

Utility Solid Waste Activities Group

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U S W A G

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HAND DELIVERY

EPA Docket Center
U.S. Environmental Protection Agency
EPA West Building
Room B102
1301 Constitution Ave., NW
Washington, D.C. 20460

Re: Comments on EPA's Proposed Standards and Practices for
All Appropriate Inquiries, Docket ID No. SFUND-2004-0001

Dear Sir or Madam:

The Utility Solid Waste Activities Group ("USWAG")¹ submits these comments on EPA's proposed Standards and Practices for All Appropriate Inquiries. 69 Fed. Reg. 52542 (Aug. 26, 2004). The proposed rule would implement the statutory requirements in the Small Business Liability Relief and Brownfields Revitalization Act ("the Brownfields law") that establish a mechanism for innocent property owners to qualify for CERCLA liability protections for releases or threatened releases of hazardous substances. Under section 101(35)(B) of CERCLA, as amended by the Brownfields law, innocent landowners, bona fide prospective purchasers, and contiguous property owners, among other things, must conduct "all appropriate inquiries" ("AAI") into prior ownership and use of a property prior to or at the time at which a person acquires a property. The Brownfields law directs EPA to promulgate a regulation setting

¹ USWAG was formed in 1978, and is an association of approximately 80 energy industry operating companies and associations, including the Edison Electric Institute ("EEI"), the National Rural Electric Cooperative Association ("NRECA"), the American Public Power Association ("APPA"), and the American Gas Association ("AGA"). EEI is the principal national association of investor-owned electric power and light companies. NRECA is the national association of rural electric cooperatives. APPA is the national association of publicly owned electric utilities. AGA is the principal national association of natural gas utilities. Together, USWAG members represent more than 85% of the total electric generating capacity of the U.S., and service more than 95% of the nation's consumers of electricity and over 93% of the nation's consumers of natural gas.

standards and practices for conducting AAI in accordance with a list of statutory criteria. The proposed rule is EPA's response to this statutory directive.

Before addressing the substance of the proposed rule, USWAG would like to commend EPA for pursuing the regulatory negotiation ("reg-neg") process despite previously unsuccessful reg-negs. EPA's reluctance to attempt the reg-neg process for most of the past decade has been quite understandable. It therefore took considerable courage on EPA's part to place the fate of this rulemaking in the hands of a diverse and often contentious Reg-Neg Committee and then to make unanimity or consensus among the 25 committee members the decision-making threshold for each issue under consideration. Without the hard work of the EPA staff from the Office of Brownfields Cleanup & Redevelopment – and in particular, the skill and patience of Patricia Overmeyer – in helping to mold a consensus, there would not have been as well thought-out a proposed rule as the one now before the public for comment.

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

I. Relationship to ASTM Environmental Assessment Standards.

As EPA knows, the prevalent environmental site assessment standard in use for the past decade is the ASTM Phase I standard known as E1527.² Congress recognized its wide acceptance in the marketplace by designating the 1997 version of this standard as the interim assessment standard to achieve CERCLA liability protections for property acquisitions from May 31, 1997, until EPA's AAI regulation becomes effective. CERCLA § 101(35)(B)(iv)(II); *see* 69 Fed. Reg. at 52545. Since the 1997 version of E1527 had been superseded by the 2000 version by the time Congress passed the Brownfields law, EPA wisely clarified what appeared to be a congressional scrivener's error by recognizing both versions of E1527 as acceptable interim standards. 68 Fed. Reg. 24888 (May 9, 2003).

USWAG members, like most of the regulated community segment that engages in site assessments for the purpose of achieving CERCLA liability protections, have successfully used ASTM E1527 for many years, are thoroughly familiar with its provisions, and in the spirit of "if it isn't broke, don't fix it", believe that EPA should promulgate an AAI rule that hews as closely to the E1527 standards as is legally permissible. We acknowledge that the Brownfields law

² The standard is officially known as the Standard Practice for Environmental Site Assessments: Phase I Environmental Site Assessment Process.

prescribes requirements that are not in the 2000 version of E1527. However, as we explain later in these comments, we believe EPA has overstated the extent to which the ASTM standard falls short of the new statutory requirements. *See* 69 Fed. Reg. at 52574-75.

Nevertheless, USWAG is pleased that EPA has actively participated in the ASTM task group process by which ASTM expects to update the E1527 standard and to bring it into conformity with the Brownfields law. Similarly, ASTM is in the process of updating its Phase I standard for forestland and rural property, known as ASTM E2247-02.³ We strongly urge EPA upon completion of this process to reference the amended E1527 and E2247 standards in the final AAI rule as acceptable alternatives to the EPA rule for conducting AAI to qualify for CERCLA liability protections.⁴

II. Comments on Specific Provisions in Proposed Rule.

As mentioned above, USWAG believes most provisions of the proposed AAI rule are sound and should be promulgated. Specific discussion of those provisions is unnecessary. The following discussion relates to provisions that we believe can be improved or warrant clarification.

A. *Limited Shelf Life of Previously Collected Information.* Proposed section 312.20(b) limits the circumstances under which previously collected information may be 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

³ This standard is officially known as Standard Practice for Environmental Site Assessment: Phase I Environmental Site Assessment Process for Forestland or Rural Property.

⁴ A recent example of EPA regulations in which the Agency encouraged the regulated community to look to industry standards in implementing the Agency's program is found in the 2002 amendments to the Oil Pollution Prevention and Response Regulations, popularly known as the SPCC rules. *See* 67 Fed. Reg. 47042, 47057-58 (July 17, 2002).

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.

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 ½ mile from the subject property. Although USWAG agrees that AAI should include a search of records to identify nearby properties subject to institutional controls, we believe that searching up to ½ mile from the subject property is not necessary to protect human health and the environment. Moreover, the ½ 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 ½ 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.

C. *Alleged Inconsistencies between ASTM E1527-00 and EPA's Proposed Rule.* EPA points to a number of provisions in the extant ASTM E1527-00 standard that it believes are inconsistent with either the statutory standards for AAI (CERCLA § 101(35)(B)(iii)) and the proposed rule. Although we acknowledge some revisions to the ASTM standard are necessary to conform to the new statutory requirements for AAI, in some cases the differences identified by EPA are neither inconsistent with the proposed rule nor less stringent.

i. 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 18th 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.

ii. 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.

iii. 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.

EPA should also clarify that the environmental professional to whom the property owner must provide information on the relationship of the purchase price to the fair market value of the property (*see* proposed section 312.22(a)(3); 69 Fed. Reg. at 52556) has no responsibility to explain this relationship in the written AAI report. Such an explanation is beyond the expertise of a typical environmental professional and should not be inferred as a reporting requirement under AAI. The environmental professional’s obligation should be limited to presenting the information provided by the property owner.

iv. 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 E1527-00 § 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.

D. 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). USWAG 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 52565.⁵ 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.

E. 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. USWAG 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.

F. 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

⁵ It is our understanding that the preamble language immediately following the quoted language in the text above is a *nonbinding* recommendation that visual inspections be conducted by the environmental professional. 69 Fed. Reg. at 52565. EPA should remove any possible ambiguity and confusion by stating in the final rule that this recommendation is not legally binding and does not trump the regulatory language that authorizes persons “under the supervision or responsible charge of an environmental professional” (*ibid.*) to conduct the visual inspection.

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, USWAG 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.

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.

G. *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 AAI 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.

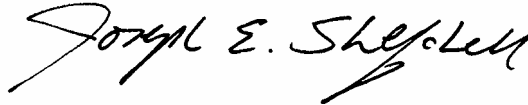
CONCLUSION

We have limited our comments to a few parts of the proposed rule that USWAG believes would be improved or clarified if our recommended changes were adopted in the final rule. The balance of the proposal is satisfactory. Again, we applaud the excellent work of the Office of Brownfields Cleanup and Redevelopment and its successful outreach efforts to build consensus for this AAI proposal. We very much appreciate EPA's consideration of our comments.

To minimize disruption for the many users of the ASTM environmental assessment standards that predate the Brownfields law and this proposed rule, we strongly urge EPA to permit the use of ASTM E1527 and E 2247, once updated to conform to the Brownfields law, as acceptable alternatives to the AAI rule.

If you have any questions or desire additional information, please contact USWAG's Executive Director, Jim Roewer (202-508-5645) (jim.roewer@uswag.org), or USWAG's counsel, Bill Weissman (202-861-3878) (william.weissman@piperrudnick.com).

Very truly yours,

A handwritten signature in black ink that reads "Joseph E. Shefchek". The signature is written in a cursive style with a large, sweeping initial "J".

Joseph E. Shefchek
Chairman, USWAG Policy Committee