28, §312.30 and §312.31, the term "person"

Please consider including the need to define the term "Persons" in §312.1 (b)(1), should be further defined, either in the preamble or in §312.10 Definitions. Under §312.28, §312.30 and §312.31, the term "person" should not include every individual in a firm, corporation, association, partnership, consortium, joint venture, commercial entity, United States Government, State, Tribe, municipality, commission, political subdivision of a State, or any interstate body, but should be limited to those persons directly involved with conducting the AAI for the purpose of §312.28, §312.30 and §312.31. For example, specialized knowledge or experience cannot mean the specialized knowledge or experience of every employee in a corporation of 25,000 employees. Clarifying language and instructive examples in the preamble will ensure that the applicability of these sections is practical.

Response:

The term "person" is defined in Section 101(21) of CERCLA. "Person" means an individual, firm, corporation, association, partnership, consortium, joint venture, commercial entity, United States Government, State, municipality, commission, political subdivision of a State, or any interstate body. Since firms, corporations, associations, partnerships, etc. may purchase potentially contaminated property and may want to attain protection from CERCLA liability, as provided under the statute, EPA is uncertain why the commenter is suggesting that the term person be limited or changed from its common legal definition and the definition provided under the CERCLA statute.

3.11 Recognized Environmental Conditions

Commenter Organization Name: City of Jacksonville, Florida

Comment Number: 0095

Excerpt Number: 2

Excerpt Text:

Sec. 312.1(2)(ii) and (iii). These subsections exceed EPA's authority by requiring prospective purchasers and grantees to investigate releases and threatened releases of substances not regulated under the Comprehensive Environmental Response, Compensation and Liability Act. Specifically, (ii) requires investigation in to petroleum releases, which are excluded under CERCLA, and (iii) "controlled substances" under 21 U.S.C. 802, the Drug Abuse, Prevention and Control Act! (See also, 312.27(b) where reports of visual inspections are to identify areas where 21 U.S.C. 802 chemicals were found.) An environmental assessment for hazardous substances is costly. While cleaning up meth labs is laudable, assessing a brownfield site for illegal drugs is an unnecessary redevelopment expense.

Response:

The scope of the all appropriate inquiries regulation as it applies the persons conducting the investigations to obtain protection from CERCLA liability is limited to identifying conditions indicative of releases and threatened releases of *hazardous substances*, as defined under Section 101(14) of CERCLA.

In those instances where a government entity receives a brownfields grant from EPA under the authorities of CERCLA section 104(k)(2) and the grant or cooperative agreement specifies that the site characterization and assessment to be funded by the grant covers additional contaminants, pollutants, petroleum, petroleum products, or controlled substances, then the scope of the all appropriate inquiries investigation must include these additional substances.

Commenter Organization Name: Mille Lacs Ojibwe

Comment Number: 0330

Excerpt Number: 11

Excerpt Text:

The Band agrees with the proposed language limiting identification of releases and threatened releases only where a threat is posed to human health or the environment.

Response:

EPA thanks the commenter for the stated support of the provision.

Commenter Organization Name: McKerr, Thomas

Comment Number: 0347

Excerpt Number: 19

Excerpt Text:

312.20(d): "Threatened" release is a very nebulous term and needs some discussion or examples.

Response:

The term "threatened release" is included in the definition of "release" in the National Contingency Plan (NCP) at 40 CFR 300.5. For the purposes of the NCP, "release also means threat of release." Under CERCLA, owners and operators of vessels and facilities may be found liable for both releases of hazardous substances and threatened releases of hazardous substances.

Commenter Organization Name: McLeod, Jeff

Comment Number: 0444

Excerpt Number: 4

Excerpt Text:

The proposed rule requires people using grant funds to address petroleum products, pollutants, contaminants and controlled substances in addition to hazardous substances while non-grant funded AAIs are only required to address hazardous substances. The rule and preamble do not address the rationale for requiring the more rigorous list for grant funded AAIs. It has been our experience that petroleum products are more commonly identified on properties undergoing Phase I's than are hazardous substances and that the majority of Phase I's conducted are done by private individuals not seeking grant funding. It would therefore stand to reason that petroleum contamination would not be required to be reported or addressed by a majority of those required to perform AAIs for CERCLA protection. It would seem more prudent to require that the same materials be addressed in either grant funded or non-grant funded AAIs.

Response:

The scope of the all appropriate inquiries regulation as it applies the persons conducting the investigations to obtain protection from CERCLA liability is limited to identifying conditions indicative of releases and threatened releases of *hazardous substances*, as defined under Section 101(14) of CERCLA. Under CERCLA, liability is extended only to releases and threatened releases of hazardous substances.

In those instances where a government entity receives a brownfields grant from EPA under the authorities of CERCLA section 104(k)(2) and the grant or cooperative agreement specifies that the site characterization and assessment to be funded by the grant covers additional contaminants, pollutants, petroleum, petroleum products, or controlled substances, then the scope of the all appropriate inquiries investigation must include these additional substances.

EPA agrees with the commenter that it may be prudent for prospective property owners to assess the subject property for releases and threatened releases of other pollutants and substances, including petroleum and petroleum products.

3.11.1 De Minimis Conditions or Releases of Hazardous Substances

Commenter Organization Name: Rose and Westra

Comment Number: 0320

Excerpt Number: 11

Excerpt Text:

R&W commends the EPA for including essentially a de minimis condition in §312.21(g), that which poses no threat to human health and the environment. The de minimis condition has been key to the success of E-1527-00 and its predecessors.

Response:

EPA thanks the commenter for the stated support of the provision.

Commenter Organization Name: Rose and Westra

Comment Number: 0320

Excerpt Number: 13

Other Sections: NEW - 3.1.1 - Interview of the current owners, occupants, employees, and/or managers of the subject property

Excerpt Text:

The proposed § 312.23(b) requires that the EP's inquiry include interviews with "major occupants" and "occupants likely to use, store, treat, handle or dispose of hazardous substances." Under this proposed rule, an environmental professional must interview all occupants of a property who are likely to "use, store, treat, handle or dispose hazardous substances ..." This could be interpreted to include any residence, as they typically have ammonia, chlorine bleach, various pesticides, etc. This requirement would create additional cost and difficulty in conducting inquiries, while providing only a minimal benefit, if any at all. For example, if a property contains an apartment complex, the EP could be required to interview every tenant in the building. R&W requests that the EPA clarify this requirement to specifically exclude de minimis use, storage, and disposal of hazardous substances that are typically associated with residential dwellings and commercial offices.

Response:

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

about the current and past uses of the property, particularly with regard to current and past uses of hazardous substances on the property.

EPA points out that the environmental professional need not specifically identify, in the written report prepared pursuant to §312.21(c), extremely small quantities or amounts of contaminants, so long as the contaminants generally would not pose a threat to human health or the environment.

Commenter Organization Name: Montana DEQ

Comment Number: 0335

Excerpt Number: 6

Excerpt Text:

Proposed Section 312.20(g) and 312.21(c): DEQ recognizes that identification of routine household cleaners typically found at businesses is probably not relevant to AAI. However, DEQ believes that small quantities or amounts of hazardous substances should be included in the report. An example of when the proposed rule could pose a problem is at an automotive maintenance facility. An automotive maintenance facility typically has cans of brake cleaner, lubricants and other chemical compounds sitting around. Although there may only be small quantities of these items and they may pose no immediate threats to human health or the environment, the facility may have had terrible housekeeping practices. No signs of contamination may be evident. However, 20 years of improperly disposing of and spilling the cleaners, lubricants, etc. may lead to soil and groundwater contamination. It is important for the prospective purchaser to be aware of all chemicals used at the property they are purchasing. DEQ requests that EPA require the identification of small quantities or amounts of hazardous substances in the AAI reports.

Response:

EPA points out that the environmental professional need not specifically identify, in the written report prepared pursuant to §312.21(c), extremely small quantities or amounts of contaminants, so long as the contaminants generally would not pose a threat to human health or the environment. However, small quantities of hazardous substances that may pose a threat to human health and the environment, if released to the environment must be identified and documented.

Commenter Organization Name: McKerr, Thomas

Comment Number: 0347

Excerpt Number: 20

Excerpt Text:

312.20(g): I know that regulators object to the definition of de minimis in 1527, but it is better than "generally would not pose a threat to human health or the environment", which is very vague and undefined. The Environmental Professional should be qualified to decide if something is not likely to raise the concern of a regulator, recognizing that there is no guaranty (I am familiar with a California EPA/DTSC requiring additional investigation at a property, based on a

10-year old report that described a situation that would have been de minimis at the time and for which there were no current indications of a release, but that was an attempt to shake down the property owner for a regional problem for which there were no other available responsible parties).

Response:

EPA points out that the environmental professional need not specifically identify, in the written report prepared pursuant to §312.21(c), extremely small quantities or amounts of contaminants, so long as the contaminants generally would not pose a threat to human health or the environment. However, small quantities of hazardous substances that may pose a threat to human health and the environment, if released to the environment must be identified and documented.

The Agency is comfortable with the current language as it expresses the intent of the statute accurately. In addition, the nature of a performance standard based rule is a lack of bright-line directives. Some aspects of the investigation are left to the discretion of the environmental professional. This provides for flexible solutions to unique and site-specific situations.

3.11.2 Controlled Substances

Commenter Organization Name: Zutz

Comment Number: 0104

Excerpt Number: 1

Excerpt Text:

This section requires investigations "to identify conditions indicative of releases... releases and threatened releases of" pollutants and contaminants, petroleum or petroleum products, and controlled substances. It appears that controlled substances could be either legal and illegal.

We take exception to including investigation for controlled substances. It is our opinion that the ramifications of this proposed rule have not been fully considered. To meet the rule as written, an investigation would need to include a vegetation survey of each property to identify marijuana, poppies, mushrooms or certain other plants. It is our opinion that most of the-current environmental professionals lack the experience, knowledge, or training to conduct such an investigation. It would also be cost prohibitive and perhaps literally impossible to conduct a vegetation survey on large parcels.

Is the intent of this investigation to identify current or former meth labs? If so, the raw components or by-products that may be used in the meth manufacturing process would be identified as a hazardous substance (although perhaps at de minimus levels).

Consider these properties and associated questions-

Land with unpaved areas - If native marijuana is identified growing on a property, is the presence a "threatened release"? If native marijuana is cut by a lawn mower, is it a "release" to the land surface?

Soil Borings • Construction Materials Testing • Monitoring Wells

Residential properties - Would current or expired legal drug prescriptions be considered de minimus? What inquiry should be done for potential illegal controlled substances? Provided they had actual knowledge, is it likely that a current or former owner or occupant would voluntarily admit that illegal controlled substances were present?

Landfills - While there is potential for current or past disposal of drugs from manufacturing, what records would there be to review for normal household or commercial disposal?

Hospitals, nursing homes, pharmacies, wastewater treatment plants - There is potential for sewer disposal of unused Pharmaceuticals or illegal drugs. However, what inquiry could or should be done?

It appears that investigation for controlled substances should be left to the discretion of the environmental professional for those few facilities that may have significant drugs, such as pharmaceutical manufacturing or distribution facilities.

We believe this section puts a significant and unnecessary burden on the environmental professional with a very low likelihood of significant findings. Therefore, we suggest that investigation for controlled substances be deleted from the final rule.

Response:

The scope of the all appropriate inquiries regulation as it applies the persons conducting the investigations to obtain protection from CERCLA liability is limited to identifying conditions indicative of releases and threatened releases of *hazardous substances*, as defined under Section 101(14) of CERCLA. Under CERCLA, liability is extended only to releases and threatened releases of hazardous substances.

In those instances where a government entity receives a brownfields grant from EPA under the authorities of CERCLA section 104(k)(2) and the grant or cooperative agreement specifies that the site characterization and assessment to be funded by the grant covers additional contaminants, pollutants, petroleum, petroleum products, or controlled substances, then the scope of the all appropriate inquiries investigation must include these additional substances.

Commenter Organization Name: anonymous institution

Comment Number: 0315

Excerpt Number: 1

Excerpt Text:

The Proposed AAI Rule will require the investigation into the presence of "controlled substances". A review of the Drug Enforcement Agency's website lists thousands of controlled substances including, narcotics, pharmaceuticals, steroids, tobacco, etc. A specific list of controlled substances is not provided in the proposed Rule. Despite this, it is our understanding that Superfund liability does not arise from the mere presence of controlled substances, as such, why is this topic included at all. The inclusion of this topic will also create the need for additional criminal/legal searches for every Phase I Site Assessment. This is well above and beyond the expertise and credentials of environmental professionals. Furthermore, these searches are already part of legal due diligence for property transfer. Attorneys licensed and experienced in criminal, drug enforcement, and property transfer laws should continue to focus on "controlled substances".

Response:

Please see response to comment number 0104, excerpt 1.

Commenter Organization Name: Potter and Adams

Comment Number: 0351

Excerpt Number: 4

Excerpt Text:

For persons defined under Section 312.1(b)(1), the investigation is limited to releases or threatened releases, as defined by CERCLA Section 101(22), of hazardous substances as defined

by CERCLA Section 101(14). For persons defined under Section 312.1(b)(2), the investigation is expanded to releases or threatened releases, as defined by CERCLA Section 101(22), of hazardous substances as defined by CERCLA Section 101(14), pollutants and contaminants as defined by CERCLA Section 101(33), petroleum and petroleum products, and controlled substances.

The proposed scope is a departure from the currently accepted scope of a Phase I environmental assessment (ASTM E 1527-00). The ASTM scope includes assessing the property with respect to the range of contaminants within the scope of CERCLA and petroleum products. The addition of controlled substances to the AAI scope will increase the cost of the AAI process. It is suggested that controlled substances be eliminated from Section 312.1(c)(2).

Response:

Please see response to comment number 0104, excerpt 1.

EPA agrees with the commenter that the expanded scope that is applicable only to certain recipients of brownfields grants is a departure from currently commercially-accepted environmental site assessments. Funding for the expanded investigations is provided through the EPA grant program.

Commenter Organization Name: Freeman & Giler

Comment Number: 0417

Excerpt Number: 6

Excerpt Text:

Proposed Rule §312.1(c)(2)(iii) adds a new - and, frankly, surprising - category of substances to be assessed during the AAI: controlled substances. The definition of "controlled substance", incorporated by reference in the proposed AAI Rule, is any "drug or other substance, or immediate precursor, included in schedule I, II, III, IV, or V of part B of [the Drug Abuse Prevention and Control Act]." Thus, the proposed AAI Rule requires EPs to assess whether or not there are illegal narcotics on the property as part of the environmental due diligence.

Granted, the manufacture and processing of many narcotics involves hazardous chemicals; however, those chemicals already fall within the CERCLA definition of a hazardous substance. It is unclear how this new requirement to assess the presence of narcotics (above and beyond the mere presence of hazardous substances) advances the goals of EPA, CERCLA, the potential landowner or even drug enforcement agencies. Since the AAI Reports are not required to be disclosed to any government agency, it does not appear that it will be an effective tool for narcotics enforcement. Moreover, few EPs have 3- to 10-years relevant experience in assessing the presence of controlled substances, and such knowledge is outside of scope of the requisite EP educational requirements described in Proposed Rule §312.10(b).

While it may be a noble goal to ferret out illegal drugs, environmental due diligence is not the appropriate vehicle to do so, and EPs are not the appropriate professionals for that task.

Response:

Please see response to comment number 0104, excerpt 1.

3.12 Data Gaps

Commenter Organization Name: City of Jacksonville, Florida

Comment Number: 0095

Excerpt Number: 5

Excerpt Text:

Secs.312.20(3)(i) and 312.23 require interviews with past and present owners, operators, and occupants. EPA recognizes that, for abandoned properties, it may be impossible to find any, and recommends contacting the owners of neighboring parcels. The inability to find such persons, says EPA, may result in data gaps to be filled or explained by the EP using "best professional judgment." The purpose of the regulation is to set standards that, when met, entitle a person to certain protections against liability. This is not helpful. In the end, the likely course of action will be sampling, even though EPA does not mandate sampling as a minimum criterion for "all appropriate inquiry." EPA should de-emphasize the hunt for people who obviously don't want the property and allow prospective purchasers to rely on historical records, site conditions, supplemented by interviews, where available.

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.

Commenter Organization Name: Myers, Steve

Comment Number: 0242

Excerpt Number: 7

Excerpt Text:

7 Steve Myers Sampling 312.20(f)

(Data gaps) Will sampling be necessary every time that there is a historical data gap or if a past owner or operator cannot be found or is unwilling to talk?

Response:

Please see response to comment number 0095, excerpt 5. Sampling and analysis may only be necessary in those limited cases where the environmental professional cannot render an opinion regarding whether or not there are conditions indicative of releases or threatened releases of hazardous substances at a property.

Commenter Organization Name: Diamond, Jason

Comment Number: 0251

Excerpt Number: 5

Excerpt Text:

The AAI rule requires that the written report summarizing the results of the inquiry identify data gaps in the information developed as part of the inquiry that affect the EP's ability to ascertain whether conditions indicative of releases or threatened releases of hazardous substances to the property are present. The rule also requires the report include comments regarding the significance of such data gaps on the EP's ability to provide an opinion as to whether the inquiry has identified conditions indicative of a release at the property. This approach allows for flexibility in addressing data gaps. The EP may exercise his judgment in determining if data gaps have significantly affected his ability to meet the objective of the AAI standard, and may include in the report his opinion regarding additional investigations and sampling and analyses that may be required to address data gaps.

Response:

The Agency agrees with the commenter.

Commenter Organization Name: Worlund, John

Comment Number: 0256

Excerpt Number: 6

Excerpt Text:

The data gap issue has the potential to make the AAI reporting process unworkable. Virtually all reports will have data gaps and they are unavoidable for properties with historic uses prior to the mid 1800's. The problem with the draft rule and the preamble is they are open to the interpretation that all data gaps are identifiable as to their existence and their significance. Clearly it is impossible to intelligently speculate on the impact of something that you know nothing about. One obvious solution is to better define what constitutes a "data gap that affects their ability to identify conditions indicative of a release ...". A reasonable interpretation would

be that a data gap must be discussed only if the professional experience or other information obtained in the conduct of the Phase 1 raises concerns about an identified data gap. This would avoid the need to speculate about what may or may not have happened on a property during the Civil War in the absence of any indication that there was any historic activity of concern on that property. The AAI process needs to arrive at closure. Any implication that extraordinary measures are required to identify and opine on data gaps will prevent closure and greatly increase the cost of preparing a report.

The concept of data gap resolution appears to be inconsistent with the principles adopted in Standard Commercial practice. The current process is not exhaustive, does not eliminate uncertainty, and is highly variable dependent upon the property. If the data gap language is maintained it must be clear that concept is applied in the context of the principles inherent in the process and standard of good commercial and customary practice.

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.

Commenter Organization Name: PIRG
Comment Number: 0258
Excerpt Number: 3

Excerpt Text:

Weaker standards also make data gaps much more likely. Data gaps may be noted and discussed in the report, pursuant to AAI draft rule. Unfortunately, when the draft rule seems to clearly allow such gaps-as is the case with the broad exceptions on site inspections-the likelihood that the report will fail to identify an environmental condition increases. At the same time, a purchaser can claim that the AAI standard was met. The purchaser may then claim a liability exemption, but not take reasonable steps to address an environmental condition missed due to a gap in information. This result is inconsistent with the Brownfields Law and is unacceptable.

Response:

The commenter may have misunderstood the scope of the rule and the statutory requirements for obtaining the liability protections. As explained in detail in Section II of the preamble to the proposed and final rules, the conduct of all appropriate inquiries is only one requirement necessary for obtaining protection from CERCLA liability. The mere fact that a prospective landowner conducted all appropriate inquiries does not provide an individual with protection from CERCLA liability. To qualify as a bona fide prospective purchaser, innocent landowner or a contiguous property owner, a person must, in addition to conducting all appropriate inquiries prior to acquiring a property, comply with all of the other statutory requirements. These criteria are summarized in section II.D. of the preamble. The all appropriate inquiries investigation may provide a prospective landowner with necessary information to comply with the other post-acquisition statutory requirements for obtaining liability protections. 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.

The final rule retains the requirement to identify data gaps, address them when possible, and document their significance. Prospective landowners may wish to consider the potential significance of any data gaps that may exist after conducting the pre-acquisition all appropriate inquiries in assessing their obligations to fulfill the additional statutory requirements after purchasing a property.

If a person properly conducts all appropriate inquiries pursuant to this rule, including the requirements concerning data gaps at §§312.10, 312.20(g) and §312.21(c)(2), the person may fulfill the all appropriate inquiries requirements of CERCLA Sections 107(q), 107(r), and 101(35), even when there are data gaps in the inquiries. However, as explained further in the preamble, fulfilling the all appropriate inquiries requirements does not, by itself, provide a person with a protection from or defense to CERCLA liability. Failure to identify a release or threatened release during the conduct of all appropriate inquiries does not negate the landowner's continuing responsibilities under the statute, including the requirements to take reasonable steps to stop the release, prevent a threatened release, and prevent exposure to the release or threatened release once the landowner has acquired a property. Also, if an existing institutional control or land use restriction is not identified during the conduct of all appropriate inquiries prior to the acquisition of a property, a landowner is not exempt from complying with the institutional

control or land use restriction after acquiring the property. None of the other statutory requirements for the liability protections is satisfied by the results of the all appropriate inquiries.

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

Commenter Organization Name: PBS & J

Comment Number: 0270

Excerpt Number: 5

Excerpt Text:

In many circumstances, so called "gaps" in data are inevitable no matter how much time and effort go into a project. This issue raises concerns about Timer, Cost, and Confidentiality. Is it necessary or a good idea to have more of the community involved in data gap interviews?

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.

It is left to the judgment and discretion of the environmental professional as to whether it is necessary or prudent to involve more of the community or use additional interviews to address data gaps. It may depend on the nature of the data gaps.

Commenter Organization Name: Miles & Stockbridge

Comment Number: 0277

Excerpt Number: 2

Excerpt Text:

3. Data Gap Definition - Another serious issue is the proposed definition of "data gap" (40 CFR § 312.10). This definition states that the AAI rules will not protect prospective purchasers for any environmental condition or liability arising from "data gap", i.e., defined as a lack or inability to obtain information required by the standards and practices listed in the proposed rule, despite good faith efforts by the environmental professional. Further, the preamble states "... a fulfillment of the "All Appropriate Inquiries" requirements does not, by itself, provide a person with a protection from or defense to CERCLA liability." (69FR52560). Such qualification to liability protection provisions will effectively nullify the prospective purchaser protections that Congress intended. Further, depending on a business' portfolio and assets, lending institutions may be reluctant or refuse to loan money to a small business acting as a prospective purchaser for fear of liability. In summary, the proposed definition of data gap will adversely impact property transactions, business development and small businesses.

Response:

The comment is premised upon an inaccurate understanding of the CERCLA liability provisions. CERCLA requires that all appropriate inquiries be conducted, AND continuing obligations be met to qualify for liability protection. This rule (all appropriate inquiries) does not affect the statutory liability scheme established by Congress, rather it defines the standards and practices that must be conducted to comply with the provisions for all appropriate inquiries requires.

Further, the rule does not state "that the AAI rules will not protect prospective purchasers for any environmental condition or liability arising from 'data gap'..." Please also see the response to comment number 0258, excerpt 3.

Commenter Organization Name: Anthony, Tony, et.al.

Comment Number: 0292

Excerpt Number: 3

Excerpt Text:

Distinguish data gaps as they relate to categorical information about the property and not as they may relate to information sources. Specifically, that "information required by the standards and

practices listed in Subpart C of this part," be referred to by "types of information about the subject property" as identified in Section 312.20 (d) Objectives, as opposed to also including (possibly) data gathering problems with information sources (312.20(b)(3)).

Response:

EPA does not agree with commenter's suggestion for distinguishing between types of data gaps. 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.

It is left to the judgment and discretion of the environmental professional as to whether it is necessary or prudent to involve more of the community or use additional interviews to address data gaps. It may depend on the nature of the data gaps.

Commenter Organization Name: anonymous institution

Comment Number: 0315

Excerpt Number: 2

Excerpt Text:

We endorse an increase historical interviewing and investigation into the past use(s) of the property and neighboring properties. However, with an increase in "practicable"(feasible) interviewing (i.e. past owners, past occupants, neighbors), a substantial increase in the number of "data gaps" will inevitably occur due to difficulty in obtaining this information. An increase in "data gaps" can only lead to a flawed CERCLA liability defense. Clear and concise wording should be outlined in the Rule to legally handle these Phase I "data gaps".

Response:

Please see response to comment number 0258, excerpt 3.

Commenter Organization Name: Herin

Comment Number: 0329

Excerpt Number: 3

Excerpt Text:

With respect to the issue of "data gaps" I would encourage EPA to provide further guidance as to how these may be efficiently treated in an AAI report so the user can more easily take advantage of the innocent landowner protections. It seems that it will be too easy for consultants to frequently default to broadly identifying data gaps which result in the user not being protected unless the user performs sampling and analysis. Some data gaps do not justify the need for further work and it would be helpful for EPA to guide the EP and user in how this determination may be made. Furthermore, the EP ought to be encouraged to specifically define the nature of each data gap (including the type of risk which may be taken by the user if the data gap is not further addressed).

Response:

Please see response to comment number 0292, excerpt 3.

Commenter Organization Name: CBPA

Comment Number: 0344

Excerpt Number: 3

Excerpt Text:

-The New Rule Appears to Make Prospective Purchasers Liable For Undiscovered On-Going Releases

No matter how thorough a Phase I is (or even a Phase II, for that matter) it is possible that sources of contamination on the subject property will remain undiscovered. Even if the site investigation identifies contamination, it may not identify all of it. It is common to discover additional materials not disclosed in the site investigation report once excavation for a construction project begins. In reality, although pre-purchase inquiry through a professionally conducted site investigation is an invaluable tool, the ultimate test is conducted by bulldozers and backhoes when construction begins.

The preamble to the proposed rule, explaining the new "data gaps" requirement (page 52560), appears to imply that purchasers are fully liable for any on-going release not discovered by the pre-purchase Phase T site investigation: "[a]n inability to obtain information. . . can have significant consequences regarding a prospective landowner's ultimate ability to claim protection from CERCLA liability [and] may result in an inability to claim protection against CERCLA liability for any on-going release." In the case complicated groundwater pollution, this could potentially expose purchasers to untold costs in liability.

The proposed rule appears to reason that if the on-going release isn't discovered during the Phase I, the landowner can't take "reasonable steps" to stop the release and will therefore be liable for all contamination released into the environment. As the rule explains (page 52560): "For example, if a person does not identify, during the all appropriate inquiries, 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." We do agree that landowners should be responsible to take reasonable steps to stop on-going releases, once the release becomes known. However, a landowner who has

conducted a pre-purchase inquiry in accordance with generally accepted good commercial and customary standards and practices should not incur CERCLA liability for any on-going release not discovered by the inquiry.

At a minimum, the proposed rule should provide additional clarifying language that makes it clear that a landowner's responsibility for any on-going release of contamination undiscovered by a properly conducted Phase I is to stop the release when and if it is discovered. It should be made absolutely clear that if the landowner takes reasonable steps to stop the release promptly upon discovery, the landowner will not be liable for the cost of cleaning up any contamination that was released into the environment while the release was ongoing.

Response:

The commenter is correct in stating that a landowner's responsibility for any on-going release of contamination undiscovered by a properly conducted Phase I is to stop the release when and if it is discovered. If the landowner takes reasonable steps to stop the release promptly upon discovery, the landowner may not be liable for the cost of cleaning up any contamination that was released into the environment while the release was ongoing. However, to obtain protection from liability under CERCLA the landowner may have to demonstrate that he or she did not know and "had no reason to know" that the contamination existed on the property prior to his or her acquisition of the property. Making such a demonstration may require that a landowner defend the accuracy and thoroughness of the all appropriate inquiries investigation conducted prior to acquiring the property. If a court determines that the all appropriate inquiries investigation was not compliant with the final regulations or otherwise should have identified releases or threatened releases of hazardous substances at the property, the court may establish that the land owner is not eligible for the liability protections.

Commenter Organization Name: Grand Rapids C of C

Comment Number: 0345

Excerpt Number: 7

Excerpt Text:

In the preamble to the proposed rule, the EPA states that an environmental professional's inability to obtain information, or data gaps, could result in the inability of the prospective purchaser to claim protection against CERCLA liability. This language seems to raise the bar for environmental consultants to the point that perfection would now be required. Under the EPA's language, if a release is discovered despite conducting "all appropriate inquiry," the prospective purchaser may not be able to claim a defense to CERCLA liability. The Grand Rapids Area Chamber of Commerce recommends that this preamble language be modified to allow prospective purchasers to obtain protection from CERCLA liability as long as they conduct "all appropriate inquiry" in conformance with the ASTM Standard into the property.

Response:

Please see response to comment number 0344, excerpt 3.

Commenter Organization Name: McKerr, Thomas

Comment Number: 0347

Excerpt Number: 9

Excerpt Text:

Data Gaps. Potentially a source of major additional costs because of the ambiguity of the language.\

Response:

The Agency believes the language is sufficiently specific. EPA points 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.

It is left to the judgment and discretion of the environmental professional as to whether it is necessary or prudent to involve more of the community or use additional interviews to address data gaps. It may depend on the nature of the data gaps.

Commenter Organization Name: McKerr, Thomas

Comment Number: 0347

Excerpt Number: 11

Excerpt Text:

-The preamble uses the example of an undiscovered leaking underground storage tank resulting in the inability to take reasonable steps to stop on going releases, thus resulting in the inability to claim protection from CERCLA liability. It is my understanding that the basis for the retro-applicability of CERCLA is that legally it is an on going release. Thus failure to discover any release on a property would result in the inability to claim CERCLA. If there is a possibility of not discovering a release and thus not complying with AAI even though every other aspect was properly performed, why do any inquiry at all? If EPA is expecting perfect information, there would be no liability to protect and the entire AAI process is negated. This statement should be removed from the preamble.

Response:

Please see response to comment number 0344, excerpt 3.

Commenter Organization Name: McKerr, Thomas

Comment Number: 0347

Excerpt Number: 22

Excerpt Text:

312.21(c)(2): see comment on definition of data gap. But even with a defined time period, the Environmental Professional should comment on the significance of the data gap as it applies to a particular property and would be negligent if he thought five years is too long and did not attempt to close the gap. I recommend adopting the 1527 language.

Response:

The Agency believes the language is sufficiently specific. EPA points 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.

It is left to the judgment and discretion of the environmental professional as to whether it is necessary or prudent to involve more of the community or use additional interviews to address data gaps. It may depend on the nature of the data gaps.

Commenter Organization Name: Greenlining Institute

Comment Number: 0354

Excerpt Number: 6

Excerpt Text:

-B. The Proposed "Data Gaps" Requirement Casts Doubt on Developers' Protection From CERCLA Liability for Undiscovered Ongoing Releases

--i. Congress intended that a developer's responsibility for contamination would be limited to taking "reasonable steps" to stop leaks and protect the public, but would not extend to expensive cleanups.

The purpose of affording prospective purchasers liability protection is to assure them that they will not incur CERCLA liability for costs of cleaning up contamination on the subject property or remediating groundwater that is polluted by releases of contamination from the subject property [Footnote: Much of the concern over CERCLA liability centers on co-mingled groundwater plumes. It is often the case that groundwater underlying industrial areas is contaminated with many different chemicals from many different sources. Because CERCLA liability is joint and several, the owner of a site that has contributed a relatively small amount of contamination to groundwater can be held liable for the cost of cleaning up the entire plume. Remediation of contaminated groundwater plumes is extremely expensive, potentially running into tens of millions of dollars or more]. The Brownfields Revitalization Act provides that all purchasers must, however, take "reasonable steps" to stop any ongoing release and protect human health and the environment. 42 U.S.C. § 9601 (35)(B)(i). Reasonable steps do not include remediating groundwater or a "full" cleanup of contamination, such as removing contaminated soil. Rather, they are intended to contain contamination and protect the public without exposing developers to the excessive liability involved in CERCLA remediation actions. Prior to this negotiated rulemaking process, staff attorneys in EPA's Office of Enforcement explained the reasonable steps obligations of protected developers:

"By making the landowner liability protections subject to the obligations to take "reasonable steps," EPA believes Congress intended to balance the desire to protect certain landowners from CERCLA liability with the need to ensure the protection of human health and the environment. In requiring reasonable steps from parties qualifying for landowner liability protections, EPA believes Congress did not intend to create, as a general matter, the same types of response obligations that exist for a CERCLA liable party (e.g., removal of contaminated soil, extraction and treatment of contaminated groundwater)."

United States Environmental Protection Agency, Office of Enforcement and Compliance Assurance, 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 9 (March 6, 2003) (emphasis original) ("Guidance Document").

--ii. Congress intended developers to be protected from liability for hidden contamination that is discovered after the purchase.

EPA's staff attorneys also made clear that protected developers are not responsible for cleaning up contamination that is missed during a properly conducted prepurchase site investigation, but are only responsible to take "reasonable steps" when and if hidden contamination comes to light:

Q7: If a protected landowner discovers a previously unknown release of a hazardous substance from a source on her property, must she remediate the release?

A7: Provided the landowner is not otherwise responsible for the release from the source, she should take some affirmative steps to "stop the continuing release," but EPA would not, absent unusual circumstances, look to her for performance of complete remedial measures.

Id. at attachment B.

--iii. The negotiated rule appears to contradict the intent of Congress by holding developers fully liable for contamination undiscovered during the pre-purchase inquiry.

EPA's negotiated rule, which is being promulgated by a different office within EPA, contradicts the Guidance Document issued by the Office of Compliance and casts doubt on whether conducting All Appropriate Inquiry prior to purchase, and thereby obtaining protected landowner status, can ever result in any meaningful CERCLA liability protection [Footnote: 7 Guidance documents do not have the force of law. See *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944); *Christensen v. Harris County*, 529 U.S. 576, 587 (2000). Rules properly adopted through notice and comment rulemaking do have the force of law and ordinarily are entitled to Chevron deference. See *United States v. Mead Corp.*, 553 U.S. 218 (2001). An agency may also change its mind in making policy determinations so long as the decision is within the range of options permitted by its organic statute or other legislation. However, the Guidance Document represents an unbiased contemporaneous interpretation of a statute the agency is entrusted with administering and it expresses the agency's understanding of the intent of Congress. We believe the Guidance Document correctly states the unambiguously expressed intent of Congress and EPA cannot now deviate from that intent.]. The intent of the negotiated rule appears to be to hold developers fully liable for contamination undiscovered during the pre-purchase inquiry.

The Statement of Basis and Purpose, explaining the new "data gaps" requirement at page 52560, implies that purchasers are fully liable for an on-going release not discovered by the pre-purchase investigation: "[a]n inability to obtain information...can have significant consequences regarding a prospective landowner's ultimate ability to claim protection from CERCLA liability. . . . [and] may result in an inability to claim protection against CERCLA liability for any on-going release." EPA reasons that if an on-going release isn't discovered during the pre-purchase investigation, the landowner can't take "reasonable steps" to stop the release (because he doesn't know about it) and will therefore be liable for all contamination released into the environment. As EPA explains: "For example, if a person does not identify, during the all appropriate inquiries, 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." EPA apparently intends to attach liability for undiscovered releases despite "good faith efforts by the environmental professional or prospective landowner" to gather information and where there is simply a lack of information indicating contamination. 69 Fed. Reg. at 52559-560. If taken literally, this language abolishes innocent purchasers' protections entirely. At best, it is ambiguous and rife with uncertainty [Footnote: This particularly troubling passage might be explained by turbulence between EPA and Negotiated Rulemaking Committee members. U.S. PIRG, a staunch advocate of public health and environmental protection, abruptly quit the rulemaking committee in part because it felt that the "data gaps" section was too lenient for developers. Letter from Julie C. Wolk, U.S. PIRG to Patricia Overmeyer, U.S. EPA, December 19, 2003. EPA, in turn, replied that U.S. PIRG could not withdraw from the negotiated rulemaking process because the committee had already reached consensus. Letter from Marianne Horinko, U.S. EPA to Gene Karpinski, U.S.

PIRG, undated. This is part of the attempt of EPA to insulate itself from legal challenges to the regulation. As a part of the negotiated rulemaking process committee members commit to support the rule once consensus is reached. This commitment, however, is certainly legally unenforceable on numerous constitutional and statutory grounds.].

At a minimum, EPA should provide clarifying language that leaves no doubt that a developer's only responsibility for any on-going release of contamination undiscovered by a properly conducted AAI is to stop the release when and if it is discovered. It should be made crystal clear that if the developer takes reasonable steps to stop the release promptly upon discovery, the she will not be liable for the cost of cleaning up any contamination that was released into the environment while the release was ongoing.

Response:

The commenter is correct in asserting that a landowner's responsibility for any on-going release of contamination undiscovered by a properly conducted all appropriate inquiries investigation is to stop the release when and if it is discovered. If the landowner takes reasonable steps to stop the release promptly upon discovery, the landowner may not be liable for the cost of cleaning up any contamination that was released into the environment while the release was ongoing. However, to obtain protection from liability under CERCLA the landowner may have to demonstrate that he or she did not know and “had no reason to know” that the contamination existed on the property prior to his or her acquisition of the property. Making such a demonstration may require that a landowner defend the accuracy and thoroughness of the all appropriate inquiries investigation conducted prior to acquiring the property. If a court determines that the all appropriate inquiries investigation was not compliant with the final regulations or otherwise should have identified releases or threatened releases of hazardous substances at the property, the court may establish that the land owner is not eligible for the liability protections. The language that the commenter cites from the preamble to the proposed rule was meant to inform prospective property owners that all appropriate inquiries must be conducted thoroughly and in compliance with the final regulations and that the failure to discover an on-going release due to an improperly conducted all appropriate inquiries investigation may result in the landowner losing protection from CERCLA liability.

The requirement to identify and document “data gaps” is not meant to establish an “open ended” search requirement. The requirement to identify “data gaps” is meant to provide documentation of what types of information an environmental professional (and those individuals under the direct charge and supervision of the environmental professional) searched for, in compliance with the objectives and performance factors of the rule, and could not find, in those cases where, in the judgment of the environmental professional affect his or her ability to determine whether or not conditions at a property are indicative of releases or threatened releases of hazardous substances on, at, in, or to the property. In cases where the environmental professional determines that data gaps or missing information about a property are not essential to his or her determination with regard to the environmental conditions of the property, documentation of data gaps is not required.

Data gaps are an essential element of all appropriate inquiries. EPA determined that it is important that the conduct of all appropriate inquiries include documentation of how missing information may affect an environmental professional's ability to adequately determine the potential environmental conditions at a property. This aspect of the inquiries allows environmental professionals to apply their professional judgment. If, for instance, there is a significant gap in data about a property and the lack of such information reduces the ability of the environmental professional to adequately characterize the environmental conditions at that property, a prospective property owner can use such information to take appropriate steps to proceed in an environmentally responsible manner with regard to further characterization of the property. The preamble to the proposed All Appropriate Inquiries rule published in the Federal Register (40 CFR Part 312), notes, "...the mere fact that a purchaser conducted all appropriate inquiries does not provide any individual with a limitation from CERCLA liability. To qualify as a bona fide prospective purchaser, innocent landowner or a contiguous property owner, a person must, in addition to conducting all appropriate inquiries prior to acquiring a property, comply with all of the other statutory requirements." (40 CFR Part 312, p. 52560). EPA views this to be consistent with Congressional intent.

Commenter Organization Name: Auditing Roundtable, BEAC

Comment Number: 0363

Excerpt Number: 6

Excerpt Text:

The proposal requests comments on proposed standards for conducting interviews of past and present owners and occupants of a property and comments on the proposed standards for reviews of historical sources of information.

The proposed standards generally propose appropriate requirements for interviewing past and present owners (when feasible) and consulting other historical sources of information. However, in circumstances in which information from predecessor entities and other historical information is sketchy or unavailable, the implication to be drawn from the proposed standard is that these are then "data gaps" to be identified in the report. Since the significance of such information may be difficult to determine, one must infer that a user of the report must conduct phase II site testing in order to have any assurance that it would qualify for the liability defenses available under CERCLA. This is likely to add substantial delay and expense as report users (lenders, purchasers and others) will likely strive to have the greatest degree of practical certainty that they would qualify for the defenses.

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.

It is left to the judgment and discretion of the environmental professional as to whether it is necessary or prudent to involve more of the community or use additional interviews to address data gaps. It may depend on the nature of the data gaps.

Commenter Organization Name: Intertox

Comment Number: 0396

Excerpt Number: 6

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

Excerpt Text:

-The proposed provisions for addressing data gaps.

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

Response:

EPA thanks the commenter for the stated support of the provisions.

Commenter Organization Name: NPCA

Comment Number: 0403

Excerpt Number: 6

Excerpt Text:

Data gaps are to be addressed using "best professional judgment." This "standard" gives little or no confidence that liability protection will be afforded the purchaser or lessee.

Response:

Please see responses to comment numbers 0354 (excerpt 6) and 0363 (excerpt 6).

3.12.1 The Rule Should Require Sampling and Analysis

Commenter Organization Name: Tweedale, Tony

Comment Number: 0045

Excerpt Number: 3

Excerpt Text:

The requirements for making data gaps evident (proposed Sec. 312.10) appear strong, but I wonder if there's any way to build in even more incentive to perform sampling & analysis (in this or other sections), using EPA's administrative powers to create some sorts of preferences for sites where sampling was included during 'all appropriate inquiry'?

Response:

Section 312.20(g) of the final rule points out that one way to address data gaps may be to conduct sampling and analysis. The final regulation does not require that sampling and analysis be conducted to comply with the all appropriate inquiries requirements. The regulation only notes that sampling and analysis may be conducted, where appropriate, to obtain information to address data gaps. The Agency notes that sampling and analysis may be valuable in determining the possible presence and extent of potential contamination at a property. Such information may be valuable for determining how a landowner may best fulfill his or her post-acquisition continuing obligations required under the statute for obtaining protection from CERCLA liability. However, the Agency does not believe that the all appropriate inquiries standards should require sampling and analysis given that this type of investigation is conducted prior to the acquisition of a property and generally represents an initial investigation into the environmental conditions of a property. Further investigation of the environmental conditions, including the conduct of sampling and analysis may be more appropriate after this initial investigation and more appropriately imposed on owners of potentially contaminated properties and not upon prospective purchasers.

Commenter Organization Name: Rynders, Dustin, et al

Comment Number: 0076

Excerpt Number: 1

Excerpt Text:

A review of the standards and practices promulgated by EPA in this rulemaking are in general acceptable. Of concern is the method by which purchasers are or are not required to close data gaps as provided in §312.20(f) and §312.21. Because data gaps may prevent an environmental professional from being able to issue an unqualified opinion, removal of data gaps is critical to the accomplishment of the stated purpose of the Brownfields Amendments - the identification of sites requiring cleanup.

Although proposed rule §312.20(f) states "Sampling and analysis may be conducted to develop information to address data gaps," [emphasis added] there is no provision for mandatory testing to receive the liability limits contemplated by the Brownfields Amendment.

To further extend the benefits of the Brownfields Amendments, we propose the following additions to the proposed regulation:

Elimination of data gaps

(a) Data gaps (as defined in §312.10) may be eliminated through the development and completion of a site specific sampling plan which shall be developed by the environmental professional (as defined in §312.10) who will be writing the opinion prescribed in §312.21.

(b) The scope of the site sampling plan need only be designed to fill the specific data gaps as identified by the environmental professional.

(c) Completion of all testing identified by a site specific sampling plan shall constitute a closing of the particular data gap so long as the site specific sampling plan and the test reports shall be included in the environmental professional's report.

Response:

See response to commenter number 0045, excerpt 3.

Commenter Organization Name: Wassom, Brady

Comment Number: 0233

Excerpt Number: 1

Excerpt Text:

In an attempt to relieve liability from businesses who want to redevelop brownfields and thus discourage the development of open space, the Brownfields Law will require those said businesses to conduct all appropriate inquiries (AAI) in order to establish that prospective purchasers had no reason to know of any contamination on a property. The proposed standards and practices for conducting AAI do not include requirements for sampling and analysis of contaminated properties. The proposed standards do require that prospective purchasers of brownfields, through the consultation of an "environmental professional" (EP) as defined by the same proposed standards, gather historical information, government data and conduct interviews to enable the purchaser to determine the extent to which a property is contaminated. In order to fill in possible data gaps that might exist after conducting the above research, voluntary sampling may be conducted but is not required. It is my contention that due to the changing demographics in the urban centers of the northeastern United States as exemplified by the state of New Jersey, this absence of a sampling and analysis requirement will be detrimental to public health. Perhaps the lack of requirements for sampling and analysis will make the process of purchasing and redeveloping brownfields less costly and, in turn, discourage the development of open space, but what are the potential costs to public health?

Like many states in the northeast, New Jersey has seen a change from an economy mainly based on industrial enterprise to one based on services over the last century. This change has left many former industrial sites vacant and prime for redevelopment. However, much of this redevelopment will not occur to feed a growing demand for industrial development in the state.

Rather, this redevelopment is needed in order to meet the demands of a growing population that is borne of the growth of the adjacent growing economies of New York and Philadelphia (Katcher, 2000). Furthermore, many of the brownfield sites in New Jersey exist on parcels of land that are too awkward and small for industrial development thus lending them to residential development (Greenberg, 2001). Meeting the demands of a growing population and redeveloping brownfields for residential use requires an primary emphasis on protecting the public health in addition to encouraging the redevelopment of brownfields. With many brownfield properties situated in low-income neighborhoods, the redevelopment of these sites also has civil rights/environmental justice implications (Greenberg, 2001).

A case that is illustrative of the potential problems with brownfields redevelopment and potential public health costs is the Grand Street Mercury Site in Hoboken, NJ. Since 1910, this site was home to a variety of manufacturing companies including the Cooper Hewitt Electric Company, the General Electric Vapor Light Company, the General Electric Company and the Quality Tool and Die Company. From 1910 to 1965 these companies manufactured mercury vapor lamps at the site. In 1990, the last owner of the site, the Quality Tool and Die Company, filed to stop operations under the New Jersey Environmental Cleanup and Responsibility Act. Remediation of the site involved removing an underground storage tank used for petroleum products and removal of associated contaminated soil. Given the history of the site, it is alarming that no federal laws required sampling for mercury contamination at the site before it was redeveloped for residential use. After the sale was complete, the property was sold to a community real estate cooperative that sold the individual units for use as apartments and art studios. One year after residents moved in, mercury contamination was discovered at the site. Subsequent sampling and analysis of urine samples from residents and owners of the units revealed that 69% of those sampled had elevated mercury levels (equal to or greater than 20 micrograms per liter) (Singh, 1998). As of June 2003, the EPA issued a unilateral administrative order for the primary responsible party to conduct remedial action (EPA, 2004).

The Hickory Woods neighborhood in Buffalo, New York is another case where a brownfield site was redeveloped into a residential development. The redevelopment was part of an urban-renewal initiative where a former steelmaking plant was converted to a housing subdivision in the late 1980s. By the mid-1990s, residents of the subdivision suspected there was contamination associated with the former steel mill. In 2000, the EPA confirmed the presence of elevated levels of lead, mercury and arsenic (Rosenberg, 2003).

Both of the above cases have some striking similarities. Both sites were brownfields in urban areas that were redeveloped for future residential development. Although, the history and previous ownership of both sites was known, sampling and analysis were not required as part of the CERCLA requirements to release the properties to new owners. Under, the proposed standards for conducting AAIs, sites such as these would not require sampling in order for liability to be released and redevelopment to begin.

Due to the demand for residential real estate in the urban areas of the northeast, brownfield development should be approached with the protection of public health as the primary consideration. The Brownfields Law is an important step in converting brownfields to usable properties, but the lack of a requirement for sampling and analysis of sites is unacceptable as it is

proposed. The proposed standards do not adequately address the unique environment in which many of the brownfields sites exist in the northeastern U.S.

Furthermore, the lack of a requirement for sampling and analysis is also disturbing in light of the fact that the proposed standards for the AAI require the EP to issue an opinion regarding additionally needed investigation, if any (Albergo, 2004). This "opinion" may be issued without knowledge of the specific future development plans for a site. In the above cases, would an EP have known that the sites were going to be used for residential development? If the EP did, the risk analysis would be much different than if the EP was under the assumption that the sites were going to be used for industrial development. Additionally, the prospective purchaser may not want to disclose the specific details of any future development for fear of being held hostage by an EP's opinion/recommendation (Albergo, 2004). The public health implications of this would not be in the best interest of the public.

The lack of a requirement to conduct sampling and analysis in the proposed standards for conducting AAIs is cited by some as the biggest challenge facing all stakeholders who have an interest in brownfields redevelopment (Siegel, 2004). Adopting boilerplate standards for the nation as a whole fails to address the unique needs of those in the urban northeastern U.S. Certainly, it would be possible to adopt different standards for different geographic regions as is done in the Clean Air Act. In these areas, where residential development is increasing, it is imperative that the EPA carefully consider the costs and benefits of brownfield redevelopment and its potential impact on the public health.

Response:

Section 312.20(g) of the final rule points out that one way to address data gaps may be to conduct sampling and analysis. The final regulation does not require that sampling and analysis be conducted to comply with the all appropriate inquiries requirements. The regulation only notes that sampling and analysis may be conducted, where appropriate, to obtain information to address data gaps. The Agency notes that sampling and analysis may be valuable in determining the possible presence and extent of potential contamination at a property. Such information may be valuable for determining how a landowner may best fulfill his or her post-acquisition continuing obligations required under the statute for obtaining protection from CERCLA liability. However, the Agency does not believe that the all appropriate inquiries standards should require sampling and analysis given that this type of investigation is conducted prior to the acquisition of a property and generally represents an initial investigation into the environmental conditions of a property. Further investigation of the environmental conditions, including the conduct of sampling and analysis may be more appropriate after this initial investigation and more appropriately imposed on owners of potentially contaminated properties and not upon prospective purchasers.

EPA agrees with the commenter's statements indicating that different types of properties represent different environmental and redevelopment challenges. The performance-based approach to the final rule was developed to allow environmental professionals to use their judgment in addressing the unique nature of individual properties. At this time, and given the general nature of the information collection requirements included in the final rule (as mandated

in the statute), EPA does not see the need for tailoring the requirements to different regions of the country, or developing separate standards for different regions.

3.12.2 The Rule Should Not Require Sampling and Analysis

Commenter Organization Name: Thacker, Barry K

Comment Number: 0071

Excerpt Number: 3

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

Excerpt Text:

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

Response:

EPA thanks the commenter for the stated support of the rule's provisions.

Commenter Organization Name: Simon, Richard M

Comment Number: 0089

Excerpt Number: 4

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

Excerpt Text:

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

Response:

EPA thanks the commenter for the stated support of the rule's provisions.

Commenter Organization Name: Goodman, J. Dwight

Comment Number: 0097

Excerpt Number: 4

Excerpt Text:

Providing sampling of any nature (ACM, soils, water, etc.) should not be an integral part of the AAI and the initial ESA preparation. If the basic purpose of the AAI is to determine the criteria to base the performance of a historical/data search for property use and potential environmental concerns...then sampling should be a follow-up, stand-alone report based on the conclusions derived from the ESA....not part of the ESA study.

Response:

EPA agrees with the commenter. Section 312.20(g) of the final rule points out that one way to address data gaps may be to conduct sampling and analysis. The final regulation does not

require that sampling and analysis be conducted to comply with the all appropriate inquiries requirements. The regulation only notes that sampling and analysis may be conducted, where appropriate, to obtain information to address data gaps. The Agency notes that sampling and analysis may be valuable in determining the possible presence and extent of potential contamination at a property. Such information may be valuable for determining how a landowner may best fulfill his or her post-acquisition continuing obligations required under the statute for obtaining protection from CERCLA liability. However, the Agency does not believe that the all appropriate inquiries standards should require sampling and analysis given that this type of investigation is conducted prior to the acquisition of a property and generally represents an initial investigation into the environmental conditions of a property. Further investigation of the environmental conditions, including the conduct of sampling and analysis may be more appropriate after this initial investigation and more appropriately imposed on owners of potentially contaminated properties and not upon prospective purchasers.

Commenter Organization Name: Worlund, John

Comment Number: 0256

Excerpt Number: 7

Excerpt Text:

I support the draft approach of not requiring sampling. Standard commercial practice is to use the AAI (Phase I) process to identify potential issues. The concept of using a Phase II process to resolve issues, frequently with the use of sampling, has worked well in standard commercial practice. When you cross over the line from collecting existing data to generating new information many issues need to be resolved. Virtually none of these issues are addressed in the current AAI or ASTM Phase I process. I would support removing any reference to sampling as part of a Phase I/ AAI process.

Response:

Please see response to comment number 0097, excerpt 4.

Commenter Organization Name: Belaire, Kent

Comment Number: 0267

Excerpt Number: 3

Excerpt Text:

The rule requires the EP to prepare a written report which summarizes the results of the inquiry and provide opinions as to whether the inquiry has identified conditions indicative of releases or threatened releases of hazardous substances on the property. This is generally consistent with the ASTM standard which has worked well in the past. The AAI rule requires that the report identify data gaps in the information developed as part of the inquiry that affects the EP's ability to identify conditions indicative of releases or threatened releases of hazardous substances to the property. The rule also requires the report include comments regarding the significance of such data gaps on the EP's ability to provide an opinion as to whether the inquiry has identified conditions indicative of a release at the property. This approach allows for the most flexibility in addressing data gaps. The EP may exercise his judgment in determining if data gaps have

significantly affected his ability to meet the objective of the AAI standard. And if so, the EP may include in the report his opinion regarding additional investigations and sampling and analyses that may be required to address data gaps.

Response:

EPA thanks the commenter for the stated support of the rule's provisions.

Commenter Organization Name: PBS & J

Comment Number: 0270

Excerpt Number: 6

Excerpt Text:

Conducting intrusive sampling and laboratory analysis during a Phase I to address "data gaps" is introducing something, which we believe only complicates answering the gap question. Conducting intrusive sampling and laboratory analysis should be done as a means to further in

Response:

EPA agrees with the commenter. Section 312.20(g) of the final rule points out that one way to address data gaps may be to conduct sampling and analysis. The final regulation does not require that sampling and analysis be conducted to comply with the all appropriate inquiries requirements. The regulation only notes that sampling and analysis may be conducted, where appropriate, to obtain information to address data gaps. The Agency notes that sampling and analysis may be valuable in determining the possible presence and extent of potential contamination at a property. Such information may be valuable for determining how a landowner may best fulfill his or her post-acquisition continuing obligations required under the statute for obtaining protection from CERCLA liability. However, the Agency does not believe that the all appropriate inquiries standards should require sampling and analysis given that this type of investigation is conducted prior to the acquisition of a property and generally represents an initial investigation into the environmental conditions of a property. Further investigation of the environmental conditions, including the conduct of sampling and analysis may be more appropriate after this initial investigation and more appropriately imposed on owners of potentially contaminated properties and not upon prospective purchasers.

Commenter Organization Name: Billington, Edward

Comment Number: 0284

Excerpt Number: 2

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

Excerpt Text:

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

Response:

EPA thanks the commenter for the stated support of the rule's provisions.

Commenter Organization Name: Rose and Westra

Comment Number: 0320

Excerpt Number: 10

Excerpt Text:

R&W supports the proposal to not require environmental sampling and testing for each AAI study to fill all data gaps. Indiscriminate use of sampling and testing needlessly increases the cost of investigations and usually increases their duration.

Response:

EPA thanks the commenter for the stated support of the rule's provisions.

Commenter Organization Name: FAA

Comment Number: 0334

Excerpt Number: 20

Excerpt Text:

SAMPLING

1) Will sampling be necessary every time that there is a historical data gap, or if past owners and/or operators cannot be found or are unwilling to talk? FAA does not believe that sampling should be required for AAI. EPs should determine the degree of obviousness of the presence of contamination based on information and impressions from on-site visual inspections, interviews, and data collected pursuant to the proposed standards. The original ASTM E1527 standard was meant to serve as a guideline for the initial Phase I environmental inquiry. If contamination is suspected based on the conclusions of the Phase I/AAI report, then additional inquiries in the form of a Phase II confirmatory sampling investigation would be warranted. However, it is inappropriate to make this costly and possibly unnecessary exploration standard for all AAI investigations. Subsurface investigation can be quite expensive and would be unnecessary in many cases.

Response:

Section 312.20(g) of the final rule points out that one way to address data gaps may be to conduct sampling and analysis. The final regulation does not require that sampling and analysis be conducted to comply with the all appropriate inquiries requirements. The regulation only notes that sampling and analysis may be conducted, where appropriate, to obtain information to address data gaps. The Agency notes that sampling and analysis may be valuable in determining the possible presence and extent of potential contamination at a property. Such information may be valuable for determining how a landowner may best fulfill his or her post-acquisition continuing obligations required under the statute for obtaining protection from CERCLA liability. However, the Agency does not believe that the all appropriate inquiries standards should require sampling and analysis given that this type of investigation is conducted prior to

the acquisition of a property and generally represents an initial investigation into the environmental conditions of a property. Further investigation of the environmental conditions, including the conduct of sampling and analysis may be more appropriate after this initial investigation and more appropriately imposed on owners of potentially contaminated properties and not upon prospective purchasers.

The rule requires environmental professionals to record and comment only on data gaps “that affect the ability of the environmental professional to identify conditions indicative of releases or threatened releases on, at, in, or to the subject property.” 69 FR at 52560. The environmental professional is required to exercise discretion in determining what data gaps should be reported. EPA cannot make this any more clear and still retain the flexibility required to evaluate unique properties. Also, the preamble to the proposed rule stated 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.” 69 FR at 52560.

Commenter Organization Name: McKerr, Thomas

Comment Number: 0347

Excerpt Number: 12

Excerpt Text:

-Conducting sampling and analysis to address data gaps opens up another Pandora's Box. I have not seen any procedure in SW-840 that addresses how to bridge data gaps.

Response:

Section 312.20(g) of the final rule points out that one way to address data gaps may be to conduct sampling and analysis. The final regulation does not require that sampling and analysis be conducted to comply with the all appropriate inquiries requirements. The regulation only notes that sampling and analysis may be conducted, where appropriate, to obtain information to address data gaps. The Agency notes that sampling and analysis may be valuable in determining the possible presence and extent of potential contamination at a property. Such information may be valuable for determining how a landowner may best fulfill his or her post-acquisition continuing obligations required under the statute for obtaining protection from CERCLA liability. However, the Agency does not believe that the all appropriate inquiries standards should require sampling and analysis given that this type of investigation is conducted prior to the acquisition of a property and generally represents an initial investigation into the environmental conditions of a property. Further investigation of the environmental conditions, including the conduct of sampling and analysis may be more appropriate after this initial investigation and more appropriately imposed on owners of potentially contaminated properties and not upon prospective purchasers.

EPA’s SW-840 guidance provides sampling and testing procedures for solid and hazardous wastes and media containing these wastes. The document is not meant to provide guidance for the conduct of all appropriate inquiries.

Commenter Organization Name: Auditing Roundtable, BEAC

Comment Number: 0363

Excerpt Number: 3

Excerpt Text:

The proposed standard should permit a qualified opinion as to the existence or potential significance of "data gaps."

The proposed rule requires environmental professionals to include in the inquiries report an identification of the data gaps that affect the ability of the environmental professional to identify conditions indicative of releases or threatened releases on, at, in or to the subject property. The report must also 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. [69 Fed. Reg. 52560]

As a practical matter, it quite simply may not be feasible for an auditor to know what information the auditor lacks, or to be able to appreciate the significance of information not in the auditor's possession. We believe it is EPA's intention not to have this issue become a source of liability to auditing professionals. Some additional clarification on the nature of the opinion required of the auditor will avoid costly and unnecessary litigation between the auditor and the users of the assessment report over responsibility for data. Lack of clarity on this point will likely significantly drive up costs of site assessments as landowners seek to fill data gaps with Phase II-type intrusive sampling activities as assessors will be reluctant to reach conclusions absent exhaustive information.

This is particularly true in an imperfect world where sources of relevant information may be long gone from the scene by the time the auditor comes in with limited time and budget to perform a reasonable assessment, e.g., the ability to track down prior owners or operators in situations of multiple prior occupiers of a property. Likewise, in the Northeastern US, where industrialization has existed for centuries, the data gaps can be substantial and the significance of such data gaps can range from immaterial to extremely consequential. The approach taken will likely drive extensive sampling in Phase II investigations, and even the ASTM Phase II guidelines are not adequate for a potential buyer to be able to ascertain whether a Phase II investigation is sufficient to qualify for the liability defenses.

We recommend that the environmental professional be required to disclose information gaps and to assess the potential significance of data gaps only to the extent known or reasonably anticipated by the environmental professional.

Response:

The rule requires environmental professionals to record and comment only on data gaps that affect the ability of the environmental professional to identify conditions indicative of releases or threatened releases on, at, in, or to the subject property. The environmental professional is required to exercise discretion in determining what data gaps should be reported and commented upon. EPA agrees with the commenter that if an environmental professional is not aware that

information is missing, he or she cannot comment on it. However, the environmental professional must gather the information required to meet the objectives and performance factors in the regulation. The environmental professional should be able to identify whether or not the required information is available or missing. The preamble to the proposed rule stated 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.”

Section 312.20(g) of the final rule points out that one way to address data gaps may be to conduct sampling and analysis. The final regulation does not require that sampling and analysis be conducted to comply with the all appropriate inquiries requirements. The regulation only notes that sampling and analysis may be conducted, where appropriate, to obtain information to address data gaps. The Agency notes that sampling and analysis may be valuable in determining the possible presence and extent of potential contamination at a property. Such information may be valuable for determining how a landowner may best fulfill his or her post-acquisition continuing obligations required under the statute for obtaining protection from CERCLA liability. However, the Agency does not believe that the all appropriate inquiries standards should require sampling and analysis given that this type of investigation is conducted prior to the acquisition of a property and generally represents an initial investigation into the environmental conditions of a property. Further investigation of the environmental conditions, including the conduct of sampling and analysis may be more appropriate after this initial investigation and more appropriately imposed on owners of potentially contaminated properties and not upon prospective purchasers.

Commenter Organization Name: USWAG

Comment Number: 0367

Excerpt Number: 13

Excerpt Text:

Decision Not to Require Sampling and Analysis. EPA specifically requested public comment on the "decision not to require sampling and analysis as part of the all appropriate inquiries regulations." 69 Fed. Reg. at 52568. USWAG concurs with that decision. However, proposed section 312.20(f) and the preamble introduces confusion by stating that "it may be necessary to conduct sampling and analysis to .. fully comply with the statutory requirements for the CERCLA liability protections." Ibid. If Congress delegated to EPA prescribing the standards and practices for AAI and sampling and analysis is not part of those standards and practices, how can failure to conduct sampling and analysis as part of AAJ ever be a violation of the statutory requirements for the CERCLA liability protections? The implication of EPA's statement is that there is a statutory requirement for sampling and analysis, at least in some circumstances, and that the regulation must therefore include such a requirement. But in fact, nothing in the statute imposes any such requirement, and EPA has correctly omitted such a requirement from the regulation. EPA should delete the final sentence in section 312.20(f) and should state categorically that whatever the advantages sampling and analysis might provide in explaining existing data gaps, sampling and analysis is not required to satisfy AAI.

Response:

EPA continues to believe that sampling and analysis may be the best approach for addressing data gaps and allowing property owners to fully comply with the statutorily-imposed continuing obligations including stopping on-going releases and undertaking appropriate care. The statutory criteria for all appropriate inquiries include “the degree of obviousness of the presence or likely presence of contamination at the property, and the ability to detect the contamination by appropriate investigation.”

Section 312.20(g) of the final rule points out that one way to address data gaps may be to conduct sampling and analysis. The final regulation does not require that sampling and analysis be conducted to comply with the all appropriate inquiries requirements. The regulation only notes that sampling and analysis may be conducted, where appropriate, to obtain information to address data gaps. The Agency notes that sampling and analysis may be valuable in determining the possible presence and extent of potential contamination at a property. Such information may be valuable for determining how a landowner may best fulfill his or her post-acquisition continuing obligations required under the statute for obtaining protection from CERCLA liability. However, the Agency does not believe that the all appropriate inquiries standards should require sampling and analysis given that this type of investigation is conducted prior to the acquisition of a property and generally represents an initial investigation into the environmental conditions of a property. Further investigation of the environmental conditions, including the conduct of sampling and analysis may be more appropriate after this initial investigation and more appropriately imposed on owners of potentially contaminated properties and not upon prospective purchasers.

Commenter Organization Name: Intertox

Comment Number: 0396

Excerpt Number: 7

Excerpt Text:

-The proposal to not require sampling and analysis as part of the all appropriate inquiries standards.

--Intertox agrees with the U.S. EPA, that sampling and analysis should not be a part of the all appropriate inquiry process. There is no site for which all information can be acquired, ascertained, or determined. There will always be data-gaps. While sampling and analysis is a valid environmental activity, it should remain as it traditionally has, a part of the Phase II environmental site assessment process. The principal issue here is that if sampling and analysis is accepted as a data-gap preventing tool, then the U.S. EPA will have to develop rules and procedures for sampling and analysis. We believe that well-developed and debated sampling and analysis procedures already exist and that the U.S. EPA should be not involved in defining an "all appropriate" sampling and analysis procedure for the environmental site assessment process.

Response:

Section 312.20(g) of the final rule points out that one way to address data gaps may be to conduct sampling and analysis. The final regulation does not require that sampling and analysis

be conducted to comply with the all appropriate inquiries requirements. The regulation only notes that sampling and analysis may be conducted, where appropriate, to obtain information to address data gaps. The Agency notes that sampling and analysis may be valuable in determining the possible presence and extent of potential contamination at a property. Such information may be valuable for determining how a landowner may best fulfill his or her post-acquisition continuing obligations required under the statute for obtaining protection from CERCLA liability. However, the Agency does not believe that the all appropriate inquiries standards should require sampling and analysis given that this type of investigation is conducted prior to the acquisition of a property and generally represents an initial investigation into the environmental conditions of a property. Further investigation of the environmental conditions, including the conduct of sampling and analysis may be more appropriate after this initial investigation and more appropriately imposed on owners of potentially contaminated properties and not upon prospective purchasers.

Commenter Organization Name: MBA

Comment Number: 0401

Excerpt Number: 3

Excerpt Text:

MBA supports the concept of allowing the environmental professional, exercising his or her judgment, to advise the user when the circumstances may be appropriate for limited sampling, if at all, as part of the overall due diligence process.

As a participant on the advisory committee, MBA recognizes the thoughtful and important discussions that occurred during the drafting process, surrounding the use of sampling. In the discussion on how data gaps may be addressed when conducting AAI, it was acknowledged that, despite good faith efforts by the environmental professional and the prospective purchaser to gather information, data gaps may still exist. EPA, and the advisory committee, considered sampling as an option used at the discretion of the environmental professional and user, based on the totality of circumstances, information already gathered, and a review of any data gaps. Sampling is simply one tool that may help the environmental professional convey a fuller picture of the conditions on the property [Footnote: Please note, EPA explicitly states "Proposed §312.20(f) points out that one way to address data gaps may be to conduct sampling and analysis." Preamble to proposed rule section II.F.7, Federal Registrar, 40 CFR Part 312, August 26, 2004].

As EPA stated clearly in numerous sections of the preamble, sampling is not required while conducting AAI [Footnote: See preamble to proposed rule sections II.F.7, III.O, and IV, Id.]. The proposed regulation also addresses the role of sampling during the discussion of data gaps, in Section C - Standards and Practices, stating that sampling "may be conducted to develop information to address data gaps.[Footnote: See §312.20(f), emphasis added.]" At no other point in AAI is sampling mentioned and there is no language requiring an environmental professional to conduct sampling. EPA is not requiring sampling to successfully complete AAI and MBA agrees with this position.

Response:

EPA thanks the commenter for the stated support of the rule's provisions.

Commenter Organization Name: NPCA

Comment Number: 0403

Excerpt Number: 9

Excerpt Text:

Instead, while the Proposed Rule does not mandate sampling and testing to address potential data gaps, its ambiguous approach to many of the content requirements in the AAI report virtually necessitates such. In addition, EPA actually states, in the regulation that although sampling and testing are not needed, they may be conducted in order to fill in data gaps. Furthermore, the EP's report must include an opinion as to additional appropriate investigation, again leading the inquirer to sampling and testing. Lastly, the Proposed Rule requires the HP and prospective purchaser consider all the information in the report to ascertain the potential presence of a release or threatened release - again, leading the EP to sampling and testing. Sampling and testing are costly and generally not undertaken at the initial evaluation of a property. This cost and burden would be compounded by the fact that under the Proposed Rule, a prospective purchaser would have already expended a great deal of money and resources in preparing the AAI report itself. As stated previously, in essence, the Proposed Rule has elevated a Phase I ESA to what would traditionally be a Phase II ESA. The costs and burdens of such will not make redevelopment of brownfield sites attractive.

Furthermore, once sampling is undertaken, how much sampling and testing is enough? What protection under the rule is afforded a potential purchaser from a overzealous engineer?

Response:

The rule requires environmental professionals to record and comment only on data gaps that affect the ability of the environmental professional to identify conditions indicative of releases or threatened releases on, at, in, or to the subject property. The environmental professional is required to exercise discretion in determining what data gaps should be reported and commented upon.

Section 312.20(g) of the final rule points out that one way to address data gaps may be to conduct sampling and analysis. The final regulation does not require that sampling and analysis be conducted to comply with the all appropriate inquiries requirements. The regulation only notes that sampling and analysis may be conducted, where appropriate, to obtain information to address data gaps. The Agency notes that sampling and analysis may be valuable in determining the possible presence and extent of potential contamination at a property. Such information may be valuable for determining how a landowner may best fulfill his or her post-acquisition continuing obligations required under the statute for obtaining protection from CERCLA liability. However, the Agency does not believe that the all appropriate inquiries standards should require sampling and analysis given that this type of investigation is conducted prior to the acquisition of a property and generally represents an initial investigation into the environmental conditions of a property. Further investigation of the environmental conditions,

including the conduct of sampling and analysis may be more appropriate after this initial investigation and more appropriately imposed on owners of potentially contaminated properties and not upon prospective purchasers.

Commenter Organization Name: Rybak, John Thomas

Comment Number: 0412

Excerpt Number: 5

Excerpt Text:

4) Proposed provisions for addressing data gaps.

a) Page # 52578

b) View: I support addressing data gaps. Specifically the EP should be required to comment on the presence of the data gap(s), and provide an opinion on the relevance and/or potential risk to the property based on the identified data gap. Under the current practice environmental consultants often ignore data gaps and do not consider their potential risk to the property.

c) Assumptions: The absence of information does not equate to an absence of risk.

d) Burden: Immaterial. The consultant simply needs it identify the missing information and comment upon the risk this missing information creates.

e) Alternative: N/A.

5) Proposal to not require sampling

a) Page # 52571

b) View: Sampling should not be mandated into the Phase I AAI Process. Not all properties should require sampling during the AAI process. Undeveloped or non-suspect properties carry much less risk and sampling is not practical. If sampling is appropriate, often the scope of work cannot be adequately developed until after the Phase I report is completed. If little is known about the history of an industrial property, sampling conducted may be inadequate. For example, sampling may be conducted on the eastern side for a UST, only at the conclusion of the Phase I to find there was another UST or Septic System on the western side also.

c) Assumptions: Sampling should not be mandated during the Phase I and/or based on incomplete information.

d) Burden: Segregation of the Phase I and sampling (Phase II) may slow down the real estate transaction process. However a proper AAI compliant Phase I would recommend Phase II sampling where appropriate and therefore the AAI process would achieve the performance objectives and properly evaluate the risks.

Response:

The rule requires environmental professionals to record and comment only on data gaps that affect the ability of the environmental professional to identify conditions indicative of releases or threatened releases on, at, in, or to the subject property. The environmental professional is required to exercise discretion in determining what data gaps should be reported and commented upon.

Section 312.20(g) of the final rule points out that one way to address data gaps may be to conduct sampling and analysis. The final regulation does not require that sampling and analysis be conducted to comply with the all appropriate inquiries requirements. The regulation only notes that sampling and analysis may be conducted, where appropriate, to obtain information to address data gaps. The Agency notes that sampling and analysis may be valuable in determining the possible presence and extent of potential contamination at a property. Such information may be valuable for determining how a landowner may best fulfill his or her post-acquisition continuing obligations required under the statute for obtaining protection from CERCLA liability. However, the Agency does not believe that the all appropriate inquiries standards should require sampling and analysis given that this type of investigation is conducted prior to the acquisition of a property and generally represents an initial investigation into the environmental conditions of a property. Further investigation of the environmental conditions, including the conduct of sampling and analysis may be more appropriate after this initial investigation and more appropriately imposed on owners of potentially contaminated properties and not upon prospective purchasers.

Commenter Organization Name: Thornhill, James

Comment Number: 0414

Excerpt Number: 1

Excerpt Text:

While the significance of data gaps should be considered by the consultant, sampling should not be required for all appropriate inquiries to be satisfied even if data gaps are present. Although the proposed rule provides that sampling may be performed to develop information to address data gaps in Section 312.20(f), comments as to whether sampling should be required were requested on page 52,560 of the preamble. There are certainly times when Phase II sampling is appropriate based upon the findings of a Phase I. The difficulty with considering sampling to fill data gaps is that there is no guidance for the user as there is a gap in information. For example, if there is a 20 year gap in the history of the use of the property, does a purchaser test soil, groundwater and surface water for all possible contaminants across the entire property? Does the purchase have to conduct a survey for subsurface anomalies to search for tanks and drums? This procedure would run counter to the customary practice of sampling when warranted due to concerns identified in the due diligence such as the presence of a past use that may have utilized chlorinated solvents. If a purchaser has made a good faith effort to review readily available information, he or she should not have to spend tens of thousands of dollars to eliminate the possible unknowns because information regarding a property is simply not available for a period of time.

Response:

The rule requires environmental professionals to record and comment only on data gaps that affect the ability of the environmental professional to identify conditions indicative of releases or threatened releases on, at, in, or to the subject property. The environmental professional is required to exercise discretion in determining what data gaps should be reported and commented upon. EPA agrees with the commenter that if an environmental professional is not aware that information is missing, he or she cannot comment on it. However, the environmental professional must gather the information required to meet the objectives and performance factors in the regulation. The environmental professional should be able to identify whether or not the required information is available or missing. The preamble to the proposed rule stated 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.”

Section 312.20(g) of the final rule points out that one way to address data gaps may be to conduct sampling and analysis. The final regulation does not require that sampling and analysis be conducted to comply with the all appropriate inquiries requirements. The regulation only notes that sampling and analysis may be conducted, where appropriate, to obtain information to address data gaps. The Agency notes that sampling and analysis may be valuable in determining the possible presence and extent of potential contamination at a property. Such information may be valuable for determining how a landowner may best fulfill his or her post-acquisition continuing obligations required under the statute for obtaining protection from CERCLA liability. However, the Agency does not believe that the all appropriate inquiries standards should require sampling and analysis given that this type of investigation is conducted prior to the acquisition of a property and generally represents an initial investigation into the environmental conditions of a property. Further investigation of the environmental conditions, including the conduct of sampling and analysis may be more appropriate after this initial investigation and more appropriately imposed on owners of potentially contaminated properties and not upon prospective purchasers.

Commenter Organization Name: Dismukes, James

Comment Number: 0416

Excerpt Number: 1

Excerpt Text:

Sampling to address data gaps is not practicable. What do you test for? Where do you sample? A very basic sampling routine consisting of three soil borings with soil and groundwater sampling for the basic chemicals of concern identified in most Phase I ESA's costs between \$3500 to \$6000. These costs far exceed EPA's estimation of \$1439.

Response:

Section 312.20(g) of the final rule points out that one way to address data gaps may be to conduct sampling and analysis. The final regulation does not require that sampling and analysis be conducted to comply with the all appropriate inquiries requirements. The regulation only notes that sampling and analysis may be conducted, where appropriate, to obtain information to

address data gaps. The Agency notes that sampling and analysis may be valuable in determining the possible presence and extent of potential contamination at a property. Such information may be valuable for determining how a landowner may best fulfill his or her post-acquisition continuing obligations required under the statute for obtaining protection from CERCLA liability. However, the Agency does not believe that the all appropriate inquiries standards should require sampling and analysis given that this type of investigation is conducted prior to the acquisition of a property and generally represents an initial investigation into the environmental conditions of a property. Further investigation of the environmental conditions, including the conduct of sampling and analysis may be more appropriate after this initial investigation and more appropriately imposed on owners of potentially contaminated properties and not upon prospective purchasers.

Commenter Organization Name: Tryon, Bill

Comment Number: 0418

Excerpt Number: 4

Excerpt Text:

No Phase II - My understanding is that the committee determined that the completion of phase II investigations would not be required in order to satisfy requirements for AAI. I recommend that this be more expressly stated in the rule.

Response:

Section 312.20(g) of the final rule points out that one way to address data gaps may be to conduct sampling and analysis. However, the preamble also clearly states that the final regulation does not require that sampling and analysis be conducted to comply with the all appropriate inquiries requirements. The regulation only notes that sampling and analysis may be conducted, where appropriate, to obtain information to address data gaps. The Agency notes that sampling and analysis may be valuable in determining the possible presence and extent of potential contamination at a property. Such information may be valuable for determining how a landowner may best fulfill his or her post-acquisition continuing obligations required under the statute for obtaining protection from CERCLA liability. However, the Agency does not believe that the all appropriate inquiries standards should require sampling and analysis given that this type of investigation is conducted prior to the acquisition of a property and generally represents an initial investigation into the environmental conditions of a property. Further investigation of the environmental conditions, including the conduct of sampling and analysis may be more appropriate after this initial investigation and more appropriately imposed on owners of potentially contaminated properties and not upon prospective purchasers.

Commenter Organization Name: Georgia Power

Comment Number: 0423

Excerpt Number: 5

Excerpt Text:

§312.20 All Appropriate Inquires (f)

In §312.20 All Appropriate Inquires (f), the last sentence in this paragraph "Sampling and analysis may be conducted to develop information to address data gaps" should be deleted.

Rationale:

-Providing direction for sampling and analysis is beyond the scope of this regulation and is not addressed in ASTM 1527. The mere suggestion of conducting sampling and analysis to address data gaps will inevitably drive the environmental professional to recommend sampling and analysis to fill a data gap. The frequency at which sampling and analysis will be recommended will automatically increase the costs of environmental site assessments. An environmental professional inherently knows that sampling and analysis is a means of characterizing the site. Furthermore, denial of this recommendation on behalf of the defendant would render the innocent landowner defense insubstantial.

Response:

Section 312.20(g) of the final rule points out that one way to address data gaps may be to conduct sampling and analysis. However, the preamble also clearly states that the final regulation does not require that sampling and analysis be conducted to comply with the all appropriate inquiries requirements. The regulation only notes that sampling and analysis may be conducted, where appropriate, to obtain information to address data gaps. The Agency notes that sampling and analysis may be valuable in determining the possible presence and extent of potential contamination at a property. Such information may be valuable for determining how a landowner may best fulfill his or her post-acquisition continuing obligations required under the statute for obtaining protection from CERCLA liability. However, the Agency does not believe that the all appropriate inquiries standards should require sampling and analysis given that this type of investigation is conducted prior to the acquisition of a property and generally represents an initial investigation into the environmental conditions of a property. Further investigation of the environmental conditions, including the conduct of sampling and analysis may be more appropriate after this initial investigation and more appropriately imposed on owners of potentially contaminated properties and not upon prospective purchasers.

3.12.3 The Agency Should Clarify How Many Years without Data Constitute a Data Gap

Commenter Organization Name: Prevatte, Chad M

Comment Number: 0093

Excerpt Number: 2

Excerpt Text:

Although the term "data gap" is defined in §312.10 to include a lack of or inability to obtain information, it does not define how many years without data constitute a "data gap".

Response:

Data gaps are generally defined as missing information. The term is not limited by any particular period of time. The comment seems only to have relevance to data gaps associated with historical information such as previous owners of a property. In such cases, the environmental professional must determine whether the missing information, due to the type of information or due to the length of time over which information is missing, whether or not the lack of information affects his or her ability to render an opinion regarding the presence of conditions indicative of releases or threatened releases of hazardous substances.

EPA notes that the rule requires environmental professionals to record and comment only on data gaps that affect the ability of the environmental professional to identify conditions indicative of releases or threatened releases on, at, in, or to the subject property. The environmental professional is required to exercise discretion in determining what data gaps should be reported and commented upon. EPA understands that if an environmental professional is not aware that information is missing, he or she cannot comment on it. However, the environmental professional must gather the information required to meet the objectives and performance factors in the regulation. The environmental professional should be able to identify whether or not the required information is available or missing. The written report should 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.

Commenter Organization Name: Zutz

Comment Number: 0104

Excerpt Number: 2

Excerpt Text:

It is our opinion the definition of a data gap is inadequate.

Here's my definition of a data gap - a lack of undefined historical records for an undefined period that later proves significant, but not at the time of conducting the Phase I ESA. Unless the historical sources review under Section 312.24 states a frequency for review, there may always be one additional record that may later prove significant. For example, should city street directories be reviewed at a minimum of 5 year intervals (current ASTM 1527-00 standard) , or each year? If city directories were not made for a smaller community, isn't the absence of

directories a data gap? How frequent should aerial photos be reviewed? Every decade? And won't there always be a data gap of aerial photos prior to manned flight? Likewise, if there are infrequent real estate records (due to unrecorded or infrequent transfer of the property), won't there be a data gap of real estate records?

If the proposed rules are going to define a data gap, then Section 312.24 should state the minimum frequency of historical reviews.

Response:

Please see response to comment number 0093, excerpt 2.

Commenter Organization Name: Anthony, Tony, et.al.

Comment Number: 0292

Excerpt Number: 2

Excerpt Text:

We recommend the definition of Data Gap be revised to reflect the following:

-A lack or absence of property information spanning a time period greater than five years would qualify as a data gap.

Without a specific time interval, any time break in information, no matter how short the duration, would be considered a data gap and would need to be addressed under 312.20 (f).

Response:

Please see response to comment number 0093, excerpt 2.

Commenter Organization Name: FAA

Comment Number: 0334

Excerpt Number: 19

Excerpt Text:

DATA GAPS

1) The proposed rule requires the EP to identify data gaps in their inquiries, to explain what actions they took to fill those gaps, and to explain the significance of the gaps to the EP's determination as to whether the subject property may be contaminated. FAA would like EPA to clarify its policy on data gaps in historic information.

For example, the proposed standard to review historical sources of information requires the EP to search as far back as the property was used. This exceeds the previous 50-year search limit specified by ASTM E1527-2000. Many rural areas may not have recorded information any older than the previous 50-year limit. If the EP cannot identify historical sources of information that explain uses of and activities at the property more than 50 years ago, would the EP identify this as a data gap? Is historical information older than 50 years significant, and will it help the EP

determine the threat or potential threat of release at the property?

Response:

Please see response to comment number 0093, excerpt 2.

EPA notes that the commenter is incorrect in stating that the ASTM E1527-2000 standard requires that an environmental professional search historical records only as far back as 50 years. The standard requires a search as far back as the property's obvious first developed use, or back to 1940, whichever is earlier (see section 7.3.2 "Uses of the Property" of ASTM E1527-2000).

Commenter Organization Name: McKerr, Thomas

Comment Number: 0347

Excerpt Number: 10

Excerpt Text:

-It is my understanding that an adequate AAI document may not be all inclusive of every scrap of information that can be collected but rather a presentation that the environmental professional has concluded meets the intent of the rule. It is theoretically possible for a data gap to be one day. But without a reasonable guideline of how to determine what constitutes a data gap the environmental professional will have no leg to stand on if there is information indicating a release or potential release (I prefer potential release to threatened release) that was available but not reviewed. For example, street (criss-cross) directories are available for some areas on a semiannual basis. Reviewing these for the property and surrounding area can be very time consuming, adding many hours of research time. ASTM Standard Practice 1527 uses 5 years as a reasonable interval. I hope that EPA accepts this. It should

Response:

Please see response to comment number 0093, excerpt 2.

Commenter Organization Name: McKerr, Thomas

Comment Number: 0347

Excerpt Number: 17

Excerpt Text:

-Data gap: A data gap, if it results in the non-discovery of a release, could be as brief as one day. In many situations data is available but the volume available is such that reviewing it would defeat "reasonable cost". "Good faith" as a defense is easily defeated. A reasonable period of time should be set, e.g., the five year period in 1527.

Response:

Please see response to comment number 0093, excerpt 2.

3.12.4 Review of Information Ordered Closed by Courts

Commenter Organization Name: Hodgson, Rory

Comment Number: 0208

Excerpt Number: 1

Excerpt Text:

What provisions are proposed for the review of information that has been ordered closed by the courts? Should it be emphasized that the Environmental Professional is a fiduciary serving in a position of "trust" and can only render informed judgments when all data gaps are removed?

Response:

EPA notes that the rule requires environmental professionals to record and comment only on data gaps that affect the ability of the environmental professional to identify conditions indicative of releases or threatened releases on, at, in, or to the subject property. The environmental professional is required to exercise discretion in determining which data gaps should be reported and commented upon. The environmental professional must gather the information required to meet the objectives and performance factors in the regulation. The environmental professional should be able to identify whether or not the required information is available or missing. If information ordered closed by a court is essential to the investigation and the environmental professional cannot obtain the necessary information from any other source, then the missing or unavailable information should be noted as a data gap. The written report should 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.

3.13 Shelf Life of the AAI Report

Commenter Organization Name: Prevatte, Chad M

Comment Number: 0093

Excerpt Number: 3

Excerpt Text:

In regards to §312.20.3, does the 180-day clock start at the most conservative point or least conservative point? For example, does the 180-day clock start when the owner is interviewed or when the environmental professional makes their declaration? These dates could differ by four weeks or more.

Response:

The final rule requires that certain aspects of the all appropriate inquiries investigation be updated if the investigation was completed more than 180 days **prior to the date of acquisition of the property** (or the date on which the prospective landowner takes title to the property) to ensure that an all appropriate inquiries investigation accurately reflects the current environmental conditions at a property. To increase the potential that information collected about the conditions of a property is accurate, as well as increase the potential that opinions and judgments regarding the environmental conditions at a property that are included in an all appropriate inquiries report are based on current and relevant information, the final rule requires that many of the components of the previous inquiries be updated within 180 days prior to the date of acquisition of the property. The components of the all appropriate inquiries that must be updated within 180 days prior to the date on which the property is acquired are:

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

Also, the final rule retains the proposed requirement that in all cases where a prospective landowner is using previously collected information, the all appropriate inquiries for the current purchase must be updated to include a summary of any relevant changes to the conditions of the property and any specialized knowledge of the prospective landowner.

Commenter Organization Name: FAA

Comment Number: 0334

Excerpt Number: 16

Excerpt Text:

FAA suggests that EPA consider an abbreviated 180-day requirement for re-assessment, including:

-Updating release data, as new releases may have occurred during the 180-day period

-Conducting interviews by phone with the current landowners or operators regarding changes in conditions and new activities at the site since the initial site visit and interviews

-Reviewing federal, state, tribal, and local government databases that have been updated since the initial AAI were completed.

Response:

The final rule requires that certain aspects of the all appropriate inquiries investigation be updated if the investigation was completed more than 180 days prior to the date of acquisition of the property (or the date on which the prospective landowner takes title to the property). EPA chose this period of time to ensure that an all appropriate inquiries investigation accurately reflects the current environmental conditions at a property. The Agency also believes that requiring the investigation to be updated within that timeframe increases the potential that information collected about the conditions of a property will be accurate, as well as increases the potential that opinions and judgments regarding the environmental conditions at a property that are included in an all appropriate inquiries report will be based on current and relevant information.

EPA is unsure what the commenter is suggesting exactly. If the commenter is providing suggestions for how certain aspects of the investigation may be updated, the Agency agrees that the procedures listed by the commenter are sufficient. If the commenter is suggesting that only the interviews, government records searches, and documentation of on-going releases portions of the all appropriate inquiries investigation should be updated, EPA disagrees with the commenter. EPA believes that the following types of information must be updated within 180 days of the date of acquisition to ensure that the investigation is current and accurate:

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

Commenter Organization Name: Intertox

Comment Number: 0396

Excerpt Number: 3

Excerpt Text:

-The proposal to establish the date on which title is transferred on a property as the date on which the property is acquired.

--Intertox agrees that property acquisition should be considered as the date on which a title document is recorded at the county assessor's office (or similar agency as may differ from state to state). We believe there is general consensus among environmental professionals that property acquisition begins when a title document is recorded as previously stated.

Response:

The Agency continues to believe that the event that most closely reflects the Congressional intent of the date on which the defendant acquired the property is the date on which a purchaser received title to the property. EPA notes that this is not the same as the date of recordation. They are two very distinct occurrences.

Commenter Organization Name: Rybak, John Thomas

Comment Number: 0412

Excerpt Number: 12

Excerpt Text:

Age of Report:

a) Page # 52577

b) View: A standard on how/when a Phase I is considered current is strongly supported. The Phase I AAI Standard is proposed to increase the quality and value of a Phase I report. To preserve quality of the AAI process the Phase I reports should be current. Reports being considered valid and current for up to 180 days is supported. With certain aspects of the reports being updated, reports can be considered current up to 365 days.

c) Assumptions: Site conditions change and a re-inspection of the property may show materially different conditions than the original report detailed. Specifically if the property is a suspect operation, onsite operations and property conditions can change rapidly.

d) Burden: The purchasers of real estate will be required to obtain current reports, and not rely on existing reports from 2 or 3 years ago. Costs of real estate transactions will increase, as new reports will be required on a greater frequency.

Response:

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

Commenter Organization Name: Greenwood, Harriet

Comment Number: PM-0127-0008

Excerpt Number: 6

Excerpt Text:

Additionally, I would like to commend the EPA and the negotiated rule making committee, for clearly allowing the use of previous assessments, provided they're in compliance with existing standards or practice, and updated within one year.

This will do a great deal to keep the commercial real estate market place operating efficiently and avoid what might be high additional costs if duplicate efforts were required by this rule.

Response:

EPA thanks the commenter for the stated support of the provision.

3.13.1 Use of Information Collected for Previous Inquiries Completed for the Same Property

Commenter Organization Name: Pike, Kenneth R

Comment Number: 0116

Excerpt Number: 1

Excerpt Text:

Transfer of AAI to Another Party (Preamble pg. 52557)

The proposed rule allows for a "second party" acquiring a property to use the results of inquiries ...conducted by a "first party". The proposed rule would also require that the "second party" update the inquiries and the report to include any relevant specialized knowledge held by the current purchaser and the environmental professional.

Comment: The Environmental Consultant would potentially be exposed to undue liability if the second party did not obtain the Consultant's permission (or provide remuneration) for reliance on the AAI Report. Also, if an adverse environmental condition not recognized in the AAI Report was identified by the second party subsequent to purchase, the Consultant could be held liable to both the first party and the second party for the adverse environmental condition because they both relied on the contents of the AAI Report. If the second party, for whatever reason, litigated against the first party (as a previous owner) because of the adverse environmental condition, and both parties relied on the Consultant's AAI Report, the Consultant would have a conflict as to which party to represent in the litigation. This could potentially leave both parties/purchasers without representation in litigation because the Consultant could not represent both sides in such an argument.

Recommendation: Because adverse environmental conditions can escape detection in even the most thorough and comprehensive property assessments and a purchaser's only recourse is often litigation, it is recommended that second party purchasers not be allowed to rely on the contents of a Consultant's AAI Report performed for a previous purchaser. Even if the Consultant can prove that the adverse environmental condition could not have been detected during the AAI and should therefore not be held liable for not detecting it, the legal costs to defend against such claims could be damaging. The second party/purchaser should afford to conduct its own AAI using a Consultant of its choosing. The second Consultant would have information from the first Consultant's AAI Report to review, disseminate and incorporate into their own AAI Report on which the second party may fully rely upon without exceptions.

Response:

The final rule allows for the use of previously conducted all appropriate inquiries, as long as the previously conducted inquiries were conducted in compliance with the statute and the all appropriate inquiries for the current purchase are updated to include a summary of any relevant changes to the conditions of the property and any specialized knowledge of the prospective landowner. EPA continues to recognize that it is not sufficient to wholly adopt previously conducted all appropriate inquiries for the same property without any

review. Certain aspects of the all appropriate inquiries investigation are specific to the current prospective landowner and the current purchase transaction. Therefore, the final rule requires that each all appropriate inquiries investigation include current information related to:

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

With regard to the commenter's concern regarding liability issues associated with using the results of an all appropriate inquiries investigation performed by another party, these issues are beyond the scope of today's rulemaking and are best addressed by the parties involved. Whenever using results provided by another party, an environmental professional should evaluate the accuracy and usefulness of the information prior to using it or incorporating such information into a current investigation.

Commenter Organization Name: NSPE

Comment Number: 0230

Excerpt Number: 10

Excerpt Text:

The proposed provisions for using previously conducted all appropriate inquiries (page 52556-52557).

It is NSPE's recommendation that EPA continue to require the previously conducted title searches, as well as all other data relative to the all appropriate inquiries requirement, be updated on a regular basis. EPA should also emphasize the requirement that the data be collected within 180 days prior to the acquisition of the property. Many prospective purchasers, in an effort to save time and cost, obtain previously performed data and reports, and force environmental professionals to sign "reliance letters," thereby allowing these third parties to rely upon the data. This data may be more than 180 days old and prepared for a different client. The liability implications on the environmental professional are extremely important and this part of the proposed rule will go far in protecting the environmental professional from third party liability.

Response:

Please see response to comment number 0116, excerpt 1.

Commenter Organization Name: Myers, Steve

Comment Number: 0242

Excerpt Number: 4

Excerpt Text:

4 Steve Myers Previous

Phase I's 312.20(b)(1) Is the intent of this paragraph to invalidate all previous Phase I

work done previously to this proposed rule becoming official if the proposed rule does become official? That is how it reads.

Response:

It is not the Agency's intent to disallow the use of information contained in previous inquiries, if the environmental professional and the prospective landowner find the previously collected information to be accurate and valid. However, EPA continues to believe that information collected as part of a prior all appropriate inquiries investigation for the same property should be updated to reflect current environmental conditions at the property and to include any specific information or specialized knowledge held by the prospective landowner. The regulatory language in today's final rule (at §312.20(c)(1)) allows for the use of information collected as part of prior all appropriate inquiries investigation for the same property provided that the prior information was collected "during the conduct of all appropriate inquiries in compliance with CERCLA Sections 101(35)(B), 101(40)(B) and 107(q)(A)(viii)." We have deleted the proposed language that would have required the previously conducted investigation to have been done in compliance with the final regulation. This allows for the use of information collected as part of previous all appropriate inquiries, as long as the information was collected in compliance with the statutory provisions for all appropriate inquiries. For property purchased on or after May 31, 1997, therefore, any information collected as part of an assessment in compliance with the ASTM E1527-97 standard or the ASTM E1527-2000 standard may be used as part of a current all appropriate inquiries investigation. For property purchased before May 31, 1997, information from assessments completed and in compliance with the statutory provisions at CERCLA Section 101(35)(B)(iv)(I) may be used as part of a current all appropriate inquiries investigation. However, this prior information may only be used if updated in accordance with §§ 312.20(b) and (c) of today's rule.

Commenter Organization Name: Myers, Steve

Comment Number: 0242

Excerpt Number: 5

Excerpt Text:

5 Steve Myers Previous

Phase I's 312.20(b)(2) Will soil or groundwater sampling data performed for previous 'All Appropriate Inquiries' reports also be invalid after one year? For example, if previous tests have shown conclusively that the soil is well above the regulatory limit for lead, an element that doesn't leach out very fast, what would be the point of re-sampling the soil 13 months later?

Response:

Since sampling and analysis is not required when conducting all appropriate inquiries, the use of the results of previous sampling and analysis events may be used by the environmental professional without being updated to comply with the provisions of the final rule. However, the environmental professional should use his or her professional judgment in determining the adequacy of such information.

It is important for the all appropriate inquiries investigation to be completed within one year prior to the date the purchaser acquires the property. We point out that the final regulation, as did the proposed regulation, allows for information from an older investigation to be used in a current investigation, however, if the all appropriate inquiries investigation was completed more than a year prior to the property acquisition date, all parts of the investigation must be reviewed and updated. We believe that a year is sufficient time for conditions at a property to change. In particular, in cases where there is a release or threatened release at a property, significant changes to the environmental conditions of a property could change during the course of a year. In addition, dependent upon the ongoing uses and ownership of a property during the course of a one-year time period, overall conditions at a property could change and new evidence of a release or threatened release could appear over that length of time. Therefore, the final rule requires that all appropriate inquiries completed for a particular property more than one year prior to the date of acquisition of that property, must be updated in their entirety. The final rule does allow for the use of information contained in previous inquiries, even when the inquiries were completed more than a year prior to the property acquisition date, as long as all information collected and all aspects of investigation be updated to included any changes that may have occurred during the interim.

Commenter Organization Name: Worlund, John

Comment Number: 0256

Excerpt Number: 3

Excerpt Text:

In theory there is no problem with the rule as drafted. In practice however several issues need to be recognized. Most practicing EP's are reluctant to rely on information previously collected by another practitioner. Part of this is liability related and part of it is the simple fact that the quality of reports varies widely. Most EP's would certainly review the previous work and use it to the extent possible.

Response:

Please see response to comment number 0116, excerpt 1.

Commenter Organization Name: Worlund, John

Comment Number: 0256

Excerpt Number: 5

Excerpt Text:

The subsequent use of a report by a third party not involved in the initial transaction would usually require a reliance letter from the EP. That is an important concept to maintain. The report, especially one involving a Brownfield site, may have risk tolerance issues associated with its preparation that are not directly transferable for one party to another. While this shouldn't prohibit the subsequent use of a report, such use should not be allowed without considered thought and discussion about the efficacy of the report to

the new player.

Response:

Please see response to comment number 0116, excerpt 1.

Commenter Organization Name: Hahn and Associates

Comment Number: 0296

Excerpt Number: 1

Excerpt Text:

I support Mr. Kenneth Pike's edocket comment (SFUND-2004-0001-0116) with regard of transfer of AAI (report) to another party. I am in agreement with Mr. Pike's recommendation as stated, including that subsequent purchasers (e.g. second party purchasers) not be allowed to rely on the contents of an AAI report prepared for another party ("first party").

Response:

Please see response to comment number 0116, excerpt 1.

Commenter Organization Name: Mille Lacs Ojibwe

Comment Number: 0330

Excerpt Number: 10

Excerpt Text:

The Band agrees with the proposed permitted use of previously conducted all appropriate inquiries according to the proposed provisions. Again, such a practice allows for the maximized use of tribal resources and is cost efficient.

Response:

The regulatory language in today's final rule (at §312.20(c)(1)) allows for the use of information collected as part of prior all appropriate inquiries investigation for the same property provided that the prior information was collected "during the conduct of all appropriate inquiries in compliance with CERCLA Sections 101(35)(B), 101(40)(B) and 107(q)(A)(viii)." We have deleted the proposed language that would have required the previously conducted investigation to have been done in compliance with the final regulation. This allows for the use of information collected as part of previous all appropriate inquiries, as long as the information was collected in compliance with the statutory provisions for all appropriate inquiries. For property purchased on or after May 31, 1997, therefore, any information collected as part of an assessment in compliance with the ASTM E1527-97 standard or the ASTM E1527-2000 standard may be used as part of a current all appropriate inquiries investigation. For property purchased before May 31, 1997, information from assessments completed and in compliance with the statutory provisions at CERCLA Section 101(35)(B)(iv)(I) may be used as part of a current all appropriate inquiries investigation. However, this prior information may only be used if updated in accordance with §§ 312.20(b) and (c) of today's rule.

Commenter Organization Name: McKerr, Thomas

Comment Number: 0347

Excerpt Number: 6

Excerpt Text:

Use of Prior Reports. The proposed approach seems very adequate but could be clarified by specifically allowing the re-use of information older than one year that will not have changed. Even if a report does not completely qualify as an AAI document, current industry practice recognizes that parts of a prior report may meet AAI requirements adequately and be used, while other sections of the report may not meet AAI requirements and should not be used, or not used without further investigation. The proposed rule does recognize this better than is explained in the preamble.

Response:

The regulatory language in today's final rule (at §312.20(c)(1)) allows for the use of information collected as part of prior all appropriate inquiries investigation for the same property provided that the prior information was collected "during the conduct of all appropriate inquiries in compliance with CERCLA Sections 101(35)(B), 101(40)(B) and 107(q)(A)(viii)." We have deleted the proposed language that would have required the previously conducted investigation to have been done in compliance with the final regulation. This allows for the use of information collected as part of previous all appropriate inquiries, as long as the information was collected in compliance with the statutory provisions for all appropriate inquiries. For property purchased on or after May 31, 1997, therefore, any information collected as part of an assessment in compliance with the ASTM E1527-97 standard or the ASTM E1527-2000 standard may be used as part of a current all appropriate inquiries investigation. For property purchased before May 31, 1997, information from assessments completed and in compliance with the statutory provisions at CERCLA Section 101(35)(B)(iv)(I) may be used as part of a current all appropriate inquiries investigation. However, this prior information may only be used if updated in accordance with §§ 312.20(b) and (c) of today's rule.

Commenter Organization Name: USWAG

Comment Number: 0367

Excerpt Number: 3

Excerpt Text:

A. Limited Shelf Life of Previously Collected Information. Proposed section 312.20(b) limits the circumstances under which previously collected information maybe used in a subsequent AAI. As written, this section is quite confusing and can be simplified without undermining the goal of a site assessment contemporaneous with the property acquisition.

First, EPA proposes that the earlier information must have been collected as part of an AAI conducted in compliance with this regulation as well as various CERCLA provisions. Proposed § 312.20(b)(1). Does this mean that information obtained in the course of a prior site assessment conducted in accordance with ASTM 1527-97 or -00 as the authorized interim standards cannot be used, subject to the updating provisions later

in the section? If that is EPA's intent, that is unnecessarily wasteful. Second, proposed section 312.20(b)(2) requires that the information have been updated within one year of the purchase of the property and proposed section 312.20(b)(3) goes even further by requiring that five important components of the inquiries be updated within 180 days of the property purchase. See 69 Fed. Reg. at 52556. There is no danger that AAI will be based on stale information. EPA needs to simplify its discussion of this issue and, particularly, clarify that relevant and reliable information obtained in the course of a prior site assessment can be used to satisfy AAI, subject to the updating provisions in the rule. It is not unusual for property transactions to take a long time to closing, and imposing unrealistic constraints on the shelf life of previously collected information is unwarranted.

Response:

EPA agrees that the regulatory language in the proposed rule was a bit confusing. EPA made some clarifications to the final rule. The regulatory language in the final rule (at §312.20(c)(1)) allows for the use of information collected as part of prior all appropriate inquiries investigation for the same property provided that the prior information was collected “during the conduct of all appropriate inquiries in compliance with CERCLA Sections 101(35)(B), 101(40)(B) and 107(q)(A)(viii).” We have deleted the proposed language that would have required the previously conducted investigation to have been done in compliance with the final regulation (*i.e.*, 40 CFR 312). This allows for the use of information collected as part of previous all appropriate inquiries, as long as the information was collected in compliance with the statutory provisions for all appropriate inquiries. For property purchased on or after May 31, 1997, therefore, any information collected as part of an assessment in compliance with the ASTM E1527-97 standard or the ASTM E1527-2000 standard may be used as part of a current all appropriate inquiries investigation. For property purchased before May 31, 1997, information from assessments completed and in compliance with the statutory provisions at CERCLA Section 101(35)(B)(iv)(I) may be used as part of a current all appropriate inquiries investigation. However, this prior information may only be used if updated in accordance with §§ 312.20(b) and (c) of today’s rule.

Commenter Organization Name: Freeman & Giler

Comment Number: 0417

Excerpt Number: 5

Excerpt Text:

Proposed Rule §312.20(b)(2) clarifies that AAI must be conducted or updated within one year prior to taking title to the subject property, and Proposed Rule §312.20(b)(3) further clarifies that certain elements of AAI ? *i.e.*, interviews with property owners, operators and occupants, searches for recorded environmental liens, reviews of government records, visual inspections of the property and the EP's declaration be conducted or updated within 180 days prior to taking title. This addresses a grey area in the ASTM standard, which merely specified that the Phase I reports were presumptively valid for 180 days, after which time it was up to the User in its "reasonable judgment" to determine whether conditions changed at the subject property to render the Phase I

invalid. This clear direction will allow the User to know with a higher degree of confidence whether its AAI is valid or "stale".

Nonetheless, it should be recognized that the proposed AAI Rule requires additional updates that are unnecessary under the ASTM standard at properties where the conditions remain unchanged and that such unnecessary updates will increase the costs of AAI.

Response:

The cost analysis conducted for the final rule does not account for the cost savings that some prospective property owners may enjoy because they have previously conducted all appropriate inquiries reports that provided some of the necessary historical information. The cost analysis assumes that all prospective property owners must undertake the all appropriate inquiries investigation without the benefit of previously conducted inquiries. Therefore, the cost estimate provided with the proposed rule represents an over-estimate of potential costs, rather than an underestimate, as the commenter suggests.

Commenter Organization Name: Georgia Power

Comment Number: 0423

Excerpt Number: 3

Excerpt Text:

§312.20 All Appropriate Inquires, (b) (1)

In §312.20 All Appropriate Inquires, (b) (1) should be changed to read:

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

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

Rationale:

-Any information obtained during previous environmental site assessments should be made available to persons in §312.1(b) regardless of whether the information was collected in full or partial compliance with the requirements of this part. For example, if a previous environmental assessment was conducted in partial compliance with ASTM 1527 or AAI because local government records were not reviewed, then it should not render all other information obtained during the previous environmental assessment (such as Sanborns, interviews, visual inspections, etc.) as unavailable for reuse.

Response:

It is appropriate to use the information collected as part of previous all appropriate inquiries, as long as the information was collected in compliance with the statutory

provisions for all appropriate inquiries and is updated as required in §312.20. In all cases, the environmental professional should review the previously obtained or collected information and assess its accuracy and applicability to the current investigation.

3.13.2 AAIs Conducted by Third Parties

Commenter Organization Name: Goodman, J. Dwight

Comment Number: 0097

Excerpt Number: 2

Other Sections: NEW - 6.6 - Impact of the rule on the cost of liability insurance

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:

Please see response to comment number 0116, excerpt 1.

Commenter Organization Name: NSPE

Comment Number: 0230

Excerpt Number: 11

Excerpt Text:

The proposed requirements for using all appropriate inquiries conducted by third parties (page 52557-52558).

The all appropriate inquiries issue, as it pertains to third parties, seems somewhat inconsistent with the "previously conducted all appropriate inquiries" issue discussed above. Under the proposed rule the information and data developed by third parties may be used so long as it was updated or collected within one year of the purchaser acquiring the property. In the requirements for "previously conducted title searches," there is a 180-day timeframe. This inconsistency could lead to confusion since it is possible for previously conducted inquiries to be performed by a third party. Under that circumstance, it seems unclear as to whether the 180 day or one year timeframe would apply. In an effort to minimize this potential confusion, we suggest that the 180-day timeframe be applied to both circumstances. We also suggest that the proposed rule be amended to prohibit post-contractual reliance letters (i.e., any attempt by a party to require an environmental professional to provide a reliance letter shall be void and unenforceable as a matter of law).

Response:

It is appropriate to use the information collected as part of previous all appropriate inquiries, as long as the information was collected in compliance with the statutory

provisions for all appropriate inquiries and is updated as required in §312.20. In all cases, the environmental professional should review the previously obtained or collected information and assess its accuracy and applicability to the current investigation.

Commenter Organization Name: ENSR International

Comment Number: 0314

Excerpt Number: 11

Other Sections: NEW - 6.6 - Impact of the rule on the cost of liability insurance

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:

Please see response to comment number 0116, excerpt 1. Ownership rights to previous reports and whether or not previous all appropriate inquiries reports can legally be transferred between parties is beyond the scope of this rulemaking.

Commenter Organization Name: McKerr, Thomas

Comment Number: 0347

Excerpt Number: 7

Excerpt Text:

Use of AAIs conducted by third parties. The proposed approach seems very adequate.

Response:

EPA thanks the commenter for the stated support of the provisions.

Commenter Organization Name: Intertox

Comment Number: 0396

Excerpt Number: 4

Excerpt Text:

-The proposed requirements for using all appropriate inquiries conducted by third parties.

--Intertox supports the proposal to allow all appropriate inquires conducted by one party

to be transferred to another party, however, we believe that an all appropriate inquiry should be valid for one year only, thereafter; the environmental professional should be required to update all aspects of the inquiry, including historical resources review, government database and records review, and site visit.

Response:

The final rule requires that all information in a previously-conducted all appropriate inquiries report be updated if the report, or previous investigation, was completed more than a year prior to the date of acquisition of the property.

3.13.3 The Agency Should Clarify whether the Results of the Reports that Have Been Prepared in Accordance with ASTM E1527-2000 Can Be Included in Updated AAI Reports

Commenter Organization Name: Prevatte, Chad M

Comment Number: 0093

Excerpt Number: 4

Excerpt Text:

In §312.20.4(c)1 it states. "All appropriate inquiries can include the results of report(s) specified in § 312.21 (c), that have been prepared by or for other persons, provided that the reports meet the objectives and performance factors of this regulation, as specified in paragraphs (d) and (e) of this section. Can the results of reports that have been prepared in accordance only with ASTM E 1527-00 be included in updated AAI reports?"

Response:

The regulatory language in the proposed rule was a bit confusing. EPA made some clarifications to the final rule. The regulatory language in the final rule (at §312.20(c)(1)) allows for the use of information collected as part of prior all appropriate inquiries investigation for the same property provided that the prior information was collected "during the conduct of all appropriate inquiries in compliance with CERCLA Sections 101(35)(B), 101(40)(B) and 107(q)(A)(viii)." We have deleted the proposed language that would have required the previously conducted investigation to have been done in compliance with the final regulation (*i.e.*, 40 CFR 312). This allows for the use of information collected as part of previous all appropriate inquiries, as long as the information was collected in compliance with the statutory provisions for all appropriate inquiries. For property purchased on or after May 31, 1997, therefore, any information collected as part of an assessment in compliance with the ASTM E1527-97 standard or the ASTM E1527-2000 standard may be used as part of a current all appropriate inquiries investigation. For property purchased before May 31, 1997, information from assessments completed and in compliance with the statutory provisions at CERCLA Section 101(35)(B)(iv)(I) may be used as part of a current all appropriate inquiries investigation. However, this prior information may only be used if updated in accordance with §§ 312.20(b) and (c) of today's rule.

3.13.4 Shelf Life Should Be Extended beyond 180 Days/One Year

Commenter Organization Name: Zutz

Comment Number: 0104

Excerpt Number: 4

Excerpt Text:

The 180 day shelf life of a report is too short.

We believe the current industry standard of a 180 days shelf life (ASTM 1527-00) is also too short. Complicated real estate transactions can take extended periods of time, especially when there is an actual or perceived risk of environmental liability as would be the case with most brownfields sites. For example, it took about a decade to complete the real estate transaction for a brownfields site in my city. In that the activities that may have caused environmental liabilities are usually related to historic land use (not current land use), the most recent time period may not be as much of a concern as earlier periods.

We suggest a shelf life of at least one to two years.

Response:

Although commenters may be correct in their assertions that some property transactions may take more than a year to close, EPA continues to believe that it is important for the all appropriate inquiries investigation to be completed within one year prior to the date the purchaser acquires the property. We point out that the final regulation, as did the proposed regulation, allows for information from an older investigation to be used in a current investigation, however, if the all appropriate inquiries investigation was completed more than a year prior to the property acquisition date, all parts of the investigation must be reviewed and updated. We believe that a year is sufficient time for conditions at a property to change. In particular, in cases where there is a release or threatened release at a property, significant changes to the environmental conditions of a property could change during the course of a year. In addition, dependent upon the ongoing uses and ownership of a property during the course of a one-year time period, overall conditions at a property could change and new evidence of a release or threatened release could appear over that length of time. Therefore, the final rule requires that all appropriate inquiries completed for a particular property more than one year prior to the date of acquisition of that property, must be updated in their entirety. The final rule does allow for the use of information contained in previous inquiries, even when the inquiries were completed more than a year prior to the property acquisition date, as long as all information collected and all aspects of investigation be updated to include any changes that may have occurred during the interim.

Commenter Organization Name: Worlund, John

Comment Number: 0256

Excerpt Number: 4

Excerpt Text:

The rule does not allow using reports over a year old and require updates if over 6 months. Large commercial purchases of the type contemplated to include complicated Brownfield issues rarely are completed in six months. The draft rule would seem to impose a need for constant update as the transaction progresses. I am not sure that is necessary or productive so long as the same parties are involved in the transaction. I am recommending that you remove the strict one-year limitation and make provisions for updates as appropriate. The specified level of effort for the six-month update could easily be applied to any update six months or six years.

Response:

Please see response to comment number 0104, excerpt 4.

Commenter Organization Name: Kane Environmental

Comment Number: 0317

Excerpt Number: 6

Excerpt Text:

The Phase I ESA should be available for updating after one year if the Phase I was completed for the same property and the same client. For example, client A purchases a commercial property and 18 months later, client A wants to refinance the same property. It is sufficient that the Phase I be updated for such purposes

Response:

The commenter is correct. EPA points out that the final regulation, as did the proposed regulation, allows for information from an older investigation to be used in a current investigation, however, if the all appropriate inquiries investigation was completed more than a year prior to the property acquisition date, all parts of the investigation must be reviewed and updated. We believe that a year is sufficient time for conditions at a property to change. In particular, in cases where there is a release or threatened release at a property, significant changes to the environmental conditions of a property could change during the course of a year. In addition, dependent upon the ongoing uses and ownership of a property during the course of a one-year time period, overall conditions at a property could change and new evidence of a release or threatened release could appear over that length of time. Therefore, the final rule requires that all appropriate inquiries completed for a particular property more than one year prior to the date of acquisition of that property, must be updated in their entirety. The final rule does allow for the use of information contained in previous inquiries, even when the inquiries were completed more than a year prior to the property acquisition date, as long as all information collected and all aspects of investigation be updated to include any changes that may have occurred during the interim.

Commenter Organization Name: FAA

Comment Number: 0334

Excerpt Number: 15

Excerpt Text:

1) Please explain the difference between the 180 days and the one-year data expiration dates more clearly.

2) Although FAA believes that it may be appropriate to update some AAI information if it was collected more than 180 days prior to acquisition of the property, the requirement to update certain information may be excessively burdensome and costly in some instances. The information FAA believes the EP should not have to update if older than 180 days includes the following:

-Interviews with previous owners/operators: Information collected from previous owners or operators, or from historical sources, will not change over time and EPA should not require the EP to update this information. The only exception to this would be if any additional previous owners or operators were identified since the initial AAI information collection. FAA believes that the requirement to re-interview previous owners and operators and historical source information is excessive.

-Database searches: Some of the information may not be updated by the data source within 180 days. For example, some federal, tribal, state, and local government records (such as the National Priorities List (NPL)) are only updated semi-annually. Other databases are only updated annually. Therefore, FAA believes that the EP should only have to update these records if there is evidence that conditions at the property have changed within the 180 days.

-Site visits: FAA has many remote properties in Alaska and other sparsely populated areas where site visits are not possible at all times during the year. FAA property transfers often take longer than 180 days after an AAI report is finished to complete. In these remote and inaccessible areas, requiring a new site visit every 180 days is excessively burdensome. If an EP must spend a day or more traveling to and from a facility to conduct a new site visit, and that professional charges at least \$150 per hour, the additional cost would be roughly \$400, not \$41-\$47 as stated on page 52571 of the proposed rule.

Response:

The final rule retains the requirement that certain aspects of the all appropriate inquiries investigation be updated if the investigation was completed more than 180 days prior to the date of acquisition of the property (or the date on which the purchaser takes title to the property) to ensure that an all appropriate inquiries investigation accurately reflects the environmental conditions at a property. To increase the potential that information collected is accurate, as well as increase the potential that opinions and judgments regarding the environmental conditions at a property that are included in an all appropriate inquiries report are based on current and relevant information, the final rule requires that many of the components of the inquiries be updated within 180 days prior to the date of acquisition of the property. The components of the all appropriate inquiries that must be updated within 180 days prior to the date of acquisition of the property are:

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

Also, the final rule retains the proposed requirement that in all cases where a purchaser is using previously collected information, the all appropriate inquiries for the current purchase must include a summary of any changes to the conditions of the property that occurred since the previous inquiries were conducted.

In today's final rule, we continue to recognize that it is not sufficient to wholly adopt previously conducted all appropriate inquiries for the same property without any review. Certain aspects of the all appropriate inquiries investigation are specific to the current purchaser and the current purchase transaction. Therefore, the final rule requires that each all appropriate inquiries investigation include current information related to:

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

Commenter Organization Name: SCANA

Comment Number: 0373

Excerpt Number: 7

Excerpt Text:

The environmental professional and the purchaser are charged with meeting the performance objectives and performance factors of the proposed rule. The Agency is asked to recognize that environmental professionals (and the purchasers) are better positioned to make a judgment call on the use of previous AAI information on a case-by-case basis. The Agency should note that the environmental professional and the purchaser retain the liability of using data obtained in the performance of an inquiry.

It is suggested that the Agency consider that the environmental professional (and purchaser where appropriate) is best poised to determine the reliability and accuracy of past AAI information as it pertains to the AAI being performed. As proposed, the Agency could limit the environmental professional's use of existing information that could be, on a case-by-case basis, valid data. The professional judgment of the environmental professional should not be encumbered by a time limiting provision. Based on this, it is recommended that the Agency strike the 1 year/180 day limiting provisions as proposed. The Agency may find it beneficial to retain these limiting provisions and designate them as guidelines.

Response:

Please see response to comment number 0334, excerpt 15.

Commenter Organization Name: NPCA

Comment Number: 0403

Excerpt Number: 12

Excerpt Text:

The Proposed Rule mandates an extremely rigid schedule for validation of Phase I ESAs. AAIs will only be valid if the report has been updated within one year prior to the date of acquisition of the subject property. In addition, certain elements of the AAI must be updated within 180 days of acquisition. This is unreasonable and in some cases may be infeasible. As discussed above, the Proposed Rule makes several significant changes to the content of the information that must be gathered as part of the new AAI standards. Most of these changes require more extensive record searches and some may lead to sampling, testing and analyses. Even without these major new aspects, property purchases, particularly industrial property purchases, can take well over a year to finalize. Given the goal of the Act, to promote cleanup and redevelopment of brownfield sites, the Proposed Rule's timeframe is not adequate.

While it maybe important to update certain aspects of the AA1, such as relevant changes in the condition of the property and any new specialized knowledge of the EP or user, other aspects, particularly with abandoned and closed sites, are unnecessary. Repeating interviews of past owners, visual inspections of the property, and government records searches are a few examples, where updates would yield little to no additional AAIs information, but are required within 180 days of acquisition. Often, these activities occur early in Phase I ESAs, so it is almost certain that these activities would have to be done more than once before acquisition in order to comply with the standards as written. In addition, a potential purchaser will now be required to pay not only for the AAI report, but contract for the required updates as well. While yielding no environmental benefit, duplication of these activities will increase the time and cost of AAIs considerably. Thus, the prescribed schedule for completion and update should be increased dramatically or eliminated altogether.

Response:

Please see response to comment number 0334, excerpt 15.

The requirement to update certain aspects of the all appropriate inquiries if the inquiries were completed more than 180 days prior to the date of acquisition of the property is not a change from the current ASTM E1527-2000 standard, which requires such information to be updated after 180 days. Further, the Agency believes that updating reports for certain information is critical to understanding the current conditions of the property and protecting the environment and human health.

Commenter Organization Name: NPCA

Comment Number: 0403

Excerpt Number: 19

Excerpt Text:

Furthermore, NPCA requests that the schedule for completion and update of AAIs be eliminated, or substantially increased.

Response:

Please see response to comment number 0334, excerpt 15.

Commenter Organization Name: TXDOT

Comment Number: 0410

Excerpt Number: 1

Excerpt Text:

Regardless of acquisition method, either purchase or condemnation, as mentioned earlier, TxDOT follows the requirements outlined in NEPA to evaluate the impacts to the environment by the development and construction of a transportation facility. However, the time between the completion of the initial NEPA assessments and evaluation and the acquisition of the property can be considerable, and usually not within the one year and 180 days outlined within §312.20(b)(2) and (3) of the proposed rules. Additionally, the development of most transportation facilities, such as new roadways on new right of way or road widening and intersection developments involve the acquisition of property from multiple landowners. The process to acquire property itself can take considerable time, considering the time spent to appraise, negotiate and close on each parcel, this does not count the extra time required for an eminent domain acquisition. Although, TxDOT makes every effort to complete "All Appropriate Inquiry," by performing a Phase I Environmental Site Assessment, through the use of standards such as ASTM E1527-97 and E1527-00 and through compliance with the National Environmental Policy Act (NEPA), some aspects of the inquiry cannot be completed by the time of acquisition, since the landowner in possession of the property may refuse access or information concerning the property even when acquisition is not conducted through the exercise of eminent domain.

With this in mind, TxDOT recommends that DOTs as well as other government entities be exempted from the requirement to have the components of the inquiry updated within 180 days prior to the purchase. On any number of TxDOT projects, this would require the continuous use of one or several environmental professionals through the one to three or more years required to acquire the necessary right of way.

Therefore, TxDOT recommends the following change in §312.20

§312.20 All Appropriate Inquiries

(a) "All appropriate inquiries" pursuant to CERCLA §101(35)(B) must include:

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

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

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

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

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

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

(3) notwithstanding §312.20(b)(2) above, the following components of the inquiries were conducted or updated within a 180 days of and prior to the date of purchase of the subject property.

(4) such updates to information required under §312.20(b)(2)&(3) above are not required should the inquiry be conducted by or on behalf of a government entity acquiring multiple properties for a project to construct a transportation facility, should the inquiry be completed and updated as part of the National Environmental Policy Act (NEPA) process.

Response:

EPA disagrees with the commenter. The statute provides no basis for treating government purchasers of property differently from other prospective landowners or grantees. Please see responses to comment numbers 0242 (excerpts 4 and 5) and 0104 (excerpt 4).

Commenter Organization Name: Dismukes, James

Comment Number: 0416

Excerpt Number: 3

Excerpt Text:

The rule does not allow for the use of prior reports, or portions thereof, that are older than one year. Updated reports are common in the commercial real estate market and generally cost approximately one half of the cost of a Phase I ESA. The historical information such as aerial photographs, fire insurance rate maps, historical topographic maps, street directories, chain of title ownership, etc. do not have to be repurchased, but simply updated. The EPA rule, as currently proposed, appears to require repurchase of

these documents, which do not change from year to year.

Response:

The regulatory language in the proposed rule was a bit confusing. EPA made some clarifications to the final rule. The regulatory language in the final rule (at §312.20(c)(1)) allows for the use of information collected as part of prior all appropriate inquiries investigation for the same property provided that the prior information was collected “during the conduct of all appropriate inquiries in compliance with CERCLA Sections 101(35)(B), 101(40)(B) and 107(q)(A)(viii).” We have deleted the proposed language that would have required the previously conducted investigation to have been done in compliance with the final regulation (*i.e.*, 40 CFR 312). This allows for the use of information collected as part of previous all appropriate inquiries, as long as the information was collected in compliance with the statutory provisions for all appropriate inquiries. For property purchased on or after May 31, 1997, therefore, any information collected as part of an assessment in compliance with the ASTM E1527-97 standard or the ASTM E1527-2000 standard may be used as part of a current all appropriate inquiries investigation. For property purchased before May 31, 1997, information from assessments completed and in compliance with the statutory provisions at CERCLA Section 101(35)(B)(iv)(I) may be used as part of a current all appropriate inquiries investigation. However, this prior information may only be used if updated in accordance with §§ 312.20(b) and (c) of today’s rule.

Commenter Organization Name: Tryon, Bill

Comment Number: 0418

Excerpt Number: 6

Other Sections: NEW - 4.1 - The impact of the rule is underestimated

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:

The regulatory language in the proposed rule was a bit confusing. EPA made some clarifications to the final rule. The regulatory language in the final rule (at §312.20(c)(1)) allows for the use of information collected as part of prior all appropriate inquiries investigation for the same property provided that the prior information was collected “during the conduct of all appropriate inquiries in compliance with CERCLA Sections 101(35)(B), 101(40)(B) and 107(q)(A)(viii).” We have deleted the proposed language that would have required the previously conducted investigation to have been done in compliance with the final regulation (*i.e.*, 40 CFR 312). This allows for the use of

information collected as part of previous all appropriate inquiries, as long as the information was collected in compliance with the statutory provisions for all appropriate inquiries. For property purchased on or after May 31, 1997, therefore, any information collected as part of an assessment in compliance with the ASTM E1527-97 standard or the ASTM E1527-2000 standard may be used as part of a current all appropriate inquiries investigation. For property purchased before May 31, 1997, information from assessments completed and in compliance with the statutory provisions at CERCLA Section 101(35)(B)(iv)(I) may be used as part of a current all appropriate inquiries investigation. However, this prior information may only be used if updated in accordance with §§ 312.20(b) and (c) of today's rule.

The final rule retains the requirement that certain aspects of the all appropriate inquiries investigation be updated if the investigation was completed more than 180 days prior to the date of acquisition of the property (or the date on which the purchaser takes title to the property) to ensure that an all appropriate inquiries investigation accurately reflects the environmental conditions at a property. To increase the potential that information collected is accurate, as well as increase the potential that opinions and judgments regarding the environmental conditions at a property that are included in an all appropriate inquiries report are based on current and relevant information, the final rule requires that many of the components of the inquiries be updated within 180 days prior to the date of acquisition of the property. The components of the all appropriate inquiries that must be updated within 180 days prior to the date of acquisition of the property are:

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

Also, the final rule retains the proposed requirement that in all cases where a purchaser is using previously collected information, the all appropriate inquiries for the current purchase must include a summary of any changes to the conditions of the property that occurred since the previous inquiries were conducted.

In today's final rule, we continue to recognize that it is not sufficient to wholly adopt previously conducted all appropriate inquiries for the same property without any review. Certain aspects of the all appropriate inquiries investigation are specific to the current purchaser and the current purchase transaction. Therefore, the final rule requires that each all appropriate inquiries investigation include current information related to:

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

Commenter Organization Name: Georgia Power

Comment Number: 0423

Excerpt Number: 4

Excerpt Text:

§312.20 All Appropriate Inquires, (b)(3)(i)

In §312.20 All Appropriate Inquires, (b)(3)(i) should be changed to read:

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

Rationale:

-It should not be required that past owners be re-interviewed for the purposes of updating the assessment within 180 days of the purchase of the subject property because past owners generally would not be expected to have new information or knowledge of the property from the original interview to within 180 days of the purchase of the property (provided the past owner was initially interviewed as a past owner).

Response:

The interviews portion of the all appropriate inquiries investigation is one aspect of the investigation that must be updated if the previously-conducted all appropriate inquiries was completed more than 180 days prior to the date of acquisition of the property. Exactly which interviews must be updated, beyond the current owner(s) and occupants, is best left to the professional judgment of the environmental professional. EPA agrees with the commenter, in that the views of previous owners may not change over the 180 day time period. However, the environmental professional may want to ask additional questions of previous owners and occupants or verify new information with such persons when updating a previously-conducted investigation.

Commenter Organization Name: Alizadeh, Ed

Comment Number: PM-0127-0001

Excerpt Number: 2

Other Sections: NEW - 1.1.1.1 - Adopt the rule as proposed

Excerpt Text:

Lastly, I think the rule -- By extending the time period that the inquiries were good from six months to a year will result in being a benefit for developers. Frequently developers from start to finish take much longer than six months before the deal is finalized, and by extending that to a year, will provide a benefit to developers who are trying to redevelop brownfield properties. In summary, the rule makes redeveloping brownfields sites more attractive to potential developers. It sets minimum criteria for environmental professionals, which enhances the public confidence, and although through the AAI studies, the fees will potentially increase due to the added research requirements, it will enhance the confidence and will be protective of human health and the environment.

Response:

EPA thanks the commenter for the stated support of the provision.

Commenter Organization Name: Dismukes, James

Comment Number: PM-0127-0012

Excerpt Number: 2

Excerpt Text:

The second issue is that on the usage of an environmental report dated greater than one year, the history of a property does not change. The photographs do not change, the ownership of record does not change, and the rate maps do not change. I do not see any avenue of which we can actually take these out of a prior report without having to go back and re-get the information, if you will, the way the current standard is proposed.

Response:

The final rule retains the requirement that certain aspects of the all appropriate inquiries investigation be updated if the investigation was completed more than 180 days prior to the date of acquisition of the property (or the date on which the purchaser takes title to the property) to ensure that an all appropriate inquiries investigation accurately reflects the environmental conditions at a property. To increase the potential that information collected is accurate, as well as increase the potential that opinions and judgments regarding the environmental conditions at a property that are included in an all appropriate inquiries report are based on current and relevant information, the final rule requires that many of the components of the inquiries be updated within 180 days prior to the date of acquisition of the property. The components of the all appropriate inquiries that must be updated within 180 days prior to the date of acquisition of the property are:

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

Also, the final rule retains the proposed requirement that in all cases where a purchaser is using previously collected information, the all appropriate inquiries for the current purchase must include a summary of any changes to the conditions of the property that occurred since the previous inquiries were conducted.

In today's final rule, we continue to recognize that it is not sufficient to wholly adopt previously conducted all appropriate inquiries for the same property without any review. Certain aspects of the all appropriate inquiries investigation are specific to the current purchaser and the current purchase transaction. Therefore, the final rule requires that each all appropriate inquiries investigation include current information related to:

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

3.14 The AAI Report Must Be Signed by an EP

Commenter Organization Name: NSPE

Comment Number: 0230

Excerpt Number: 6

Excerpt Text:

We are in agreement with the signature and attestation language requirements provided in the rule.

Response:

EPA thanks the commenter for the stated support of the provision.

Commenter Organization Name: NSPE

Comment Number: 0230

Excerpt Number: 7

Excerpt Text:

NSPE believes that the environmental professional should be required to provide a signature as well as the two statements provided as part of the proposed rule. However, the importance of the signature, in and of itself, is not inherently obvious and does not afford the owner or the public with any increased protection. It is NSPE's point of view that these protections must be provided at the outset of the project?when the owner is looking for a qualified environmental professional. In order to provide these protections and information, it is NSPE's opinion that this post-project signature requirement should be coupled with an objective pre-project licensure requirement, similar to that required for the professional engineer or professional geologist. By using the already existing licensure infrastructure and rules, as established by the individual states, the public would be provided with an objective and searchable database, which they could use to verify the qualifications of the environmental professional and to track the environmental professionals location/employer should questions arise. These two previously mentioned professions, engineering and geology, provide objective and rational bases for identifying those individuals who possess the requisite minimum knowledge and experience (i.e., qualifications) needed to perform certain activities. These bases can also serve the public as a resource from which the public can obtain available information related to the environmental professional. Although NSPE focuses on the protection of the professional engineer's license, we also acknowledge that we share specific market niches with other qualified professions. Our concern with the signature is that it, in and of itself, will not provide the public with the objective professional protections that can be provided if a different and more controlled approach were to be employed.

Response:

The final rule provides a definition of environmental professional that sets minimum qualifications for the person who supervises the all appropriate inquiries investigation and signs the final report. EPA believes that individuals who meet the minimum qualifications included in the definition have sufficient education and experience to

conduct and oversee the activities necessary to complete the investigation and render the opinions necessary regarding environmental conditions and the potential need for further investigation. Prospective landowners and grantees are always free to hire professionals with stronger qualifications than the minimum qualifications provided in the definition of environmental professional.

Commenter Organization Name: Intertox

Comment Number: 0396

Excerpt Number: 1

Excerpt Text:

-The proposed requirements for an all appropriate inquiries report, including the signature requirements for the all appropriate inquiries report.

--Intertox supports the proposed requirements for an all appropriate inquiry report. The report is the culmination of the review of historical sources of information, review of government records, and site inspection. Therefore, documentation of approach, results, and identification of environmental liabilities is essential to the purchaser.

Response:

EPA thanks the commenter for the stated support of the provisions.

Commenter Organization Name: Rybak, John Thomas

Comment Number: 0412

Excerpt Number: 2

Excerpt Text:

)Requirements for an AAI Report including EP Signature

a)Page # 5278

b)View: I support the EP Signature. The EP signature signifies that the report is complete, not in draft form. Draft Reports are not considered acceptable. Furthermore it provides assurance and/or certification the EP has completed the AAI process.

c)Assumptions: Reports without signature are in draft form

d)Burden: None.

Response:

EPA thanks the commenter for the stated support of the provisions.

Commenter Organization Name: Rybak, John Thomas

Comment Number: 0412

Excerpt Number: 18

Excerpt Text:

Results of Inquiry by an Environmental Professional.

a)Page 52578

b) View: All of the requirements below taken directly from the proposed AAI standard are supported. It clearly defines that the Professional completing the Phase I must meet the definition AAI EP, certification that the Phase I report itself meets the performance standards of the AAI Phase I, provides a professional opinion and identifies relevant data gaps. There are tremendous increases in quality over the current standard, which many professionals argue is not intended require a written opinion. When reviewing a Phase I report we are searching for sound and thorough investigation followed by the Professional's judgment whether or not additional investigation should be conducted.

The proposed AAI standard would require the EP document in a written Phase I report: (1) Professional Opinion; (2) identification of data gaps and their significance; (3) qualifications of the EP.

Furthermore the proposed standard requires the written report include the following language and signature of the EP:

[I, we] declare that, to the best of [my, our] professional knowledge and belief, [I, we] meet the definition of Environmental Professional as defined in§312.10 of this part.

[I, we] have the specific qualifications based on education, training, and experience to assess a property of the nature, history and setting of the subject property. [I, we] have developed and performed the all appropriate inquiries in conformance with the standards and practices set forth in 40 CFR part 312.

The above two mandatory statements are to be followed by an EP signature.

c) Assumptions: n/a

d) Burden: This should not place an unreasonable burden on an AAI EP. The certification that AAI has been accomplished, content of the written report, including the EP's professional judgment are critical to the AAI process, preserving the CERCLA defenses, and evaluating the real estate from a Lender's perspective.

Response:

EPA thanks the commenter for the stated support of the provisions.

3.14.1 The Agency Should Clarify whether the Seal of the Licensed Professional Engineers and Professional Geologists Will Be Required on the AAI Report

Commenter Organization Name: Goodman, J. Dwight

Comment Number: 0097

Excerpt Number: 10

Excerpt Text:

It is understood that a new AAI "statement of qualifications" within the ESA is necessary, and that the EP and/or preparer will need to sign the ESA. However, will the "seal" of the licensed PE or PG or other registered professional be required on the document?

Response:

The final rule does not require that a P.E. or a P.G. apply his or her seal to an all appropriate inquiries report.

3.14.2 Review of Information Ordered Closed by Courts

Commenter Organization Name: Roeser, Daniel

Comment Number: 0249

Excerpt Number: 6

Excerpt Text:

Results of inquiry by an environmental professional.

Since the validity of the AAI as defined in the proposed rules is so highly dependent on performance of the inquiry by, or under the supervision of, an EP, I recommend that the proposed rules be modified to require inclusion of documentation of the EP's credentials in the AAI report.

Response:

The final rule only requires that the environmental professional acknowledge that he or she meets the requirements to qualify as an environmental professional and “to declare that: [I/We] have developed and performed the all appropriate inquiries in conformance with the standards and practices set forth in 40 CFR Part 312.” When hiring an environmental professional, a prospective landowner or grantee may always ask an environmental professional to provide copies of his or her credentials or otherwise prove that he or she meets the minimum qualifications provided in the definition of environmental professional.

Commenter Organization Name: Andrews, Douglas

Comment Number: 0399

Excerpt Number: 5

Excerpt Text:

3. 312.21 Results of inquiry by an environmental professional.

Since the validity of the AAI as defined in the proposed rules is so highly dependent on performance of the inquiry by, or under the supervision of, an EP, I recommend that the proposed rules be modified to require inclusion of documentation of the EP's credentials in the AAI report.

Response:

The final rule only requires that the environmental professional acknowledge that he or she meets the requirements to qualify as an environmental professional and “to declare that: [I/We] have developed and performed the all appropriate inquiries in conformance with the standards and practices set forth in 40 CFR Part 312.” When hiring an environmental professional, a prospective landowner or grantee may always ask an environmental professional to provide copies of his or her credentials or otherwise prove that he or she meets the minimum qualifications provided in the definition of environmental professional.

Commenter Organization Name: Hoskins, Herbert

Comment Number: 0428

Excerpt Number: 4

Excerpt Text:

Since the validity of the AAI as defined in the proposed rules is so highly dependent on performance of the inquiry by, or under the supervision of, an EP, I recommend that the proposed rules be modified to require inclusion of documentation of the EP's credentials in the AAI report.

Response:

The final rule only requires that the environmental professional acknowledge that he or she meets the requirements to qualify as an environmental professional and “to declare that: [I/We] have developed and performed the all appropriate inquiries in conformance with the standards and practices set forth in 40 CFR Part 312.” When hiring an environmental professional, a prospective landowner or grantee may always ask an environmental professional to provide copies of his or her credentials or otherwise prove that he or she meets the minimum qualifications provided in the definition of environmental professional.

3.14.3 The Signature Requirement Should Be Modified

Commenter Organization Name: Rose and Westra

Comment Number: 0320

Excerpt Number: 9

Other Sections: NEW - 3.16 - Division of responsibilities (tasks performed by EP vs. landowner/purchaser)

Excerpt Text:

The Proposed Rules allow the landowner or prospective purchaser to perform certain activities. The Proposed Rules do not state how this information is to be incorporated into the AAI process. Is it to be provided to the EP to include in his/her report? If so, this could make the EP responsible for the accuracy of this information. While R&W supports disclosure from a prospective purchaser/landowner to the EP and including this information in a single document, R&W requests modifying the signature requirements to explicitly state that the EP cannot comment on the accuracy and is not qualified to assess of the significance of information provided by a prospective purchaser/landowner.

Response:

The final rule only requires that the environmental professional acknowledge that he or she meets the requirements to qualify as an environmental professional and “to declare that: [I/We] have developed and performed the all appropriate inquiries in conformance with the standards and practices set forth in 40 CFR Part 312.” This statement would apply only to the statement and information contained in the report. The environmental professional is not required to certify the results. In addition, the environmental professional may always identify as data gaps any information not received from the prospective landowner or grantee that may affect the environmental professional’s ability to render an opinion regarding the presence of conditions indicative of releases or threatened releases of hazardous substances.

Commenter Organization Name: Dismukes, James

Comment Number: 0416

Excerpt Number: 7

Excerpt Text:

The declaration requires the language 'I have developed and performed the all appropriate inquires in conformance with the standards and practices set forth in 40 CFR part 312' to be signed off on by the EP although four areas of 312 requires actions by other parties and not the EP. These are detailed in 312.22 and summarized here as lien search, specialized knowledge or experience, relationship of purchase price to market, and commonly known information about the property. The EP is not responsible for this information and cannot declare that all appropriate inquires was performed if this information is not provided.

Response:

The final rule only requires that the environmental professional acknowledge that he or

she meets the requirements to qualify as an environmental professional and “to declare that: [I/We] have developed and performed the all appropriate inquiries in conformance with the standards and practices set forth in 40 CFR Part 312.” This statement would apply only to the statement and information contained in the report. The environmental professional is not required to certify the results. In addition, the environmental professional may always identify as data gaps any information not received from the prospective landowner or grantee that may affect the environmental professional’s ability to render an opinion regarding the presence of conditions indicative of releases or threatened releases of hazardous substances.

Commenter Organization Name: Tramm, Kenneth

Comment Number: 0425

Excerpt Number: 2

Excerpt Text:

40 CFR part 312.21(d) requires the environmental professional to make a statement in the written report that “[I, We] have the specific qualifications based on education, training, and experience to assess a property of the nature, history, and setting of the subject property.” This statement implies that in order for an environmental professional to assess a property, they must have specific experience of a property with similar nature, history and setting. For example, if an assessment were conducted at a property located on the Austin Chalk and two weeks into the project, it is determined that a nickel plating facility was formerly located on the property, the environmental professional must evaluate if they had prior experience assessing a nickel plating facility on the Austin Chalk. Given that it is not normal practice for environmental Professionals to keep detailed records of every assessment they have been involved in, the literal interpretation of the proposed declaration is extremely onerous.

Furthermore, the declaration imposes requirements on the environmental professional that are not stated elsewhere in the regulation. We recommend that the declaration language mirror the requirements of an environmental professional as stated in 321.10(b)(1). As such, we recommend the declaration be modified to the following. “[I, We] have the specific education, training, and experience necessary to exercise professional judgment to develop opinions and conclusions regarding the presence of releases or threatened releases (per § 312.1(c)) to the surface or subsurface of the subject property.” Alternatively, the EPA should clarify what specific qualifications would be necessary for an environmental professional to conduct an assessment and make a declaration.

Response:

The final rule only requires that the environmental professional acknowledge that he or she meets the requirements to qualify as an environmental professional and “to declare that: [I/We] have developed and performed the all appropriate inquiries in conformance with the standards and practices set forth in 40 CFR Part 312.” This statement would apply only to the statement and information contained in the report. The environmental professional is not required to certify the results. In addition, the environmental

professional may always identify as data gaps any information not received from the prospective landowner or grantee that may affect the environmental professional's ability to render an opinion regarding the presence of conditions indicative of releases or threatened releases of hazardous substances.

The individual carrying out the all appropriate inquiry must acknowledge that he or she meets the requirements of an environmental professional. That is the intent of the signature requirement.

Commenter Organization Name: Westward Environmental

Comment Number: 0429

Excerpt Number: 1

Excerpt Text:

Regarding the heading of What Are the Proposed Requirements for Reviews of Historical Sources of Information? on page 52561 of the proposed rule:

-it states "The proposed rule would not require that any specific type of historical information be collected..." as "...any list of specific documents could result in undue burdens...".

-We agree that a rigid listing of specific sources can be a problem for some areas/property types.

-However, this reluctance to recommend specific sources gives us concern as it relates to the following statements - "[I, We] have the specific qualifications based on education, training, and experience to assess a property of the nature, history, and setting of the subject property. [I, We] have developed and performed the all appropriate inquiries in conformance with the standards and practices set forth in 40 CFR Part 312." The preceding statements are too open to challenge as they are written.

-We would suggest that the same "qualifier" for declaring conformance with the definition of Environmental Professional be included in the preceding statements as follows - "[I, We], to the best of [my, our] professional knowledge and belief, have the specific qualifications based on education, training, and experience to assess a property of the nature, history, and setting of the subject property. [I, We], to the best of [my, our] professional knowledge and belief, have developed and performed the all appropriate inquiries in conformance with the standards and practices set forth in 40 CFR Part 312."

Response:

EPA believes the current wording for the signature statement is appropriate. The final rule only requires that the environmental professional acknowledge that he or she meets the requirements to qualify as an environmental professional and "to declare that: [I/We] have developed and performed the all appropriate inquiries in conformance with the standards and practices set forth in 40 CFR Part 312." This statement would apply only to the statement and information contained in the report. The environmental professional

is not required to certify the results. In addition, the environmental professional may always identify as data gaps any information not received from the prospective landowner or grantee that may affect the environmental professional's ability to render an opinion regarding the presence of conditions indicative of releases or threatened releases of hazardous substances.

3.15 Suggestions for Including Additional Requirements or Revising the Proposed Requirements

Commenter Organization Name: Intertox

Comment Number: 0396

Excerpt Number: 21

Excerpt Text:

-The identification of voluntary consensus standards that are applicable to and compliant with today's proposed standards and practices for all appropriate inquiries.

--Voluntary consensus standards that may be applicable and compliant to the proposed rule are listed below. We offer these as evidence that all appropriate inquiry standards have been debated and formalized by several organizations since the late 1980s. We suggest that the U.S. EPA and its negotiated rule making committee review these in-depth and adapt those elements that would create an all appropriate inquiry rule that is specific, measurable, actionable, and realistic.

-ASFE. 1995. Phase I and Phase II Environmental Site Assessments: Recommended Management Procedures for Consultants and Clients, 2nd edition. Silver Spring, MD.

-ASFE. 1989. Preacquisition Site Assessments: Recommended Management Procedures for Consulting Engineering Firms. Silver Spring.

-American Society of Civil Engineers. 1996. Environmental Site Investigation Guidance Manual (ASCE Manuals & Reports on Engineering Practice No. 83). New York.

-Association of Ground Water Scientists & Engineers. 1992. Guidance to Environmental Site Assessments. Dublin, OH.

-California Department of Toxic Substances Control. 2001. Phase I Environmental Site Assessment Advisory: School Property Evaluations. Sacramento.

-Canadian Standard Association. 2001. Phase I Environmental Site Assessments (Z768). Ontario.

-Colangelo R.V. and Miller R.D. 1995. Environmental Site Assessments and Their Impact on Property Value: The Appraiser's Role. Chicago: The Appraisal Institute.

-Colten C.E. and Mulville-Friel D. 1990. Guidelines and Methods for Conducting Property Transfer Site Histories (HWRIC-RR-049). Champaign: Illinois State Museum-Hazardous Waste Research & Information Center.

-Consulting Engineers Council of Metropolitan Washington. 1992. Environmental Site Assessments: Guidance for Users and Providers-The Mid-Atlantic Standard of Care. Washington, D.C.

-Environmental Assessment Association. 1992. Basic Guide for Environmental Inspection. Scottsdale, AZ.

-Environmental Assessment Association. 1992. Environmental Site Assessments Regulations & Guidelines. Scottsdale, AZ.

-Federal Aviation Administration. 2003. Environmental Site Assessment (AIP Guide No. 1310).

-Hejzlar Z. 1999. Technical Aspects of Phase I/II Environmental Site Assessments. West

Conshohocken, PA: ASTM.

-International Standards Organization. 2002. Environmental Assessment of Sites and Organizations (ISO-14015). New York.

-National Park Service. 1999. Level 1 Pre-Acquisition Environmental Site Assessment Guidance Manual. Washington, D.C.

-New York State. 2004. Environmental Real Estate Assessment Guide. Governor's Office of Regulatory Reform.

-Ohio EPA. 2002. Phase I Property Assessment for the Voluntary Action Program.

-South/Southwest Hazardous Substance Research Center. 2001. Conducting Environmental Site Assessments for Brownfield Properties. Atlanta: Georgia Tech Research Institute.

Response:

EPA thanks the commenter for this list of standards that may be applicable to the conduct of all appropriate inquiries. EPA did not receive requests to review potentially applicable standards from any other standards development organization other than ASTM International. ASTM International updated its E1527 environmental site assessment standard to be consistent with the all appropriate inquiries provisions of CERCLA, as amended. EPA is referencing the updated, E1527-05 standard as compliant with the final rule. In the future, if other standards development organizations request that EPA review their standards for consistency with the final rule, the Agency will do so.

Commenter Organization Name: Tryon, Bill

Comment Number: 0418

Excerpt Number: 3

Excerpt Text:

One-size-fits-all - The completion all appropriate inquiry is required in order to qualify for many defenses to CERCLA liability. In defining AAI, however, EPA has established a one-size-fits-all approach. That the same level of inquiry should be required in order to qualify for defenses as an innocent landowner, adjacent property owner, or one subject to institutional controls seems illogical. Study of the legislation does not reveal a rationale for this uniform requirement.

Institutional Controls -As written, the legislation does not require specific actions to qualify for this exemption. Logically, one should be exempt from liability simply by virtue of abiding by institutional controls. This can occur by design, after careful study or by accident, simply as a result of failure to take actions which violate institutional controls. In order to proactively avoid violation of institutional controls, a more active investigation would be required, however the scope of such an investigation could be significantly less than the scope of work as currently defined.

Adjacent Properties - As a result of the legislation and one-size-fits-all rule, the requirements for defense as an innocent overliar have become more stringent. In the past, no due diligence was required. Under the proposed rule, however, innocent parties who have not performed due diligence will have theoretical liability for groundwater

contamination over which they have no control.

Response:

In the Brownfields Amendments to CERCLA all of the references to the all appropriate inquiries provisions are the same without qualification regarding the type of liability protection or type of property. EPA sees no reason to vary the standards based upon the type of liability protection (e.g., bona fide prospective purchaser, contiguous property owner, innocent landowner).

The statute requires that property owners comply with all land use restrictions and not impede the integrity of institutional controls. As part of the final rule for all appropriate inquiries, prospective landowners and grantees must search for institutional controls in place or applicable to the subject property.

The commenter is correct in asserting that Congress did establish that landowners asserting the contiguous property owner liability protection must have conducted all appropriate inquiries prior to acquiring the property. This is a change over the EPA's previous "Contaminated Aquifer Policy."

Commenter Organization Name: Wohlers Environ Svcs

Comment Number: 0435

Excerpt Number: 1

Excerpt Text:

Does the EPA intend to specify which tasks of the All Appropriate Inquiries (AAI) investigation should be performed by a designated Environmental Professional (EP), and which tasks can be performed by a non-EP under supervision of an EP? If not, can firms conducting AAI investigations make this determination?

Response:

It is left to the discretion of the environmental professional overseeing the conduct of the all appropriate inquiries as to who performs each aspect of the inquiries. An individual meeting the definition of environmental professional must review and sign the written report. EPA also *recommends* that a person meeting the definition of environmental professional conduct the on-site visual inspection of the property.

3.15.1 Information Considered by the EP in Reaching an Opinion Regarding the Environmental Condition(s) of the Subject Property Should Be Included in the AAI Report as an Appendix

Commenter Organization Name: Katz, William B

Comment Number: 0049

Excerpt Number: 1

Excerpt Text:

It seems to me that one thing is missing, unless I missed it. That is a requirement that a report must have an appendix containing all the data of whatever kind that has been considered in leading to the opinion of the environmental professional as set forth in the main body of the report. I have reviewed too many reports that do not include all the data, merely the conclusions of the person writing the report. That makes it impossible to consider the information leading to those conclusions and decide if it is correct, complete, or questionable.

Response:

The type of background information and documentation to include with the written report of the all appropriate inquiries investigation is left to the discretion of the environmental professional.

3.15.2 The AAI Report Should Be Submitted to the Agency or the Appropriate State Agency

Commenter Organization Name: Rynders, Dustin, et al

Comment Number: 0076

Excerpt Number: 2

Excerpt Text:

The agency's proposed rule does not require that a written report be submitted to EPA or another government agency or that a written report be maintained on the subject property for any length of time. §312.22(c). This seems insufficient in our analysis. We propose the following language be added:

Recording requirement

(a)An entity wishing to assert this defense shall submit a sealed copy to either the Agency or the appropriate state environmental agency to ensure the reliability of the documents.

(b)The copy on file would be unsealed only in the event that an enforcement action concerning the same property was pursued by the Administrator or Agency, and the defendant asserted the "all necessary inquiries" defense.

(c)Until these two conditions are met, the sealed report will be considered as entirely privileged material, with the privilege belonging to the persons who originally filed the sealed copy with the Agency or state environmental agency.

Response:

The final rule does not include any new reporting or disclosure obligations and there is not requirement to submit final reports of all appropriate inquiries investigations to EPA or any other government entity. The rule only applies to those property owners who may seek the landowner liability protections provided under CERCLA for innocent landowners, contiguous property owners or bona fide prospective purchasers. The documentation requirements included in this rule are primarily intended to enhance the inquiries by requiring the environmental professional to record the results of the inquiries and his or her conclusions regarding conditions indicative of releases and threatened releases on, at, in, or to the property and to provide a record of the environmental professional's inquiry.

Although today's rule does not include any new disclosure requirements, CERCLA Section 103 does require persons in charge of vessels and facilities, including on-shore and off-shore facilities, to notify the National Response Center of any release of a hazardous substance from the vessel or facility in a quantity equal to or greater than a "reportable quantity," as defined in CERCLA Section 102(b). Today's rule includes no changes to this reporting requirement nor any changes to any other reporting or disclosure requirements under federal, tribal, or state law.

3.15.3 Require EPs to Incorporate Existing Tribal Standards and Regulations into the AAI Process

Commenter Organization Name: Leech Lake Ojibwe

Comment Number: 0125

Excerpt Number: 1

Excerpt Text:

Comment #1: Require Environmental Professionals to Incorporate Existing Tribal Certification Standards into the AAI Process.

In an effort to protect the health of the Reservation Population and the quality of the Reservation Environment, the Leech Lake Band adopted Tribal environmental laws and, in 2003, formally established a Brownfields Response Program. This program is part of an ongoing multi-year effort to assert the Band's inherent sovereignty and civil regulatory authority, expand the Band's environmental enforcement capabilities, and develop a dynamic and responsive approach to the cleanup of contaminated properties.

A key element of this program is the Band's Hazardous Substances Control Act ("HSCA"). The main purpose of this Tribal Hazardous Waste Ordinance is two-fold: (1) to provide for the cleanup of sites on the Reservation containing hazardous substances; and (2) to prevent the creation of future hazards due to the improper disposal of hazardous substances on or into the Reservation's air, land, surface water or groundwater. The HSCA imposes an obligation on all persons residing on or conducting business within the exterior boundaries of the Reservation to comply with the terms of the Act.

Critical to the successful implementation of the HSCA is the Band's enforcement of its Tribal clean-up standards, which were designed to be protective of the Reservation Population and the Reservation Environment. These certification standards apply to all lands located within the Reservation's exterior boundaries and supplement the federally mandated requirements of the proposed rule as well as other relevant federal regulations.

EPA's proposed rule, however, makes no mention of the need for environmental professionals ("EPs") to either recognize or consider the existence of applicable Tribal regulatory requirements when undertaking AAI analyses. This absence of regulatory language is surprising in light of EPA's Indian Policy. Based on the requirements of federal law and policy, therefore, EPs who investigate properties on Reservation lands must afford the Band's enforcement standards the same deference and respect as they would to the federal government and its applicable standards.

To ensure that an EP fully complies with the requirements of EPA's proposed rule while simultaneously fulfilling obligations imposed by the Band's Brownfields Response Program and its HSCA, the Band makes the following recommendations:

(1)EPs must meet informally with Tribal environmental regulatory officials before commencing AAI investigations on properties located within a Reservation's exterior

boundaries

(2) EPs must become familiar with applicable Tribal laws, ordinances, practices, and procedures related to the actual or potential presence of hazardous substances within the Reservation Environment; and

(3) EPs must structure their AAI analyses and investigations so as to incorporate applicable Tribal standards into the overall AAI process.

Furthermore, the Band believes that an EP's failure to integrate Tribal standards into the AAI analysis would result in an invalid certification. Accordingly, the Band suggests strongly that EPA include within its final rule a statement to the effect that any failure by an EP to incorporate Tribal standards into the larger AAI process will be deemed a failure by the EP to conduct AAI in conformance with the standards and practices set forth in EPA's rule. Only by including such language into the final rule will Tribes, including the Leech Lake Band, be able to continue their effective implementation of Tribal laws, ordinances, and related Brownsfield Response Programs.

Response:

The commenter's request is beyond the scope of today's rule. Parties conducting business within the jurisdiction of a state or tribal government always are required to comply with all applicable state and tribal regulations. EPA cannot modify a federal regulation to include all applicable provisions of all states and all tribes.

3.15.4 The EP's Report Should Only Include Data Necessary for the Judgment of the EP

Commenter Organization Name: Koch, Donald

Comment Number: 0234

Excerpt Number: 6

Excerpt Text:

The regulations misconstrue the meaning of CERCLA (101)(35)(B) in that the report of the environmental professional was meant to be just one component of the all appropriate inquiries rule, not the entire rule. The environmental professional's report should only include the data necessary for the judgement of the environmental professional.

Response:

The provisions governing the requirements for the all appropriate inquiries written report are included in 40 CFR 312.21(c) and represent only one aspect of the final rule. These requirements include documentation of the environmental professional's findings, his or her opinion regarding conditions indicative of releases or threatened releases of hazardous substances, the identification of data gaps and comment on their significance, and the signature requirements.

3.15.5 The Agency Should Specify a Required Format/Outline for the AAI Report

Commenter Organization Name: Rose and Westra

Comment Number: 0320

Excerpt Number: 6

Excerpt Text:

The Proposed Rules do not include a suggested outline or format for the AAI report. R&W strongly suggests that a standard outline be required (as in the E-1527-00). This will facilitate review and use of AAI reports by the marketplace. The lack of a standard reporting format poses significant inconsistencies in the marketplace, similar to the situation prior to the 1993 implementation of E-1527-93.

Response:

The purpose of the written report is to ensure that any person claiming one of the CERCLA landowner liability protections be able to show documentation that all appropriate inquiries were conducted in compliance with the federal regulations, should such documentation be required.¹ The Agency notes that while today's final regulation does not require parties conducting all appropriate inquiries to retain the written report or any other documentation discovered, consulted, or created in the course of conducting the inquiries, the retention of such documentation and records may be helpful should the property owner need to assert protection from CERCLA liability after purchasing a property.

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

Given that the type and extent of information available on a particular property may vary greatly with its size, type, past uses, and location, and the type and extent of information necessary for an environmental professional to render an opinion regarding conditions indicative of releases or threatened releases of hazardous substances associated with any property may vary, we decided not to include in the final rule specific requirements governing the content of all reports.

The provisions of the final rule allow for the property owner (or grantee) and any environmental professional engaged in the conduct of all appropriate inquiries for a specific property to design and develop the format and content of a written report that will meet the prospective landowner's (or grantee's) objectives and information needs in

¹ Nothing in this regulation or preamble is intended to suggest that any particular documentation prepared in conducting all appropriate inquiries will be admissible in court in any litigation where a party raises one of the liability protections, or will in any way alter the judicial rules of evidence.

addition to providing documentation that all appropriate inquiries were completed prior to the acquisition of the property, should the landowner (or grantee) need to assert protection from liability after purchasing a property.

Commenter Organization Name: Freeman & Giler

Comment Number: 0417

Excerpt Number: 7

Excerpt Text:

Proposed Rule §312.21(c) requires that the EP prepare a written report; however, aside for the certification statement, it provides no guidance for the format of that report. While we support the discretion the AAI Rule vests in the EP, without clearer guidance from USEPA it will be difficult for the User (especially a new User or a User unfamiliar with AAI) to determine the adequacy of the EP's report. Consider including sample EP report outlines, similar to that which the ASTM Standard E-1527 provides in its Appendix X2, Recommended Table of Contents and Report Format, which USEPA would consider acceptable in satisfying the Rule's requirements.

Response:

Please see response to comment number 0320, excerpt 6.

3.15.6 Explicitly State that Due Diligence According to the Standard Will Not Address Significant Compliance-Related Liabilities

Commenter Organization Name: Auditing Roundtable, BEAC

Comment Number: 0363

Excerpt Number: 4

Excerpt Text:

The standard should explicitly recognize that conducting "all appropriate inquiry" and qualifying for CERCLA liability defenses does not guarantee the lack of conditions which could give rise to liability to purchasers of property. The standard is expressly aimed at satisfying requirements related to specific CERCLA liability defenses (innocent landowner, bona fide prospective purchaser, contiguous property owner). These defenses may or may not exist under applicable state law, and where they do not exist under state law, liability may attach to parties taking title notwithstanding performance of "all appropriate inquiry." Similarly, although "all appropriate inquiry" includes an evaluation of operations having the potential to have been a source of releases to the environment, and thus Superfund-type liability, conducting due diligence pursuant to the proposed standard will not address regulatory compliance-related liability exposures that are of enormous significance. Clarity in this regard is helpful in establishing realistic expectations for users of the standard, and to reduce the potential for liability disputes between users and sendee providers.

Response:

The preamble to today's rule clearly states that the requirements of the final rule apply only to prospective property owners who are seeking protection from liability under the federal Superfund Law (CERCLA). Prospective property owners wishing to establish protection from, or a defense to, liability under state superfund or other related laws must comply with the all criteria established under state laws, including any criteria for conducting site assessments or all appropriate inquiries established under applicable state statutes or regulations.

3.15.7 Clarify That, Although the Rule Requires No New Reporting or Disclosure, These May Be Required under Other Existing Standards (e.g., Release Reporting)

Commenter Organization Name: Auditing Roundtable, BEAC

Comment Number: 0363

Excerpt Number: 5

Excerpt Text:

5. The proposed standard should clarify that while no new reporting or disclosure obligations are imposed by the proposal, in the course of performing due diligence under the standard conditions may be detected which require reporting or disclosure under existing legal requirements. Many states and some federal reporting requirements are triggered by "any person having knowledge" of a release or spill, and in some state law cases, if certain threshold storage requirements have been met, the reporting obligation is triggered by a spill of "any amount" To avoid any misunderstanding that the proposed standard does not obligate reporting, a clear statement should be made that this standard does not revoke or override underlying state and federal requirements in connection with release reporting.

Response:

The preamble to the final rule clearly states that although the final rule does not include any new disclosure requirements, CERCLA Section 103 does require persons in charge of vessels and facilities, including on-shore and off-shore facilities, to notify the National Response Center of any release of a hazardous substance from the vessel or facility in a quantity equal to or greater than a "reportable quantity," as defined in CERCLA Section 102(b). Today's rule includes no changes to this reporting requirement nor any changes to any other reporting or disclosure requirements under federal, tribal, or state law.

3.16 Division of Responsibilities (Tasks Performed by EP vs. Landowner or Purchaser)

Commenter Organization Name: Goodman, J. Dwight

Comment Number: 0097

Excerpt Number: 9

Excerpt Text:

Allowing by rule certain data to be furnished by the owner, purchaser, client, etc. for use within the ESA may be somewhat questionable by the preparer due to liabilities and confidence the preparer has that the information furnished is accurate, or more so, unbiased. Regulatory data typically obtained for sites from third party database companies are a different scenario, and deemed to be reliable and unbiased in my opinion.

Response:

Based upon comments received from the public concerning proposed § 312.22(a), requiring land owners/grantees provide the environmental professional with certain information in the following situations,

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

the Agency proposes a change. In today's final rule § 312.22(a) will read:

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

As a result of this change from “must” to “may,” the environmental professional should note as a data gap any of the four types of information that is not disclosed from the above list. Also, please keep in mind that specialized knowledge is always a factor in a court's decision as to whether to grant liability protection to an owner or grantee.

Commenter Organization Name: Scalise, Frederick W, et al

Comment Number: 0105

Except Number: 3

Other Sections: NEW - 3.4 - Recorded environmental cleanup liens searches

Excerpt Text:

This section should more clearly indicate that it is NOT the responsibility of the Environmental Professional to search for environmental cleanup liens. Searching and analyzing title and deed records is not generally within the scope of expertise of an Environmental Professional, and is best

left to a title company or title insurance company. It should be solely the responsibility of the person defined in §312.1 to provide any information regarding liens to the Environmental Professional.

Response:

The final rule allows that the search for recorded environmental cleanup liens be performed either by the prospective landowner or grantee, or through the inquiry of the environmental professional. The search for such liens may not necessarily require the expertise of an environmental professional and therefore may be more efficiently or more cost-effectively performed by the prospective landowner or grantee, or his or her agent. 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. If such information is collected by the prospective landowner or grantee, or other agent who is not under the supervision or responsible charge of the environmental professional, the final rule allows for, but does not require, the information that is collected by or on the behalf of the prospective landowner or grantee to be provided to the environmental professional. If the information is provided to the environmental professional, he or she can then make use of such information during the conduct of the all appropriate inquiries and when rendering conclusions or opinions regarding the environmental conditions of the property. If such information is not provided to the environmental professional and the lack of such information affects the ability of the environmental professional to identify conditions indicative of releases or threatened releases of hazardous substances on, at, in or to the property, the lack of information should be noted as a data gap (per the requirements of §312.21(b)(2)).

Commenter Organization Name: NSPE

Comment Number: 0230

Excerpt Number: 8

Excerpt Text:

Under the language of the proposed rule, the division of responsibilities pertaining to all appropriate inquiries allows the prospective owner or the landowner to perform certain investigatory activities. It is NSPE's position that the landowner or the prospective purchaser should be allowed to perform these activities, but should not be allowed, under any circumstances, to be protected under the innocent purchaser defense unless the party can show that

1. They possess the minimum educational and experiential requirements as set forth in the final rule, and
2. The author and relationship to the instant property is clearly defined in any and all documentation so that a third party will know of the potential conflicts of interest that may exist.

Response:

The entire all appropriate inquiries rule requires good faith compliance. The Agency believes anything less will not be considered compliant with the rule.

Commenter Organization Name: Rose and Westra

Comment Number: 0320

Excerpt Number: 9

Other Sections: NEW - 3.14.3 - The signature requirement should be modified

Excerpt Text:

The Proposed Rules allow the landowner or prospective purchaser to perform certain activities. The Proposed Rules do not state how this information is to be incorporated into the AAI process. Is it to be provided to the EP to include in his/her report? If so, this could make the EP responsible for the accuracy of this information. While R&W supports disclosure from a prospective purchaser/landowner to the EP and including this information in a single document, R&W requests modifying the signature requirements to explicitly state that the EP cannot comment on the accuracy and is not qualified to assess of the significance of information provided by a prospective purchaser/landowner.

Response:

The final rule only requires that the environmental professional acknowledge that he or she meets the requirements to qualify as an environmental professional and “to declare that: [I/We] have developed and performed the all appropriate inquiries in conformance with the standards and practices set forth in 40 CFR Part 312.” This statement would apply only to the statement and information contained in the report. The environmental professional is not required to certify the results. In addition, the environmental professional may always identify as data gaps any information not received from the prospective landowner or grantee that may affect the environmental professional’s ability to render an opinion regarding the presence of conditions indicative of releases or threatened releases of hazardous substances.

The individual carrying out the all appropriate inquiry must acknowledge that he or she meets the requirements of an environmental professional. That is the intent of the signature requirement.

Commenter Organization Name: FAA

Comment Number: 0334

Excerpt Number: 14

Excerpt Text:

1) FAA believes that some of the activities the proposed rule identifies as those the landowner or purchaser might conduct and be responsible for require special knowledge and are not appropriate for a landowner or purchaser to conduct (69 FR 52556). For example, the requirement to determine the significance of the relationship between the purchase price of the property and the value of the property if it wasn't contaminated could require specialized knowledge that the landowner or purchaser wouldn't have. FAA believes that the EP should be required to conduct these activities.

Response:

Many commenters asserted that an environmental professional should not be required to consider the relationship of the purchase price to the value of the property as part of the all appropriate inquiries investigation. Concerns raised by commenters include whether environmental professionals are qualified to assess the fair market value of a property.

The final rule allows for this criterion to be conducted by the prospective landowner or the grantee or undertaken as part of the inquiry by an environmental professional. If an environmental

professional is not qualified to consider the relationship of the purchase price to the value of the property, the prospective landowner or grantee may undertake the task or hire another third party to make the comparison of price and fair market value and consider whether any differential is due to potential environmental contamination.

Commenter Organization Name: CBPA

Comment Number: 0344

Excerpt Number: 6

Excerpt Text:

-The New Rule Appears to Make the Purchaser (as Opposed to the Environmental Professional) Significantly Responsible for Discerning Contamination.

ASTM E1 527 distinguishes between the responsibilities of the "user", that is the purchaser, and the responsibilities of the environmental professional hired by the user to conduct the site assessment. The structure of ASTM E1527 recognizes that purchasers hire environmental professionals to issue Phase I reports and that purchasers will rely on those reports as a defense to CERCLA liability should any contamination problem subsequently come to light. The role of the user in ASTM E1527 is minimal. The user may supply certain records to the environmental professional. ASTM E1527-00 §5.1. Users often engage title companies to perform title searches and report environmental liens or use limitations to the environmental professional performing the site assessment. These records are then used in the preparation of the environmental professionals report.

The new rule takes an entirely different approach, appearing to make the user significantly responsible for discerning contamination. Rather than relying on a report prepared by a professional, a purchaser may find himself facing a plaintiffs accusations that he is responsible for ensuring the completeness and accuracy of the Phase I report.

For example, proposed § 312.30 states that "[throughout the inquires," the user "must take into account commonly known or reasonably ascertainable information. . . and consider such information when seeking to identify conditions indicative of releases or threatened releases." This language appears to make the user responsible for identifying contamination. This appears nonsensical. The user hires an environmental professional to conduct an investigation, and the user should be able to rely on the professional's report without herself analyzing information. This requirement is unclear and increases uncertainty by appearing to increase responsibilities of the user in vague and undefined ways that might be open to any number of interpretations by plaintiffs (including EPA) in cost recovery actions.

Response:

CERCLA places liability for releases and threatened releases of hazardous substances upon owners and operators of facilities and vessels. Owners and operators seeking protection from liability as innocent landowners, bona fide prospective purchasers, or contiguous property owners must comply with the criteria provided in the statute for attaining such protections, including conducting all appropriate inquiries. The statute requires that all appropriate inquiries include an inquiry conducted by an environmental professional. However, the responsibility for conducting the all

appropriate inquiries as well as the responsibility for complying with all the other statutory criteria required to obtain protection from liabilities rests with the owner or operator.

A prospective landowner may hire an environmental professional to identify the environmental conditions of a property, but ultimate responsibility for complying with the statutory criteria rests with the property owner.

Commenter Organization Name: McKerr, Thomas

Comment Number: 0347

Excerpt Number: 5

Excerpt Text:

Division of Responsibilities. The proposed approach seems very adequate.

Response:

EPA thanks the commenter for the stated support of the provisions.

Commenter Organization Name: Auditing Roundtable, BEAC

Comment Number: 0363

Excerpt Number: 2

Excerpt Text:

The assessment report is required to include discussion of activities that the rule recognizes may be outside the purview of the site assessor.

The purchaser or the landowner (or presumably other experts working on behalf of the landowner) may conduct inquiries relating to; (i) lien searches, (ii) an assessment of the specialized knowledge of the purchaser/landowner, (iii) an assessment of the reasonably ascertainable information, and (iv) assessing the relationship between the fair market value of the property and the purchase price. The proposed rule then requires the environmental professional to include such information within the report and to include it as part of the opinions being rendered.

Although these elements should go into a purchaser's ability to demonstrate whether it qualifies for the liability defenses under CERCLA, it should not be a requirement that discussion of these elements be included in the auditor's report if the auditor has not participated in these tasks. Requiring the report prepared by the site assessor to contain discussion of tasks performed by others not employed by the assessor or working at his or her direction could be an unnecessary source of potential liability. Further, in only rare instances will an environmental professional be trained and able to render meaningful opinions on the above four subjects. Thus, most opinions rendered in these areas will be so limited by qualifying language as to render them of little use to those relying on the all appropriate inquiry process.

We recommend that for auditor liability reasons, the environmental professional be required in the report only to disclose the information made available to them during the course of their inquiries, but not to require this information to be a part of the opinions given by the environmental professional.

Response:

The final rule only requires that the environmental professional acknowledge that he or she meets the requirements to qualify as an environmental professional and “to declare that: [I/We] have developed and performed the all appropriate inquiries in conformance with the standards and practices set forth in 40 CFR Part 312.” This statement would apply only to the statement and information contained in the report. The environmental professional is not required to certify the results. In addition, the environmental professional may always identify as data gaps any information not received from the prospective landowner or grantee that may affect the environmental professional’s ability to render an opinion regarding the presence of conditions indicative of releases or threatened releases of hazardous substances.

The individual carrying out the all appropriate inquiry must acknowledge that he or she meets the requirements of an environmental professional. That is the intent of the signature requirement.

Commenter Organization Name: Eden Housing

Comment Number: 0380

Excerpt Number: 7

Excerpt Text:

The New Rule Appears to Make the Purchaser (as Opposed to the Environmental Professional) Significantly Responsible for Discerning Contamination

ASTM E1527 distinguishes between the responsibilities of the "user", that is the purchaser, and the responsibilities of the environmental professional hired by the user to conduct the site assessment. The structure of ASTM E1527 recognizes that purchasers hire environmental professionals to issue Phase I reports and that purchasers will rely on those reports as a defense to CERCLA liability should any contamination problem subsequently come to light. The role of the user in ASTM E1527 is minimal. The user may supply certain records to the environmental professional. ASTM E1527-00 §5.1. Users often engage title companies to perform title searches and report environmental liens or use limitations to the environmental professional performing the site assessment. These records are then used in the preparation of the environmental professionals report. The new rule takes an entirely different approach, appearing to make the user significantly responsible for discerning contamination. Rather than relying on a report prepared by a professional, a purchaser may find himself facing a plaintiff's accusations that he is responsible for ensuring the completeness and accuracy of the Phase I report.

For example, proposed § 312.30 states that "[t]hroughout the inquires," the user "must take into account commonly known or reasonably ascertainable information. . . and consider such information when seeking to identify conditions indicative of releases or threatened releases." This language appears to make the user responsible for identifying contamination. The user hires an environmental professional to conduct an investigation, and the user should be able to rely on the professional's report without herself analyzing information. This requirement is unclear and increases uncertainty by appearing to increase responsibilities of the user in vague and undefined ways that might be open to any number of interpretations by plaintiffs (including EPA) in cost recovery actions. Eden, its staff, and most purchasers contemplating redevelopment, are not

scientists. We cannot be held responsible for identifying contamination ourselves. We must be able to rely on environmental professionals to identify contamination.

Response:

CERCLA places liability for releases and threatened releases of hazardous substances upon owners and operators of facilities and vessels. Owners and operators seeking protection from liability as innocent landowners, bona fide prospective purchasers, or contiguous property owners must comply with the criteria provided in the statute for attaining such protections, including conducting all appropriate inquiries. The statute requires that all appropriate inquiries include an inquiry conducted by an environmental professional. However, the responsibility for conducting the all appropriate inquiries as well as the responsibility for complying with all the other statutory criteria required to obtain protection from liabilities rests with the owner or operator.

A prospective landowner may hire an environmental professional to identify the environmental conditions of a property, but ultimate responsibility for complying with the statutory criteria rests with the property owner.

The final rule retains, as part of the federal all appropriate inquiries requirements, the consideration of any specialized knowledge or experience of the prospective landowner (or grantee if the grantee is or will be the property owner). The final rule does not extend this requirement beyond what already was required under CERCLA since 1986 and established through case law. The final rule requires that all appropriate inquiries include the consideration of specialized knowledge held by the prospective landowner or grantee with regard to the subject property, the area surrounding the subject property, the conditions of adjoining properties, as well as other experience relative to the inquiries that may be applicable to identifying conditions indicative of releases or threatened releases at the subject property. The rule also requires that the results of the inquiries take into account any specialized knowledge related to the property, surrounding areas, and adjoining properties held by the persons responsible for undertaking the inquiries, including any specialized knowledge on the part of the environmental professional. Case law related to the innocent landowner defense shows that courts appear to have interpreted the “specialized knowledge” factor to mean that the professional or personal experience of the defendant may be taken into account when analyzing whether the defendant made all appropriate inquiries.