



Susan Podziba & Associates

PUBLIC POLICY MEDIATION AND CONSENSUS BUILDING

**FINAL REPORT
of
Susan Podziba & Associates**

on the

**Negotiated Rulemaking Process to Develop the
All Appropriate Inquiry Standard Required under
the Small Business Liability Relief and Brownfields
Revitalization Act (Public Law No. 107-118)**

**U.S. Environmental Protection Agency
Office of Solid Waste and Emergency Response
Office of Brownfields Cleanup and Redevelopment**

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All Appropriate Inquiry (AAI) Negotiated Rulemaking U.S. Environmental Protection Agency

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INTRODUCTION

The All Appropriate Inquiries Negotiated Rulemaking was initiated by the U.S. Environmental Protection Agency (EPA) to develop a proposed rule establishing federal standards and practices for the All Appropriate Inquiries, as required under CERCLA Section 101(35)(B), as amended by the Small Business Liability Relief and Brownfields Revitalization Act (Public Law No. 107-118).

EPA formally chartered the All Appropriate Inquiries Negotiated Rulemaking Advisory Committee (Committee) under the Federal Advisory Committee Act (FACA)¹ for the purpose of negotiating a consensus on the terms of a proposed rule setting forth standards and practices for the conduct of All Appropriate Inquiries (AAI).

The negotiated rulemaking process involved a convening assessment to determine the feasibility of proceeding with a consensus process to develop the All Appropriate Inquiries standards and negotiations among EPA and representatives of key stakeholder groups that will be significantly affected by the AAI Standard.

The negotiations resulted in a final consensus on recommended text for a proposed AAI standard. In accordance with the Negotiated Rulemaking Act of 1996, §563(a)(7), EPA, “to the maximum extent possible consistent with the legal obligations of the Agency, will use the consensus of the committee with respect to the proposed rule as the basis for the rule proposed by the Agency for notice and comment.”

EPA retained Susan Podziba & Associates to provide convening and facilitation services for the negotiated rulemaking process.

BACKGROUND

On January 11, 2002, the Small Business Liability Relief and Revitalization Act (Pub. L. No. 107-118), also known as the “Brownfields Amendments” to the Comprehensive

¹ As required under FACA, the All Appropriate Inquiry Negotiated Rulemaking Advisory Committee was composed of a balanced group of stakeholder representatives, all meetings were open to the public, all meeting materials were available for public review, and time was set aside at each meeting for public comment.

Environmental Response, Compensation, and Liability Act (CERCLA), was enacted. The Brownfields Amendments amended CERCLA to include liability protections for certain landowners. One of several requirements applicable to landowners seeking liability protection is the requirement to conduct all appropriate inquiries into past uses and ownership of a property prior to acquisition (§101(35)(B)). The all appropriate inquiries standards and practices are relevant to:

- the innocent landowner defense to CERCLA liability (§101 (35));
- the contiguous property owner protection from CERCLA liability (§107(q));
- the bona fide prospective purchaser protection from CERCLA; and
- the brownfields site characterization and assessment grant program (§104(k)(2)).

The Brownfields Amendments require EPA to establish regulations setting forth “standards and practices” to carry out all appropriate inquiries by January 11, 2004, two years after enactment. The Brownfields Amendments include ten criteria specified by Congress, which must be included in the federal standards for all appropriate inquiries. In addition, the Brownfields Amendments establish an interim standard for the conduct of all appropriate inquiries that will remain in effect until EPA promulgates federal standards. For properties purchased after May 31, 1997, Congress established the interim standard as the American Society for Testing and Materials (ASTM) E1527-97 Phase I environmental site assessment standard. EPA developed a direct final rule to allow for the use of the ASTM E1527-2000 Phase 1 environmental site assessment standard as an interim standard for all appropriate inquiries given consistent feedback from stakeholders that the 1997 standard is no longer current industry practice and is not readily available.

The All Appropriate Inquiries Notice of Proposed Rulemaking will be based upon and include the All Appropriate Inquiry Negotiated Rulemaking Advisory Committee’s recommended consensus regulatory language and will be published in the Federal Register. Following a public comment period, EPA will develop a final rulemaking. The Final Rule will replace the interim standard established by Congress as the federal standard for the conduct of all appropriate inquiries.

PROJECT DURATION AND MILESTONES

The AAI Negotiated Rulemaking Process began in August 2002 and was completed in December 2003. The convening assessment was initiated in August 2002 and the Convening Assessment Report was finalized in December 2002. EPA published a Federal Register Notice announcing its Intent to Negotiate the Proposed Rule on All Appropriate Inquiries on March 6, 2003. On April 7, 2003, EPA published a Federal Register Notice establishing the All Appropriate Inquiry Negotiated Rulemaking Advisory Committee (Committee) and announcing its first meeting. EPA held a public meeting on April 15, 2003 to accept comment on the purpose and membership of the

Committee. The first meeting of the All Appropriate Inquiry Negotiated Rulemaking Advisory Committee was held on April 29-30, 2003.

The negotiations were conducted over six multiple-day meetings during the eight-month period between April and November 2003. The Committee reached final consensus on all issues under discussion on November 14, 2003. On December 18, 2003, the Committee approved its November 12-14 meeting summary, which documented the Committee's final consensus on all issues.

NEGOTIATED RULEMAKING COMMITTEE PARTICIPANTS

The All Appropriate Inquiry Negotiated Rulemaking Advisory Committee included EPA and twenty-four members, who represented the following eight categories of stakeholder groups: state government, tribal government, local government, real estate developers (residential, commercial, industrial, for profit, not-for-profit), bankers and lenders, environmentalists, environmental justice advocates, and environmental professionals. EPA carefully monitored the composition of the Committee to ensure balanced representation from affected and interested stakeholder groups.

EPA, as a member of the All Appropriate Inquiry Negotiated Rulemaking Advisory Committee, represented the federal government. Between Committee meetings, EPA met regularly with its "federal partners" to obtain their input and to assess the impacts of particular regulatory alternatives, under consideration by the Committee, on work conducted by other federal agencies. The federal partners workgroup included the U.S. Department of Interior, U.S. Forestry Service, U.S. Department of Justice, U.S. Department of Defense, National Oceanic and Atmospheric Administration, Federal Deposit Insurance Corporation, and U.S. Department of Housing and Urban Development.

The twenty-five organizational members of the Committee were supported by resource participants. The resource participants were interested parties with significant knowledge relevant to implementation of the all appropriate inquires standard, but who typically represent or interact with multiple stakeholders. They were authorized to provide relevant information to the Committee, but did not negotiate. The categories of resource participants included environmental attorneys, real estate brokers, environmental insurance professionals, and environmental data managers.

The organizational members of the All Appropriate Inquiry Negotiated Rulemaking Advisory Committee were:

- American Society of Civil Engineers
- ASFE
- Center for Public Environmental Oversight
- Environmental Bankers Association
- Environmental Defense

Gila River Indian Community/ Cherokee Nation
Illinois Environmental Protection Agency (Association of State and Territorial
Solid Waste Management Officials (ASTSWMO))
International Council of Shopping Centers
International Municipal Lawyers Association
Mortgage Bankers Association of America
Maryland Department of the Environment (ASTSWMO))
National Association of Development Organizations
National Association of Home Builders
National Association of Industrial and Office Properties
National Association of Local Government Environmental Professionals
National Brownfield Association
National Groundwater Association
Partnership for Sustainable Brownfields Redevelopment
Real Estate Roundtable
The U.S. Conference of Mayors
Trust for Public Land
U. S. Environmental Protection Agency
U. S. Public Interest Research Group
Wasatch Environmental, Inc.
West Harlem Environmental Action

The Resource Participants were:

American Bar Association, Environment, Energy, and Resources Section
American Society of Testing and Materials
Zurich-North America (Insurance)
AIG Environmental (Insurance)
National Association of Realtors
Environmental Data Resources, Inc.

PRODUCTS AND OUTCOMES

The ultimate product and outcome of the negotiated rulemaking is the All Appropriate Inquiry Negotiated Rulemaking Advisory Committee's consensus document, which contains recommended proposed regulatory language. EPA will develop and publish a proposed rule in the Federal Register based upon and including this consensus language.

Additional products developed as part of the negotiated rulemaking process include the *Final Convening Assessment on the Feasibility of a Negotiated Rulemaking Process to Develop the All Appropriate Inquiry Standard (December 17, 2004)*, final meeting summaries and agendas for each of the six Committee meetings, and the Committee's ground rules. All of these documents are available from EPA's website at <http://www.epa.gov/brownfields/regneg.htm>.

All the documents associated with the All Appropriate Inquiries standard are available in the public docket for the proposed rule, Docket Number SFUND-2004-0001.

RELEVANT STATUTES AND EXECUTIVE ORDERS

The Statutes and Executive Orders relevant to development of the proposed rule on the all appropriate inquiries standards are: Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), as amended by The Small Business Liability Relief and Brownfields Revitalization Act of 2002, and commonly known as Superfund; Paperwork Reduction Act; Regulatory Flexibility Act; Unfunded Mandates Reform Act; National Technology Transfer Advancement Act of 1995; Federal Advisory Committee Act; Executive Order 13132: Federalism; Executive Order 13175: Consultation and Coordination with Indian Tribal Governments; Executive Order 13045: Protection of Children from Environmental Health and Safety Risks; Executive Order 13211: Actions that Significantly Affect Energy Supply, Distribution, or Use; and Executive Order 12866: Regulatory Planning and Review.

NEGOTIATED RULEMAKING PROCESS

The negotiated rulemaking process includes two phases: the convening assessment and the negotiations. EPA initiated the convening phase of the negotiated rulemaking process to identify appropriate stakeholder groups and solicit advice and input from experienced public and private sector users of similar environmental site assessment standards. As a result of a positive feasibility determination, EPA decided to proceed with the negotiated rulemaking process. Negotiations among a balanced committee of stakeholders occurred between April and November 2003 and concluded in a final consensus on all issues under discussion.

Susan Podziba & Associates (SP&A) provided the process management services for the negotiated rulemaking. Susan Podziba, Public Policy Mediator, served as project director, convener, and lead facilitator. She was assisted by a facilitation team, which included Alexis Gensberg and Meighan Matthews, SP&A Associates.

Convening Assessment

As convener, Susan Podziba contacted interested parties, who could potentially be affected by the all appropriate inquiries rule, to determine the feasibility of proceeding with a negotiated rulemaking process to develop the proposed AAI standard.

The convener interviewed approximately sixty representatives of federal, state, county, local, and tribal government; for profit and not-for-profit developers, real estate and

environmental attorneys, real estate brokers, bankers and lenders, environmental professionals, environmentalists, environmental justice advocates, and insurance companies. Virtually every interviewee expressed support for addressing the issues and differences among interested parties through the negotiated rulemaking process.

Based on an evaluation of the information derived from these interviews, the convener determined and recommended to EPA that it was feasible to proceed with the negotiated rulemaking process. The feasibility determination was based on a high level of stakeholder interest in participating in the process; the degree to which interests and issues among the stakeholders are interrelated; the possibility of engaging a balanced committee of representatives; and the likelihood of success in achieving consensus on the AAI standards within the available time frame.

The findings of the convener are documented in the report, *Convening Assessment Report on the Feasibility of a Negotiated Rulemaking Process to Develop the All Appropriate Inquiry Standard Required under the Small Business Liability Relief and Brownfields Revitalization Act*. This report identifies categories of stakeholders, substantive issues by stakeholder group, key issues across stakeholder groups, procedural issues, participation, process design, protocols and procedures, and recommends organizational members and resource participants for the advisory committee.

Negotiations

The All Appropriate Inquiry Negotiated Rulemaking Advisory Committee negotiations occurred between April and November 2003, and included six face-to-face multiple day meetings held in Washington, D. C., a series of work group conference calls between meetings, and consideration of intensive public input throughout the process.

Each meeting followed a formal agenda and was open to the public. Each day of each meeting included time set aside for public comment during which members of the public addressed the Committee to offer recommendations, ask questions, and comment on issues under discussion.

The negotiating process was an iterative discussion of the ten criteria spelled out in the Brownfields Amendments. Each issue was intensively discussed until agreements in concept were reached. EPA drafted regulatory language to reflect the agreements in concept. The draft regulatory language was then thoroughly reviewed and revised until the Committee reached tentative agreements on the text of each section of the recommended proposed standard. The Committee then reviewed all of its tentative agreements, made some additional revisions to address new concerns raised by some of its members, and reached final consensus on all issues that were subjected to negotiations.

The facilitation team drafted meeting summaries after each meeting, which were reviewed, revised, and approved by the Committee. The summaries served as records of agreements and identified key discussion points of outstanding issues.

The negotiated rulemaking process allowed for continued review of Committee proceedings by constituents of the organizations represented on the Committee and the general public. The Committee gave full consideration to input offered by the public during its deliberations.

Throughout the process, work groups were formed to discuss issues that required more time than could be made available during meetings of the full Committee. Workgroups were composed of those Committee members most interested in the subject under discussion and resource participants who could provide expertise. All were conducted through facilitated conference calls. Work groups were initiated for issues such as: definition of environmental professional, objectives and performance goals, potential use of a tiered approach for the standard, and interview requirements. Proposals developed by work groups were presented to the full Committee for consideration.

In addition, the facilitation team maintained on-going contact with Committee members on an as-needed basis to build consensus on controversial issues. Such discussions often led to the development of proposals that were presented to the Committee.

In addition to the twenty-five members and resource participants of the Committee and their organizational constituents, members of the public at large were actively engaged throughout the negotiations. In some instances, Committee members surveyed their constituents to obtain additional information on questions and issues of concern. The Committee received and reviewed scores of public comments in the form of e-mails and letters and heard numerous public comments on issues such as the definition of environmental professional, EPA accreditation of environmental professional certifying agencies, identifying past occupants (including interviews with neighbors), and how to conduct database research of institutional controls.

After 13.5 meeting days (108 hours), the Committee completed all of its work at an intense final meeting. Some new issues were raised and the Committee, committed to its success, worked hard to find ways to accommodate all issues raised by all members. All Committee members agreed to support the proposed standard they had jointly developed.

According to the Committee's ground rules, EPA is committed to publishing a proposed rule based upon and including the consensus language, and the Committee members will not provide formal negative comments on the consensus language presented in the Notice of Proposed Rulemaking.

LESSONS LEARNED

The observations and opinions below are offered solely on behalf of Susan Podziba & Associates, the company retained by EPA for convening, facilitation, and process support services for the All Appropriate Inquiry Negotiated Rulemaking.

Advantages of Negotiated Rulemaking

Use of Negotiated Rulemaking to Develop the AAI Standard: Virtually all individuals and organizations involved in the negotiated rulemaking agree that EPA will promulgate a better AAI standard for having used the negotiated rulemaking process to develop the proposed rule. As a result of the negotiated rulemaking process, the AAI standard accounts for the interests, concerns, and nuances that were raised by each of the All Appropriate Inquiry Negotiated Rulemaking Advisory Committee members as well as members of the public who provided comments at meetings or sent emails or letters to EPA and the Committee. It is expected that few new issues will surface during the formal comment period that have not already been discussed by the Committee.

The commitment and hard work of the Committee, the breadth of its discussions, and the decision-making rule that required consensus agreements, resulted in a standard that balances the goals of brownfields redevelopment and community revitalization with protection of public health and the environment and is rooted in the complex real world conditions within which the AAI standard will be implemented.

EPA Benefited from Knowledge of Industry, Community Interests, and other Government Entities: The negotiated rulemaking process enabled EPA to benefit from the knowledge and expertise of the regulated community, that is, those who will implement the standard in their daily professional lives. In addition, representatives from groups that advocate on behalf of the public, and especially those representing specific community organizations, raised concerns and shared their understandings of likely impacts of the AAI standard on the public health and sustainability of individual communities. Finally, state, tribal, and local government officials provided information concerning program integration and implementation challenges.

The decisions regarding the on-site visual inspection requirement of the AAI standard illustrate the impact of Committee deliberations. As early as the convening interviews, municipal representatives asserted that in extraordinary situations, they cannot gain access to properties prior to taking title or acquiring the property. They were concerned that without building flexibility into the visual inspection requirement, these properties would continue to lie fallow because municipalities would not risk incurring CERCLA liability to develop them.

On the other hand, other Committee members, especially those from state government and public interest organizations, were wary of providing exceptions to the visual on-

site inspection requirement that might result in contaminated properties being targeted for redevelopment prior to obtaining adequate information to support proper cleanup and protection of public health.

The Committee worked diligently to develop language that both accounted for extraordinary situations and provided sufficient levels of protection for human health and the environment. Ultimately, given that AAI is a first step in establishing a basis for seeking liability protection, the Committee developed a solution that established standards for the collection of information prior to property acquisition without imposing significant burdens on prospective property owners prior to obtaining ownership of a property.

Public Education: The AAI Negotiated Rulemaking Process significantly contributed to public education concerning the AAI standard. The All Appropriate Inquiry Negotiated Rulemaking Advisory Committee included representatives of trade associations that educate their members about government regulations. In addition, members of the public attended meetings of the Committee, and EPA made all Committee documents available to the public through the Internet and the public docket.

The affected public is, therefore, well versed in the AAI standard and the rationales for each of its elements -- an infrastructure of knowledgeable individuals exists for ongoing public education of the AAI standard's requirements. In addition, the Committee members and members of the public who followed the negotiated rulemaking process better understand the limitations of public sector decision-making and the role government plays in working to accomplish its mission as it balances the interests of a multitude of stakeholders.

Components of the Negotiated Rulemaking Process

Convening Assessment: The convening assessment was an important tool for determining the feasibility of a negotiated rulemaking process to develop the AAI standard. The in-depth convening interviews and report provided a clear articulation of the issues, dynamics, and perspectives that would become the focus of the All Appropriate Inquiry Negotiated Rulemaking Advisory Committee discussions. Many interviewees who became Committee members felt they had been "heard and understood" because their ideas and perspectives were reflected in the convening report. The interviews also enabled the facilitator to begin building relationships with Committee members, which enhanced her ability to function effectively as facilitator.

Finally, the convening assessment helped EPA identify and name members of the negotiating committee, as it differentiated those parties with a real stake in the issues from those with limited interests. Parties concerned with only one or few issues have

little incentive to consider alternatives because they have little need to integrate their interests with those of the other Committee members.

Ground Rules: The development of ground rules created a common set of understandings concerning governance of the All Appropriate Inquiry Negotiated Rulemaking Advisory Committee. The ground rules outlined the Committee goals, deadline, responsibilities of the negotiators and facilitators, decision-making rule, status of the agreement, and relationship between member participation and a final consensus.

For example, the Mission Statement, negotiated by the Committee, clarified the key objectives underlying the AAI standard. It read, in part:

[...] the Committee will work together as a team to develop all appropriate inquiry standards and practices that are protective of public safety, public health, and the environment and promote productive use of properties subject to the Brownfields Law.

The need to balance the goals of protection of the environment and public health with the goals of increasing land revitalization and community economic development goals sustained the discussions. Since Committee members approached these objectives differently, the mission statement continually served as a reminder of the need to account for all the interests reflected among Committee members.

The ground rules helped avoid conflicts concerning process questions, however, they were simply a set of self-policing agreements among Committee members. There was no enforcement or formal sanction for breaking a ground rule.

Despite Committee-wide agreement upon its ground rules, and after agreeing to the Committee's final consensus on all issues and the November 12-14 meeting summary, which documented that the All Appropriate Inquiry Negotiated Rulemaking Advisory Committee reached final consensus on all issues, one Committee member sent a letter to EPA stating her organization's desire to withdraw from the negotiated rulemaking process on December 19, 2003. This violated a ground rule, which stated:

Once final consensus is achieved, Committee members may not thereafter withdraw their consensus. (Ground Rule III B)

The ground rules should continue to be a set of voluntary agreements among Committee members. Participating organizations may, however, need to better understand the implications of their agreements to participate.

In addition, the ground rules did not outline the method for memorializing the fact of the agreement. The facilitator's practice is to use the final meeting summary for this purpose, and EPA's practice has been to use a signature page. In future processes, it will be helpful to explicitly address this question in the ground rules.

Deadlines: The ground rules established a deadline, which was crucial for reaching final consensus. The most difficult decisions were not made until time was about to run out. As late as the sixth meeting, many Committee members expected a seventh. Once it became clear that the sixth meeting was their final meeting, the parties reached closure on all remaining issues.

Participation

EPA Team: EPA provided a highly competent team for the negotiated rulemaking effort, which included the Office of Brownfields Cleanup and Redevelopment, Office of General Counsel, Office of Site Remediation Enforcement, Office of Site Remediation and Technology Innovation, and the Conflict Prevention and Resolution Center.

The negotiated rulemaking process also enjoyed support from EPA senior management, as illustrated by occasional visits from the Deputy Assistant Administrator, who thanked the All Appropriate Inquiry Negotiated Rulemaking Advisory Committee members for their commitment and hard work.

The negotiated rulemaking process demanded a great deal of effort from the EPA team, which included a negotiator, a regulatory analyst, a legal advisor, senior staff, administrators, and technical and process experts. The regulatory analyst and the negotiator had multiple tasks and responsibilities to perform. In the weeks between Committee meetings, they reviewed and commented on meeting summaries and meeting agendas; participated in conference calls; drafted and revised regulatory language; checked in internally with EPA senior management workgroup members and technical experts; met with representatives from other federal agencies to learn how proposals under discussion would impact them; responded to outside information requests from the public; responded to concerns raised by members of the public; responded to media requests; and managed Committee logistics such as travel reimbursement, FACA compliance, and Federal Register notices.

The effort by all members of this team, and especially EPA staff who drafted and distributed revised regulatory text to reflect Committee discussions during and following each Committee meeting, significantly contributed to the success of the negotiated rulemaking process. In addition, the internal coordination throughout the process contributed to a relatively smooth ratification process within EPA for the terms of the standard.

Six meetings were very limited given the complexity of the issues. If the EPA regulatory analyst had not been able to quickly translate Committee decisions into draft regulatory language for Committee discussions, the six meetings might not have been sufficient.

Committee Member Commitment: Each organizational member participating in the negotiated rulemaking process was represented by a principal negotiator and an alternate. The Committee had virtually perfect attendance at all meetings. The fact that their work could become the proposed federal standard for all appropriate inquiries, motivated the Committee members' commitment. The ongoing display of EPA commitment and its willingness and ability to quickly respond to Committee requests also contributed to the Committee's sustained commitment to complete its task. In addition, Committee members agreed, in their ground rules, that decisions could not be deferred due to absences. In other words, in order to complete its work, tentative agreements needed to be reached at each meeting.

Resource participants: The category of resource participants was created for the All Appropriate Inquiry Negotiated Rulemaking Advisory Committee, as there were organizations with a great deal of useful information to contribute to the negotiations, but that do not represent unique or distinct stakeholders. Some of the members of these organizations represent the range of stakeholders. As a result, these organizations could not develop unified negotiating positions on key issues because their members as well as their members' clients hold differing views.

Resource participants spoke at meetings, but could not dissent from proposals. This model was effective in efficiently bringing important information to the Committee that could immediately be incorporated into Committee discussions and decisions.

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