



PDHonline Course G222 (3 PDH)

**EPA's All Appropriate Inquiries Rule –
CERCLA Defense**

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2020

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**Tuesday,
November 1, 2005**

Part III

Environmental Protection Agency

**40 CFR Part 312
Standards and Practices for All
Appropriate Inquiries; Final Rule**

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 312

[SFUND-2004-0001; FRL-7989-7]

RIN 2050-AF04

Standards and Practices for All Appropriate Inquiries

AGENCY: Environmental Protection Agency.

ACTION: Final rule.

SUMMARY: The Environmental Protection Agency (EPA) today is establishing federal standards and practices for conducting all appropriate inquiries as required under sections 101(35)(B)(ii) and (iii) of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA). Today's final rule establishes specific regulatory requirements and standards for conducting all appropriate inquiries into the previous ownership and uses of a property for the purposes of meeting the all appropriate inquiries provisions necessary to qualify for certain landowner liability protections under CERCLA. The standards and practices also will be applicable to persons conducting site characterization and assessments with the use of grants awarded under CERCLA section 104(k)(2)(B).

DATES: This final rule is effective November 1, 2006.

ADDRESSES: EPA established a docket for this action under Docket ID No. SFUND-2004-0001. All documents in the docket are listed in the EDOCKET index at <http://www.epa.gov/edocket>. Although listed in the index, some information is not publicly available, i.e., information labeled Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available either electronically in EDOCKET or in hard copy at the EPA Docket Center, EPA West Building, Room B102, 1301 Constitution Ave., NW., Washington, DC. This docket facility is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding Federal holidays. The telephone number for the Public Reading Room is (202) 566-1744, and the telephone number for the OSWER Docket is (202) 566-0276.

FOR FURTHER INFORMATION CONTACT: For further information on specific aspects

of today's rule, contact Patricia Overmeyer of EPA's Office of Brownfields Cleanup and Redevelopment at (202) 566-2774 or at overmeyer.patricia@epa.gov. Mail inquiries may be directed to the Office of Brownfields Cleanup and Redevelopment (5105T), 1200 Pennsylvania Ave. NW., Washington, DC 20460.

SUPPLEMENTARY INFORMATION:

I. General Information

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

This regulation may affect most directly those persons and businesses purchasing commercial property or any property that will be used for commercial or public purposes and who may, after purchasing the property, seek to claim protection from CERCLA liability for releases or threatened releases of hazardous substances. Under section 101(35)(B) of CERCLA, as amended by the Small Business Liability Relief and Brownfields Revitalization Act (Pub. L. 107-118, 115 stat. 2356, "the Brownfields Amendments") such persons and businesses are required to conduct all appropriate inquiries prior to or on the date on which the property is acquired. Prospective landowners who do not conduct all appropriate inquiries prior to or on the date of obtaining ownership of the property may lose their ability to claim protection from CERCLA liability as an innocent landowner, bona fide prospective purchaser, or contiguous property owner.

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

eligible brownfields grantees, must conduct all appropriate inquiries prior to or on the date of acquiring a property.

The background document, "Economic Impacts Analysis for the Proposed All Appropriate Inquiries Final Regulation" and the Addendum to this document provide a comprehensive analysis of all potentially impacted entities. These documents are available in the docket established for today's rule. A summary of potentially affected businesses is provided in the table below.

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

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

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

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

documents may be viewed at the EPA Docket Center, EPA West, Room B102, 1301 Constitution Avenue, NW., Washington, DC. The EPA Docket Center Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding Federal holidays. The telephone number for the Public Reading Room is (202) 566-1744, and the telephone number for the OSWER Docket is (202) 566-0276.

2. *Electronic Access.* You may access this **Federal Register** document electronically through the EPA Internet under the "**Federal Register**" listings at <http://www.epa.gov/fedrgstr>.

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

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

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I. Statutory Authority

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

II. Background

A. What is the Intent of Today's Rule?

On August 26, 2004, EPA published a notice of proposed rulemaking outlining proposed standards and practices for the conduct of "all appropriate inquiries." This regulatory action was initiated in response to legislative amendments to the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA). On January 11, 2002, President Bush signed the Small Business Liability Relief and Brownfields Revitalization Act (Pub. L. 107-118, 115 Stat. 2356, "the Brownfields Amendments"). The Brownfields Amendments amend CERCLA by providing funds to assess and clean up brownfields sites, clarifying CERCLA liability provisions for certain landowners, and providing funding to enhance state and tribal cleanup programs. The intent of today's rule is to finalize regulations setting federal standards and practices for the conduct of all appropriate inquiries, a key provision of the Brownfields Amendments. Subtitle B of Title II of the Brownfields Amendments revises CERCLA section 101(35), clarifying the requirements necessary to establish the innocent landowner defense. In addition, the Brownfields Amendments add protections from CERCLA liability for bona fide prospective purchasers and contiguous property owners who meet certain statutory requirements.

Each of the CERCLA liability provisions for innocent landowners, bona fide prospective purchasers, and contiguous property owners, requires that, among other requirements, persons claiming the liability protections conduct all appropriate inquiries into prior ownership and use of a property prior to or on the date a person acquires a property. The law requires EPA to develop regulations establishing standards and practices for how to conduct all appropriate inquiries. Congress included in the Brownfields Amendments a list of criteria that the Agency must address in the regulations establishing standards and practices for conducting all appropriate inquiries

section 101(35)(2)(B)(ii) and (iii). The Brownfields Amendments also require that parties receiving a federal brownfields grant awarded under CERCLA section 104(k)(2)(B) to conduct site characterizations and assessments must conduct these activities in accordance with the standards and practices for all appropriate inquiries.

The regulations established today only address the all appropriate inquiries provisions of CERCLA sections 101(35)(B)(i)(I) and 101(35)(B)(ii) and (iii). Today's rule does not address the requirements of CERCLA section 101(35)(B)(i)(II) for what constitutes "reasonable steps."

B. What is "All Appropriate Inquiries?"

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

Under CERCLA, persons may be held strictly liable for cleaning up hazardous substances at properties that they either currently own or operate or owned or operated at the time of disposal. Strict liability in the context of CERCLA means that a potentially responsible party may be liable for environmental contamination based solely on property ownership and without regard to fault or negligence.

In 1986, the Superfund Amendments and Reauthorization Act (Pub. L. No. 99-499, 100 stat. 1613, "SARA") amended CERCLA by creating an "innocent landowner" defense to CERCLA liability. The new section 101(35)(B) of CERCLA provided a defense to CERCLA liability, for those persons who could demonstrate, among other requirements, that they "did not know and had no reason to know" prior to purchasing a property that any hazardous substance that is the subject of a release or threatened release was disposed of on, in, or at the property. Such persons, to demonstrate that they had "no reason to know" must have undertaken, prior to, or on the date of acquisition of the property, "all appropriate inquiries" into the previous ownership and uses of the property consistent with good commercial or

customary standards and practices. The 2002 Brownfields Amendments added potential liability protections for "contiguous property owners" and "bona fide prospective purchasers" who also must demonstrate they conducted all appropriate inquiries, among other requirements, to benefit from the liability protection.

C. What Were the Previous Standards for All Appropriate Inquiries?

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

In the case of property acquired by a non-governmental entity or non-commercial entity for residential or other similar uses, the current interim standards for all appropriate inquiries may not be applicable. For those cases, the Brownfields Amendments to CERCLA establish that a "facility inspection and title search that reveal no basis for further investigation shall be considered to satisfy the requirements' for all appropriate inquiries. In addition, such properties are not within the scope of today's rule. The interim standards remain in effect only until the effective date of today's rule which promulgates federal regulations establishing standards and practices for conducting all appropriate inquiries.

On May 9, 2003, EPA published a final rule (68 FR 24888) clarifying that for the purposes of achieving the all

appropriate inquiries standards of CERCLA section 101(35)(B), and until the effective date of today's regulation, persons who purchase property on or after May 31, 1997 could use either the procedures provided in ASTM E1527-2000, entitled "Standard Practice for Environmental Site Assessments: Phase I Environmental Site Assessment Process," or the earlier standard cited by Congress in the Brownfields Amendments, ASTM E1527-97.

Today's notice is a final rule and as such replaces the current interim standards for all appropriate inquiries established by Congress in the Brownfields Amendments and clarified by EPA in the May 9, 2003 final rule. Since the Agency is promulgating a final rule establishing federal regulations containing the standards and practices for conducting all appropriate inquiries, the interim standard will no longer be the operative standard for conducting all appropriate inquiries upon November 1, 2006, the effective date of today's rule. Until November 1, 2006, both the standards and practices included in today's final regulation and the current interim standards established by Congress for all appropriate inquiries will be recognized by EPA as satisfying the statutory requirements for the conduct of all appropriate inquiries under section 101(35)(B) of CERCLA.

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

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

prospective purchaser, a property owner must have acquired a property subsequent to any disposal activities involving hazardous substances at the property.

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

EPA notes that, as explained below, persons conducting all appropriate inquiries in compliance with today's final rule are not entitled to the CERCLA liability protections provided for innocent landowners, bona fide prospective purchasers, and contiguous property owners, unless they also comply with all of the continuing obligations established under the statute. As explained below, compliance with today's final rule is only one requirement necessary for CERCLA liability protection. We also note that the requirements of today's rule apply 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.

1. Bona Fide Prospective Purchaser

The Brownfields Amendments added a new bona fide prospective purchaser provision at CERCLA section 107(r). The provision provides protection from CERCLA liability, and limits EPA's recourse for unrecovered response costs to a lien on property for the lesser of the unrecovered response costs or increase in fair market value attributable to

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

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

Persons claiming to be bona fide prospective purchasers should keep in mind that failure to identify an environmental condition or identify a release or threatened release of a hazardous substance on, at, in or to a property during the conduct of all appropriate inquiries does not relieve a landowner from complying with the other post-acquisition statutory requirements for obtaining the liability protections. Landowners must comply with all the statutory requirements to obtain the liability protection. For

example, an inability to identify a release or threatened release during the conduct of all appropriate inquiries does not negate the landowner's responsibilities under the statute to take reasonable steps to stop a release, prevent a threatened release, and prevent exposure to any previous release once any release is identified. Compliance with the other statutory requirements for the bona fide prospective purchaser liability protection is not contingent upon the findings of all appropriate inquiries.

2. Contiguous Property Owner

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

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

The contiguous property owner liability protection "protects parties that

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

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

3. Innocent Landowner

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

- Having no knowledge or reason to know that any hazardous substance which is the subject of a release or threatened release was disposed of on, in, or at the facility;
- Providing full cooperation, assistance and access to persons authorized to conduct response actions at the property;

- Complying with any land use restrictions and not impeding the effectiveness or integrity of any institutional controls;

- Taking reasonable steps to stop continuing releases, prevent any threatened release, and prevent or limit human, environmental, or natural resource exposure to any previously released hazardous substances;

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

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

Like contiguous property owners, innocent landowners must perform all appropriate inquiries prior to or on the date of acquisition of a property and cannot know, or have reason to know, of contamination to qualify for this landowner liability protection. Persons claiming to be innocent landowners also should keep in mind that failure to identify an environmental condition or identify a release or threatened release of a hazardous substance on, at, in or to a property during the conduct of all appropriate inquiries, does not relieve or exempt a landowner from complying with the other statutory requirements for asserting the innocent landowner defense. Landowners must comply with all the statutory requirements to obtain the defense. For example, an inability to identify a release or threatened release during the conduct of all appropriate inquiries does not negate the landowner's responsibilities under the statute to take reasonable steps to stop the release, prevent a threatened release, and prevent exposure to a previous release. Compliance with the other statutory requirements for the innocent landowner defense is not contingent upon the results of an all appropriate inquiries investigation.

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

Congress included in the Brownfields Amendments a list of criteria that the Agency must include in the regulations establishing standards and practices for conducting all appropriate inquiries. In addition to providing these criteria in the statute, Congress instructed EPA to develop regulations establishing standards and practices for conducting all appropriate inquiries in accordance with generally accepted good commercial and customary standards and practices. The criteria are set forth in CERCLA section 101(35)(2)(B)(iii) and include:

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

III. Summary of Comments and Changes From Proposed Rule to Final Rule

EPA received over 400 public comments in response to the August 26, 2004 proposed rule. Comments were received from environmental consultants with experience in performing site assessments, trade

associations, state government agencies, environmental interest groups, and other public interest associations. Commenters generally supported the purpose and goals of the proposed rule. Many commenters complimented the Agency on its decision to develop the proposed rule using the negotiated rulemaking process. However, commenters had differing views on certain aspects of the proposed rule. In particular, the Agency received widely differing views on the proposed definition of "environmental professional." Although many commenters supported the definition as proposed, other commenters raised concerns regarding the stringency of the proposed qualifications. A significant number of commenters applauded the proposed definition of an environmental professional and stated that it may increase the rigor and caliber of environmental site investigations. Commenters who would not qualify as an environmental professional under the proposed definition raised concerns with regard to the specific qualifications proposed.

EPA received a significant number of comments regarding the statutory requirements for qualifying for the CERCLA liability protections. Several commenters also raised concerns with regard to the performance-based approach to the all appropriate inquiries investigation included in the proposed rule. Commenters were concerned that the proposed performance-based approach would make it more difficult to qualify for the CERCLA liability protections than an approach that requires strict adherence to prescriptive data gathering requirements that do not allow for the application of professional judgment. However, the vast majority of commenters who commented on the performance-based nature of the proposed rule supported the proposed approach.

Other commenters raised concerns with regard to the proposed rule's requirements to identify and comment upon the significance of "data gaps" where the lack of information may affect the ability of an environmental professional to render an opinion regarding conditions at a property that are indicative of releases or threatened releases of hazardous substances. Commenters were concerned that if any data gaps exist potential contamination would not be identified, allowing property owners to escape liability for contamination. Other commenters supported the proposed requirement to identify data gaps, or missing information, that may affect the environmental professional's ability to

render an opinion regarding the environmental conditions at a property and comment on their significance in this regard and stated that the requirement would lend credibility to the inquiry's final report.

We received many comments on the proposed provision to compare the purchase price of a property to the fair market value of the property (if the property were not contaminated). One concern raised is that commenters believe that the exact market value of a property is difficult to determine. Some commenters took exception to the fact that EPA did not propose that prospective landowners have to conduct formal real estate appraisals of the property to determine fair market value. Although this provision has been a statutory requirement for the conduct of all appropriate inquiries since 1986, some commenters thought the requirement should not be included within the scope of all appropriate inquiries. Other commenters stated that the environmental professional should not be required to undertake the comparison.

We received some comments on the results of the economic impact analysis that was conducted to assess the potential costs and impacts of the proposed rule. Many commenters generally agreed with the Agency's conclusion that the average incremental cost increase associated with the requirements in the proposed rule over the current industry standard would be minimal. However, some commenters asserted that EPA underestimated the incremental costs associated with the proposed rule. Although a few commenters mentioned particular activities included as requirements in the proposed rule that would increase the burdens and costs associated with conducting all appropriate inquiries, most of these commenters did not provide specific reasons for claimed cost increases over baseline activities. Some commenters simply stated that the proposed requirements would result in an increase in the price of phase I environmental site assessments. We provide a summary of the comments received on the economic impact analysis for the proposed rule, our responses to issues raised by commenters, and the results of some additional analyses conducted based on some of the issues raised, in an addendum to the economic impact analysis, which is provided in the docket for today's final rule.

In section IV of this preamble, we discuss the requirements of the final rule, including a summary of the provisions included in the August 26,

2004 proposed rule, the significant comments raised in response to the proposed provisions, and a summary of our rationale for the final rule requirements. Generally, the final rule closely resembles the provisions included in the proposed rule. We adopted relatively minor changes in response to public comments. For example, we received a number of comments urging EPA to modify the proposed definition of environmental professional to allow individuals who have significant experience in conducting environmental site assessments, but do not have a Baccalaureate degree, to qualify as environmental professionals. We were convinced by the arguments presented in many of these public comments. Therefore, the definition of an environmental professional included in today's final rule allows individuals with ten years of relevant full time experience to qualify as an environmental professional for the purpose of overseeing and performing all appropriate inquiries.

With respect to the proposed requirements governing the use of previously-conducted environmental site assessments for a particular property, we agreed with commenters who pointed out the proposed rule was unclear. In today's final rule, we modify the proposed rule language to allow for the use of information contained in previously-conducted assessments, even if the information was collected more than a year prior to the date on which the subject property is acquired. The final rule does require that all aspects of a site assessment, or all appropriate inquiries investigation, completed more than one year prior to the date of acquisition of the subject property be updated to reflect current conditions and current property-specific information. In the case of all appropriate inquiries investigations completed less than one year prior to the date of acquisition of the subject property but more than 180 days before the acquisition date, the final rule retains the requirements of the proposed rule that only certain aspects of the all appropriate inquiries must be updated.

In the case of the requirement to search for institutional controls that was included in the proposed requirements to review federal, state, tribal and local government records, we agreed with commenters who pointed out that searching for institutional controls associated with properties located within a half mile of the subject property is overly burdensome and without sufficient benefit to the purpose of the investigation. The final rule

requires that the search for institutional controls be confined to the subject property only.

We adopted one other change in the final rule, based upon public comments. In the proposed rule, we delineated responsibilities for particular aspects of the all appropriate inquiries investigation between the environmental professional and the prospective landowner of the subject property (or grantee). We defined the inquiry of the environmental professional to include: interviews with past and present owners, operators and occupants; reviews of historical sources of information; reviews of federal state tribal and local government records; visual inspections of the facility and adjoining property; commonly known or reasonably ascertainable information; and 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 also defined "additional inquiries" that must be conducted by the prospective landowner or grantee (or an individual on the prospective landowner's or grantee's behalf). These "additional inquiries" include: specialized knowledge or experience of the prospective landowner (or grantee); the relationship of the purchase price to the fair market value of the property, if the property was not contaminated; and commonly known or reasonably ascertainable information. The requirement to search for environmental cleanup liens was proposed to be the responsibility of the prospective landowner (or grantee), if the search is not conducted by the environmental professional. The proposed rule required the prospective landowner (or grantee) to provide all information collected as part of the "additional inquiries" to the environmental professional.

The final rule retains the proposed delineation of responsibilities. However, based upon the input provided in public comments, the final rule does not require the prospective landowner (or grantee) to provide the information collected as part of the "additional inquiries" to the environmental professional. Although we continue to believe that the information collected or held by the prospective landowner (or grantee) should be provided to the environmental professional overseeing the other aspects of the all appropriate inquiries, we agree with commenters who asserted that prospective landowners and grantees should not be required to provide this information to the environmental professional.

Commenters argued that property owners (and grantees) may want to hold some information (e.g., the purchase price of the property) confidential. CERCLA liability rests with the owner or operator of a property and not with an environmental professional hired by the prospective landowner and who is not involved with the ownership or operation of the property. Since it ultimately is up to the owner or operator of a property to defend his or herself against any claims to liability, we agree with commenters that asserted that the regulations should not require that prospective landowners (or grantees) provide information collected to comply with the "additional inquiries" provisions to the environmental professional. Should the required information not be provided to the environmental professional, the environmental professional should assess the impact that the lack of such information may have on his or her ability to render an opinion with regard to conditions indicative of releases or threatened releases of hazardous substances on, at, in or to the property. If the lack of information does impact the ability of the environmental professional to render an opinion with regard to the environmental conditions of the property, the environmental professional should note the missing information as a data gap in the written report. We discuss each of the requirements of the final rule in Section IV of this preamble.

IV. Detailed Description of Today's Rule

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

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

In the case of persons claiming one of the CERCLA landowner liability protections, the scope of today's rule includes the conduct of all appropriate inquiries for the purpose of identifying releases and threatened releases of hazardous substances on, at, in or to the property that would be the subject of a

response action for which a liability protection would be needed and such a property is owned by the person asserting protection from liability. CERCLA liability is limited to releases and threatened releases of hazardous substances which cause the incurrence of response costs. Therefore, in the case of all appropriate inquiries conducted for the purpose of qualifying for protection from CERCLA liability (CERCLA section 107), the scope of the inquiries is to identify releases and threatened releases of hazardous substances which cause or threaten to cause the incurrence of response costs.

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

The scope of today's rule does not include property purchased by a non-governmental entity or non-commercial entity for "residential use or other similar uses * * * [where] a facility inspection and title search * * * reveal no basis for further investigation." (Pub. L. 107-118 § 223). CERCLA section

101(35)(B)(v) states that in those cases, title search and facility inspection that shall not be a basis for further investigation shall satisfy the requirements for all appropriate inquiries.

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

B. To Whom Is the Rule Applicable?

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

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

The final rule does not include any new reporting or disclosure obligations. 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. Today's rule contains no new requirements to notify or submit information to EPA or any other government entity.

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.

D. What Are the Final Documentation Requirements?

The proposed rule required that the environmental professional, on behalf of the property owner, document the results of the all appropriate inquiries in a written report. As explained in the preamble to the proposed rule, the property owner could use this report to document the results of the inquiries. Such a report can be similar in nature to the type of report previously provided under generally accepted commercial practices. We proposed no requirements regarding the length, structure, or specific format of the written report. In addition, the proposed rule did 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.

Today's final rule retains the requirements, as proposed, for documenting the results of the all appropriate inquiries investigation conducted under the supervision or responsible charge of an environmental professional. As noted above, the primary purpose of the documentation requirement is to enhance the inquiry of the environmental professional by requiring that the environmental professional record the results of the inquiries and his or her conclusions. The written report may allow any person claiming one of the CERCLA landowner liability protections to offer documentation in support of his or her claim that all appropriate inquiries were conducted in compliance with the federal regulations.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

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.

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.

Several commenters raised issues with regard to the proposed requirement that the environmental professional document and comment on the significance of 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. Some commenters stated that the need to identify data gaps will make it difficult to determine when an all appropriate inquiries investigation is complete and therefore the requirement would act as a disincentive to the development of potentially contaminated properties. Other commenters asserted that the fact that the regulations recognize data gaps creates a loophole that would result in property owners claiming to be protected from CERCLA liability after conducting an incomplete investigation that includes significant data gaps. These commenters raised concerns that CERCLA liability protection could be claimed by property owners simply because they conducted an all appropriate inquiries investigation, even in those cases where releases on, at, in, or to the property were missed during the investigation. Other commenters stated their support for the requirements to document data gaps, as proposed. A summary of EPA's response to these comments and the requirements for documenting data gaps included in the final rule is provided below in Section IV.N.

The final rule, at § 312.21(d), retains the proposed requirement that the environmental professional who conducts or oversees the all appropriate inquiries sign the written report. There are two purposes for the requirement to include a signature in the report. First, the individual signing the report must declare, on the signature page, that he or she meets the definition of an

environmental professional, as provided in § 312.10. In addition, the rule requires that the environmental professional 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.

Some commenters raised concerns about whether the proposed rule would require the environmental professional to certify the all appropriate inquiries report and its findings. Today's final rule does not require the environmental professional to "certify" the results of the all appropriate inquiries when signing the report. The two statements or declarations mentioned above and required to be included in the final written report documenting the conduct of all appropriate inquiries are meant to document that an individual meeting the qualifications of an environmental professional was involved in the conduct of the all appropriate inquiries and that the activities performed by, or under the supervision or responsible charge of, the environmental professional were performed in conformance with the regulations. Reports signed by individuals holding a Professional Engineer (P.E.) or Professional Geologist (P.G.) license, need not include the individual's professional seal.

A few commenters requested that EPA include specific requirements for the content of a final report in the final rule. 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 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.

E. What Are the Qualifications for an Environmental Professional?

Proposed Rule

In the Brownfields Amendments, Congress required that all appropriate inquiries include "the results of an inquiry by an environmental professional" (CERCLA section 101(35)(B)(iii)(I)). The proposed rule included minimal qualifications for persons managing or overseeing all appropriate inquiries. The intent of setting minimum professional qualifications, is to ensure that all inquiries are conducted at a high level of professional ability and ensure the overall quality of both the inquiries conducted and the conclusions or opinions rendered with regard to conditions indicative of the presence of a release or threatened release on, at, in, or to a property, based upon the results of all inquiries. The proposed rule required that an environmental professional conducting or overseeing all appropriate inquiries possess sufficient specific education, training, and experience necessary to exercise professional judgment to develop opinions and conclusions regarding the presence of releases or threatened releases of hazardous substances to the surface or subsurface of a property. In addition, the proposed rule included minimum qualifications, including minimum levels of education and experience, that characterize the type of professional who is best qualified to oversee and direct the development of comprehensive inquiries and provide the landowner with sound conclusions and opinions regarding the potential for releases or threatened releases to be present at the property. The proposed rule allowed for individuals not meeting the proposed definition of an environmental professional to contribute to and participate in the all appropriate inquiries on the condition that such individuals are conducting inquiries activities under the supervision or responsible charge of an individual that meets the regulatory definition of an environmental professional.

The proposed rule required that the final review of the all appropriate inquiries and the conclusions that follow from the inquiries rest with an individual who qualifies as an environmental professional, as defined in proposed section § 312.10 of the proposed rule. The proposed rule also required that in signing the report, the environmental professional must document that he or she meets the definition of an "environmental

professional" included in the regulations.

The proposed definition first and foremost required that, to qualify as an environmental professional, a person must "possess sufficient specific education, training, and experience necessary to exercise professional judgment to develop opinions and conclusions regarding the presence of releases or threatened releases * * * to the surface or subsurface of a property, sufficient to meet the objectives and performance factors" that are provided in the proposed regulation. The proposed definition of an environmental professional included individuals who possess the following combinations of education and experience.

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

Public Comments

We received a significant number of public comments on the proposed definition of environmental professional. Many commenters supported the definition of environmental professional as proposed. However, a significant number of commenters raised concerns with regard to the proposed educational requirements. Commenters pointed out that the proposed minimum qualifications for an environmental professional did not allow for individuals with many years of relevant experience in conducting environmental site assessments to qualify as environmental professionals, if such individuals do not have college degrees. The proposed rule only allowed for persons with a Baccalaureate degree or higher in specific disciplines of science and engineering, and a specific number of years of experience, to qualify as an

environmental professional, unless an individual was otherwise licensed as an environmental professional by a state, tribe or the federal government. Some commenters questioned the Agency's reasoning for restricting the degree requirements to only certain types of science or engineering. Commenters requested that EPA provide more specific definitions of the types of science and engineering degrees that would be necessary to qualify as an environmental professional.

Commenters also asserted that the proposed "grandfather clause" allowing for individuals having a Baccalaureate degree (or higher) and who accumulated ten years of full time relevant experience on or before the promulgation date of the final rule to qualify as an environmental professional was too stringent and provided too small of a window of opportunity for individuals not otherwise meeting the proposed definition of environmental professional to qualify.

Some commenters stated that the definition of environmental professional should not be restricted to those individuals licensed as P.E.s or P.G.s. A few commenters stated that a licensed professional is no more qualified to perform all appropriate inquiries investigations than other individuals with a significant number of years of experience in conducting such activities. Other commenters asserted that only licensed P.E.s and P.G.s are qualified to supervise all appropriate inquiries activities.

EPA also received comments from independent professional certification organizations and members of these organizations, including the Academy of Certified Hazardous Materials Managers, requesting that their organizations' certification programs be named in the regulatory definition of an environmental professional.

Final Rule

After careful consideration of the issues raised by commenters regarding the proposed definition of environmental professional, we made a few modifications to the proposed definition to reduce the potential burden that the proposed definition may have placed upon individuals who have significant experience in conducting environmental site assessments but do not meet the proposed educational, or college degree, requirements. We agree with those commenters who asserted that individuals with a significant number of years of experience in performing environmental site assessments, or all appropriate inquiries

investigations, should qualify as environmental professionals for the purpose of conducting all appropriate inquiries, even in cases where such individuals do not have a college degree. Therefore, in the final rule, persons with ten or more years of full-time relevant experience in conducting environmental site assessments and related activities may qualify as environmental professionals, without having received a college degree.

In addition, we agreed with commenters who pointed out that the requirement that environmental professionals hold specific types of science or engineering degrees was too limiting. In the final rule, persons with any science or engineering degree (regardless of specific discipline in science or engineering) can qualify as an environmental professional, if they also meet the other required qualifications, including the requirement to have five (5) years of full-time relevant experience.

We also agree with commenters who asserted that the proposed grandfather clause was too restrictive. As mentioned above, we agree with commenters who pointed out that individuals with a significant number of years of experience in conducting environmental site assessments or all appropriate inquiries investigations should be able to qualify as environmental professionals, for the purpose of carrying out the provisions of today's rulemaking. In addition, we agree with commenters who stated that the ability for experienced professionals to qualify as an environmental professional should not be limited to those who meet the threshold qualifications on the effective date of the final rule. Therefore, the proposed grandfather clause is not included within the definition of environmental professional in the final rule. As explained above, in today's final rule, individuals with ten or more years of full-time relevant experience in conducting environmental site assessments and related investigations will qualify as environmental professionals for the purposes of this rulemaking.

The final rule retains the provision recognizing as environmental professionals those individuals who are licensed by any tribal or state government as a P.E. or P.G., and have three years of full-time relevant experience in conducting all appropriate inquiries. We continue to contend that such individuals have sufficient specific education, training, and experience necessary to exercise professional judgment to develop opinions and conclusions regarding

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

Although the final rule recognizes tribal and state-licensed P.E. and P.G.s and other such government licensed environmental professionals with three years of experience to be environmental professionals, the rule does not restrict the definition of an environmental professional to these licensed individuals. The definition of an

environmental professional also includes individuals who hold a Baccalaureate or higher degree from an accredited institution of higher education in engineering or science and have the equivalent of five (5) years of full-time relevant experience in conducting environmental site assessments, or all appropriate inquiries. In addition, individuals with ten years of full-time relevant experience in conducting environmental site assessments, or all appropriate inquiries qualify as environmental professionals for the purpose of conducting all appropriate inquiries. Individuals with these qualifications most likely will possess sufficient specific education, training, and experience necessary to exercise professional judgment to develop opinions and conclusions regarding conditions indicative of releases or threatened releases on, at, in, or to a property, sufficient to meet the objectives and performance factors included in § 312.20(e) and (f).

In addition to the qualifications for environmental professionals mentioned above, EPA is retaining the proposed provision to include within the definition of an environmental professional individuals who are licensed to perform environmental site assessments or all appropriate inquiries by the Federal government (e.g., the Bureau of Indian Affairs) or under a state or tribal certification program, provided that these individuals also have three years of full-time relevant experience. We contend that individuals licensed by state and tribal governments, or by any department or agency within the federal government, to perform all appropriate inquiries or environmental site assessments, should be allowed to qualify as an environmental professional under today's regulation. State and tribal agencies may best determine the qualifications defining individuals who "possess sufficient specific education, training, and experience necessary to exercise professional judgment to develop opinions and conclusions regarding conditions indicative of releases or threatened releases on, at, in, or to a property, sufficient to meet the rule's objectives and performance factors" within any particular state or tribal jurisdiction.

In response to requests from members of independent certification organizations that EPA recognize in the regulation those organizations whose certification requirements meet the environmental professional qualifications included in the final rule, we point out that today's final rule does

not reference any private party professional certification standards. Such an approach would require that EPA review the certification requirements of each organization to determine whether or not each organization's certification requirements meet or exceed the regulatory qualifications for an environmental professional. Given that there may be many such organizations and given that each organization may review and change its certification qualifications on a frequent or periodic basis, we conclude that such an undertaking is not practicable. EPA does not have the necessary resources to review the procedures of each private certification organization and review and approve each organization's certification qualifications. Therefore, the final rule includes within the regulatory definition of an environmental professional, general performance-based standards or qualifications for determining who may meet the definition of an environmental professional for the purposes of conducting all appropriate inquiries. These standards include education and experience qualifications, as summarized below. The final rule does not recognize, or reference, any private organization's certification program within the context of the regulatory language. However, the Agency notes that any individual with a certification from a private certification organization where the organization's certification qualifications include the same or more stringent education and experience requirements as those included in today's final regulation will meet the definition of an environmental professional for the purposes of this regulation.

Based upon the input received from the public commenters, EPA determined that the definition of environmental professional included in today's final rule establishes a balance between the merits of setting a high standard of excellence for the conduct of all appropriate inquiries through the establishment of stringent qualifications for environmental professionals and the need to ensure that experienced and highly competent individuals currently conducting all appropriate inquiries are not displaced.

Summary of Final Rule's Definition of Environmental Professional

In summary, the definition of environmental professional included in today's final rule includes individuals who possess the following qualifications:

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

The definition of "relevant experience" is "participation in the performance of environmental site assessments that may include environmental analyses, investigations, and remediation which involve the understanding of surface and subsurface environmental conditions and the processes used to evaluate these conditions and for which professional judgment was used to develop opinions regarding conditions indicative of releases or threatened releases * * * to the subject property."

The final rule retains the proposed requirement that environmental professionals remain current in their field by participating in continuing education or other activities and be able to demonstrate such efforts.

The final rule also retains the allowance for individuals not meeting the definition of an environmental professional to contribute to and participate in the all appropriate inquiries on the condition that such individuals are conducting inquiries activities under the supervision or responsible charge of an individual that meets the regulatory definition of an environmental professional. This provision allows for a team of individuals working for the same firm or organization (e.g., individuals working for the same government agency) to share the workload for conducting all appropriate inquiries for a single property, provided that one member of the team meets the definition of an environmental professional and reviews the results and conclusions of the inquiries and signs the final report.

The final rule requires that the final review of the all appropriate inquiries and the conclusions that follow from the inquiries rest with an individual who qualifies as an environmental professional, as defined in § 312.10. The final rule also requires that in signing

the report, the environmental professional must document that he or she meets the definition of an "environmental professional" included in the regulations.

F. References

Proposed Rule

In the proposed rule, the Agency reserved a reference section and stated in the preamble that we may include references to applicable voluntary consensus standards developed by standards' developing organizations that are not inconsistent with the final regulatory requirements for all appropriate inquiries or otherwise impractical. The Agency requested comments regarding available commercially accepted voluntary consensus standards that may be applicable to and compliant with the proposed federal standards for all appropriate inquiries.

Section 12(d) of the National Technology Transfer and Advancement Act of 1995 ("NTTAA"), Public Law 104-113, section 12(d) (15 U.S.C. 272 note), directs agencies to use technical standards that are developed or adopted by voluntary consensus standards bodies, unless their use would be inconsistent with applicable law or otherwise impractical. Voluntary consensus standards are technical standards (e.g., materials specifications, test methods, sampling procedures, and business practices) that are developed or adopted by voluntary consensus standards bodies. When developing the proposed rule, EPA considered using an existing voluntary consensus standard developed by ASTM International as the federal standard for all appropriate inquiries. This standard is known as the ASTM E1527-2000 standard (entitled "Standard Practice for Environmental Site Assessments: Phase I Environmental Site Assessment Process"). In the preamble to the proposed rule, we acknowledged the prevalent use of the ASTM E1527-2000 standard and the fact that it generally is recognized as good and customary commercial practice. However, when we proposed the federal standards for all appropriate inquiries, EPA determined that the ASTM E1527-2000 standard is inconsistent with applicable law. As a result, EPA chose not to reference the ASTM E1527-2000 standard because it was inconsistent with applicable law.

Public Comments

We received relatively few comments citing available and applicable voluntary consensus standards for

conducting all appropriate inquiries. Several commenters did argue that the interim standard cited in the statute, the ASTM E1527-97 Environmental Site Assessments: Phase I Environmental Site Assessment Process, or the updated ASTM E1527-2000, is sufficient to meet the statutory criteria. A few commenters stated a preference for the ASTM E1527-2000 standard over the requirements included in the proposed rule. ASTM International is a standards development organization whose committees develop voluntary consensus standards for a variety of materials, products, systems and services. ASTM International is the only standards development organization that submitted a comment requesting that the Agency consider its standard, the ASTM E1527-2000 Standard Practice for Environmental Site Assessments: Phase I Environmental Site Assessment Process, as an equivalent standard to the federal regulations.

Final Rule

Since publication of the proposed rule, ASTM International and its E50 committee, the committee responsible for the development of the ASTM E1527-2000 Phase I Environmental Site Assessment Process, has reviewed and updated the "2000" version of the E1527 standard to address EPA's concerns regarding the differences between the ASTM E1527-2000 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.

In today's 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") and recognizing the E1527-05 standard as consistent with today's final rule. The Agency determined that this voluntary consensus standard is consistent with today's final rule and is compliant with the statutory criteria for all appropriate inquiries. Persons conducting all appropriate inquiries may use the procedures included in the ASTM E1527-05 standard to comply with today's final rule.

It is the Agency's intent to allow for the use of applicable and compliant voluntary consensus standards when possible to facilitate implementation of the final regulations and avoid disruption to parties using voluntary

consensus standards that are found to be fully compliant with the federal regulations.

G. What Is Included in "All Appropriate Inquiries?"

Proposed Rule

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

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

Public Comments

We received a few comments addressing the statutory criteria and the

inclusion of certain particular criteria within the scope of the proposed rule. Some commenters requested that EPA not include in the final rule the criterion to consider the relationship of the purchase price of the property to the fair market value of the property, if the property is not contaminated. In addition, a few commenters stated the final rule should not include within the scope of the all appropriate inquiries the specialized knowledge or experience on the part of the prospective landowner.

The Agency notes that both criteria that commenters requested be removed from the scope of the all appropriate inquiries regulations are criteria specifically required by Congress to be included in the regulations. In addition, both criteria have been part of the all appropriate inquiries provisions under the CERCLA innocent landowner defense since 1986. The proposed rule included no changes from the previous statutory provisions.

Final Rule

The final rule retains provisions addressing each of the statutory criteria for the conduct of all appropriate inquiries included in CERCLA section 101(35)(B)(iii).

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

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

Proposed Rule

The proposed rule required that many, but not all, of the inquiries activities be conducted by, or under the supervision or responsible charge of, an individual meeting the qualifications of the proposed definition of an environmental professional. The proposed rule also provided that several of the activities included in the inquiries could be conducted either by the prospective landowner or grantee, and not have to be conducted under the supervision or responsible charge of the environmental professional. The proposed rule required that the results of all activities conducted by the prospective landowner or grantee, and not conducted by or under the

supervision or responsible charge of the environmental professional, be provided to the environmental professional to ensure that such information could be fully considered when the environmental professional develops an opinion, based on the inquiry activities, as to whether conditions at the property are indicative of a release or threatened release of a hazardous substance (or other contaminant) on, at, in, or to the property.

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

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

The proposed rule required that all other required inquiries and activities, beyond those listed above to be conducted by, or under the supervision or responsible charge of, an environmental professional.

Public Comments

Several commenters asserted that the mandatory nature of the proposed provision requiring the prospective landowner to provide information regarding the four criteria listed above to the environmental professional is problematic. Particularly with regard to the requirement to provide “specialized knowledge or experience of the defendant,” commenters pointed out difficulties in a prospective landowner being able to document such knowledge and experience sufficiently. Also, with regard to the information related to the “relationship of the purchase price to the fair market value of the property, if the property was not contaminated,” many commenters pointed out that prospective landowners may not want to divulge information regarding the price paid for a property. Commenters pointed out that the requirement to

consider “commonly known or reasonably ascertainable information” about a property is implicit to all aspects of the all appropriate inquiries requirements. In addition, commenters stated that CERCLA liability lies solely with the owners and operators of a vessel or property. A decision on the part of a prospective landowner to not furnish an environmental professional with certain information related to any of the statutory criteria can only affect the property owner’s ability to claim a liability protection provided under the statute. In addition, the statute does not mandate that information deemed to be the responsibility of the prospective landowner and not part of the “inquiry of the environment professional” be provided to the environmental professional or even be part of the inquiry of the environmental professional. Some of the statutory criteria are inherently the responsibility of the prospective landowner.

Final Rule

We agree with the commenters who asserted that the results and information related to the criteria identified as being the responsibility of the prospective landowner should not, as a matter of law, have to be provided to the environmental professional. The statute does not mandate that a prospective landowner provide all information to an environmental professional. Given that the burden of potential CERCLA liability ultimately falls upon the property owner or operator, a prospective landowner’s decision not to provide the results of an inquiry or related information to an environmental professional he or she hired to undertake other aspects of the all appropriate inquiries investigation can only affect the liability of the property owner. In addition, we believe that the environmental professional may be able to develop an opinion with regard to conditions indicative of releases or threatened releases on, at, in, or to a property based upon the results of the criteria identified to be part of the “inquiry of an environmental professional.” Any information not furnished to the environmental professional by the prospective landowner that may affect the environmental professional’s ability to render such an opinion may be identified by the environmental professional as a “data gap.” The provisions of the final rule (as did the proposed rule) then require that the environmental professional comment on the significance of the data gap or missing information on his or her ability to render such an opinion, in light of all

other information collected and all other data sources consulted.

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 information associated with such inquiries [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.

I. When Must All Appropriate Inquiries Be Conducted?

CERCLA section 101(40)(B)(i), as amended, requires bona fide prospective purchasers to conduct all appropriate inquiries into "previous ownerships and uses of the facility." In the case of contiguous property owners, CERCLA section 107(q)(1)(A)(viii) requires that a person claiming to be a contiguous property owner conduct all appropriate inquiries "at the time at which the person acquired the property." In the case of innocent landowners, section 101(35)(B)(i)(I) of CERCLA requires that the property owner conduct all appropriate inquiries "on or before the date on which the defendant acquired the facility."

Proposed Rule

Other than to specify that all appropriate inquiries must be conducted on or prior to the date a person acquires a property, the statute is silent regarding how close to the actual date of acquisition the inquiries must be completed. The proposed rule required that all appropriate inquiries be conducted or updated within one year

prior to taking title to a property. The proposed rule provided that prospective landowners could use information collected as part of previous inquiries for the same property, if the inquiries were completed or updated within one year prior to the date the property is acquired. The proposed rule required that certain information collected as part of a previous all appropriate inquiries be updated if it was collected more than 180 days prior to the date a person purchased the property. In addition, in the preamble to the proposed rule, Agency defined the date of acquisition of a property as the date on which the prospective landowner acquires title to the property.

Public Comments

Commenters generally agreed with the proposed provision to define the date of acquisition of a property as the date on which a person acquires title to the property. A few commenters stated that the requirement for an all appropriate inquiries investigation to be completed within a year of the date of acquisition of the property is too stringent and may not allow sufficient time for some property transactions to be completed. Some commenters also asserted that the proposed requirement to update certain aspects of the all appropriate inquiries investigation, if the investigation was conducted more than 180 days prior to the date of the acquisition of the property was too stringent.

Final Rule

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 person received title to the property. As explained in the preamble to the proposed rule, the Agency considered other dates, such as the date a prospective landowner signs a purchase or sale agreement. However, it could be burdensome to require a prospective landowner to have completed the all appropriate inquiries prior to having an agreement with a seller to complete a sales transaction. In fact, the time period between the date on which a sales agreement is signed and the date on which the title to the property is actually transferred to the prospective landowner may be the most convenient time for the prospective landowner to obtain access to the property and undertake the all appropriate inquiries. In addition, requiring that all appropriate inquiries be completed on some date prior to the date of title transfer could result in requiring prospective landowners to undertake all

appropriate inquiries so early in the property acquisition process as to require the inquiries to be completed prior to the prospective landowner making a final decision on whether to actually acquire the property.

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 prospective landowner acquiring the property. Today's final rule includes regulatory language at § 312.20(a) clarifying that all appropriate inquiries must be conducted within one year prior to the date on which a person acquires a property.

All appropriate inquiries may include information collected for previous inquiries that were conducted or updated within one year prior to the acquisition date of the property. In addition, as explained in more detail below, the final rule retains the requirement that several of the components of the inquiries be updated within 180 days prior to the date the property is purchased. Today's final rule includes a definition of the "date of acquisition," or purchase date, of a property (i.e., the date the landowner obtains title to the property).

Although commenters may be correct in their assertions that some property transactions may take more than a year to close, we continue to believe that it is important for the all appropriate inquiries investigation to be completed within one year prior to the date the property is acquired. 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 prior 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 for the all appropriate inquiries to be complete. 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 occur during the course of a year. In addition, depending upon the 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. Therefore, today's 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, be updated in their entirety. As summarized below, 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 was updated within a year and includes any changes that may have occurred during the interim.

J. Can a Prospective Landowner Use Information Collected for Previous Inquiries Completed for the Same Property?

Proposed Rule

The proposed rule allowed parties conducting all appropriate inquiries to use the results of and information from previous inquiries completed for the same property, under certain conditions. First, the previous inquiries must have been conducted in compliance with the proposed rule and with CERCLA sections 101(35)(B), 101(40)(B) and 107(q)(A)(viii). In addition, the information in the previous inquiries must have been collected or updated within one year prior to the date of acquisition of the property. Certain types of information collected more than 180 days prior to the current date of acquisition must be updated for the current all appropriate inquiries. Also, the information required under some specific criterion (e.g., relationship of purchase price to property value, specialized knowledge on part of defendant) must be collected specifically for the current transaction.

Public Comments

A significant number of commenters pointed out that the regulatory language in proposed § 312.20(b)(1) of the proposed rule precludes the use of information contained in assessments or the results of all appropriate inquiries conducted more than a year prior to the date of acquisition of a property. Commenters pointed out that since the language in the proposed rule stated that previously collected information had to have been collected "in compliance with the requirements of * * * 40 CFR Part 312," any information included in all appropriate inquiries reports completed prior to the promulgation of the final rule could not be used, since compliance with the

regulation could not be achieved prior to its publication.

Final Rule

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.

The final rule continues to recognize that there is value in using previously collected information when such information was collected in accordance with the statutory provisions and good customary business practices, particularly when the use of such previously-collected information will reduce the need to undertake duplicative efforts.

The final rule also 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 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.

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 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);

- 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); and

- Commonly known or reasonably ascertainable information about the property.

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

Proposed Rule

The proposed rule allowed for all appropriate inquiries to be conducted by one party and transferred to another party, provided that certain conditions are met. Under certain circumstances, the prospective landowner, or a grantee, may use a report of all appropriate inquiries conducted for the property by or for another party, including the seller of the property or another party. For example, there are situations where the federal government or a state government agency may conduct the all appropriate inquiries on behalf of the local government for a property being purchased by a local government, such as the “targeted brownfields assessments” conducted on behalf of local governments by EPA. This situation also may occur when a state government covers the cost of the all appropriate inquiries for a property owned by a local government or actually conducts the all appropriate inquiries itself when the local government does not have access to appropriate staff or capital resources. A local government may conduct all appropriate inquiries for a third party in its community, such as a private prospective landowner. In addition, local redevelopment agencies may locate a contaminated property, conduct all appropriate inquiries, acquire the property, and then sell the property to a private developer.

The proposed rule allowed for a person acquiring a property, or a grantee, to use the results of an all appropriate inquiries report conducted by or for another party, if the report meets the proposed rule’s objectives and performance factors and the person who is seeking to use the previously-collected information or report reviews all information collected and updates the contents of the report as required by § 312.20(c) and necessary to accurately reflect current conditions at the property. In addition, the proposed rule required that the prospective landowner, or grantee, update the inquiries and the report to include any commonly known and reasonably ascertainable information, relevant specialized knowledge held by the

prospective landowner and the environmental professional, and the relationship of the purchase price to the value of the property, if it were not contaminated.

Public Comments

Commenters generally supported the proposed provision allowing for all appropriate inquiries investigations conducted by or for one party to be used by another party.

Final Rule

For the reasons discussed in the preamble to the proposed rule and summarized above, the final rule retains the provision allowing that all appropriate inquiries investigations may be conducted by or for one party and used by another party. In all cases, the all appropriate inquiries investigation must be updated to include commonly known and reasonably ascertainable information and any relevant specialized knowledge held by the prospective landowner and environmental professional. In addition, the evaluation of the relationship between the purchase price and the fair market value of the property must reflect the current sale of the property. In all other aspects of the investigation, the all appropriate inquiries must be in compliance with the provisions of the final regulation.

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

Proposed Rule

As explained in the preamble to the proposed rule, when developing the proposed standards, EPA and the Negotiated Rulemaking Committee structured the proposal around the statutory criteria established by Congress in section 101(35)(B)(iii) of CERCLA. As development of the proposed rule progressed, it became apparent that the purposes and objectives for the individual criterion and the types of information that must be collected to meet the objectives of each criterion often overlapped. For example, in developing standards addressing the criterion requiring a review of historical information, a search for recorded environmental cleanup liens, and a review of government records, the Committee concluded that the objectives of each criterion or activity were similar, which could lead to the collection of the same information to fulfill each of the criterion’s objectives. For example, a chain of title document is historic information that may include

information on environmental cleanup liens, as well as information on past owners of the property indicating that previous owners managed hazardous substances on the property.

To avoid requiring duplicative efforts, but to ensure that the proposed regulations included standards and practices that result in a comprehensive assessment of the environmental conditions at a property, the proposed all appropriate inquiries standards were structured around a concise set of objectives and performance factors. The proposed objectives and performance factors applied to the standards comprehensively. In conducting the inquiries collectively, the landowner and the environmental professional must seek to achieve the objectives and performance factors and use the objectives and standards as guidelines in implementing, in total, all of the other proposed regulatory standards and practices.

Public Comments

Commenters overwhelmingly supported the proposed approach of structuring the all appropriate inquiries standards around a definitive set of performance factors and objectives. Commenters stated that the establishment of performance factors will improve the quality of environmental site assessments because the performance factors allow for the application of professional judgement and provide flexibility.

A few commenters did not support the proposed approach of structuring the regulations around a set of performance factors and objectives. These commenters asserted that the objectives and performance factors made the regulation too vague and open-ended. In addition, the commenters stated that they want the regulation to be centered around a “checklist” of activities, each of which should be required to be completed independently and without consideration of a comprehensive performance approach. Commenters who argued for a checklist approach said that such an approach would ensure that the environmental professional only would have to undertake a finite list of activities and it would be easier (in the commenter’s opinion) for property owners to obtain liability protection if the list of activities could be completed without regard to performance goals or an overall objective. These commenters also expressed concern that, if the regulations are based on performance factors that the all appropriate inquiries investigation would not have an

endpoint at which prospective landowners could stop looking for evidence of releases or threatened releases. The commenters believed that under a checklist approach liability protection would be awarded upon completion of all activities on the checklist.

Final Rule

We are retaining the proposed performance factors and objectives in the final rule. We continue to believe, as did many commenters, that basing the regulations on a set of overall performance factors and specific objectives lends clarity and flexibility to the standards. Such an approach also allows for the application of professional judgment and expertise to account for site-specific circumstances. The primary objective of an all appropriate inquiries investigation is to identify conditions indicative of releases and threatened releases of hazardous substances on, at, in, or to the subject property. In the case of recipients of brownfields grants, the objective may be expanded to include petroleum and petroleum products, pollutants, contaminants, and controlled substances, depending upon the scope of the grantee's cooperative agreement.

The performance factors are meant to guide the individual aspects of the investigation toward meeting both the statutory criteria for all appropriate inquiries and the regulatory objectives of (1) collecting necessary information about the uses and ownerships of a property and (2) identifying, through the collection of this information, conditions indicative of releases and threatened releases on, at, in, or to the subject property. By establishing a concise set of objectives and setting some boundaries on the information collection activities through the establishment of performance factors, we believe that the final rule fulfills the statutory objectives, provides for a comprehensive assessment of the environmental conditions at the property, and avoids the conduct of duplicative investigations and data collection efforts.

EPA disagrees with the commenters who argued that the proposed approach of establishing overall objectives and performance factors for the all appropriate inquiries standards would result in an approach that is too vague and open-ended. In fact, by establishing clear objectives and setting parameters to the investigation through a set of performance factors that include gathering information that is publicly available, obtainable from its source

within reasonable time and cost constraints, and which can practicably be reviewed, the approach taken in the final rule provides reasonable goals and endpoints to the information collection requirements. The proposed objectives provide a discrete list of the types of information that must be collected as part of the all appropriate inquiries investigation. In addition, the performance factors set boundaries around the efforts that must be taken and the cost burdens that must be incurred to obtain the required information. The fact that the rule is framed within a primary objective, to "identify conditions indicative of releases and threatened releases of hazardous substances," actually reduces the open-ended nature of the investigation and establishes an overall goal for the inquiries.

Commenters who advocated that a checklist approach (or an approach not based upon overall objectives and performance factors) is superior because they believe that it would better provide for a stopping point in the investigation may have misunderstood the statutory requirements that must be met to obtain a defense to CERCLA liability. These commenters may have incorrectly assumed that the completion of the all appropriate inquiries investigation is all that is required to obtain liability protection. The conduct of all appropriate inquiries is only one requirement for obtaining relief from CERCLA liability. Prospective landowners must conduct all appropriate inquiries prior to acquiring a property to qualify for a defense to CERCLA liability as an innocent landowner, bona fide prospective purchaser or contiguous landowner. However, once a property is acquired, the property owner must comply with all of the other statutory criteria necessary to qualify for the liability protections. In particular, landowners must undertake "reasonable steps" to "stop any continuing releases." Therefore, the final rule's objective of identifying conditions indicative of releases and threatened releases of hazardous substances on, at, in, or to a property links appropriately with the statutory criteria requiring the landowner to address such releases to qualify for the liability protections.

Conducting the inquiries merely in compliance with a checklist and without the purpose of meeting an overall objective could result in an inability to recognize the value of certain types of information or in chasing down multiple sources of information that may not have added value for meeting the overall objective

of the investigation. A lack of information or an inability to obtain information that may affect the ability of an environmental professional to determine whether or not there are conditions indicative of a release or threatened release of a hazardous substance (or other contaminant) on, at, in or to a property can have significant consequences regarding a prospective landowner's ultimate ability to claim protection from CERCLA liability. Failure to identify a release during the conduct of all appropriate inquiries does not relieve the property owner from the responsibility to take reasonable steps and address the release. Even if the Agency agreed with the commenters and adopted a "checklist" approach for the regulation, simply conducting the checklist of activities and ending the investigation after each activity is conducted would not result in protection from CERCLA liability (as commenters claimed).

The final rule also establishes that in those cases where certain information included in the list of regulatory objectives (§ 312.20(e)) cannot be found or obtained within the parameters of the performance factors, such data gaps must be identified and the significance of the missing information with regard to the environmental professional's ability to render an opinion on the presence of conditions indicative of releases and threatened releases be documented. Exhaustive and costly efforts do not have to be made to access all available sources of data and find every piece of data and information about a property. Nor does the rule require that duplicative information be sought from multiple sources. The inquiries and the overall investigation must be undertaken to meet the data collection objectives and primarily determine the environmental conditions of the property. Structuring the standards around such objectives will render the results of the investigation more valuable to a landowner in his or her efforts to comply with the post acquisition continuing obligations for obtaining the CERCLA liability protections than an approach framed around a mere checklist of activities.

In retaining the proposed objectives and performance factors, the final rule allows that an all appropriate inquiries investigation need not address each of the regulatory criterion in any particular sequence. In addition, information relevant to more than one criterion need not be collected twice, and a single source of information may satisfy the requirements of more than one criterion and more than one objective. However, the information required to achieve each

of the objectives and performance factors must be obtained for the all appropriate inquiries investigation to be complete. Although compliance with the all appropriate inquiries requirements ultimately will be determined in court, the final rule allows the prospective landowner or grantee and environmental professional to determine the best process and sequence for collecting and analyzing all required information. The sequence of activities and the sources of information used to collect any required information is left to the judgment and expertise of the environmental professional, provided that the overall objectives and the performance factors established for the final rule are met.

In performing the inquiries, including but not limited to conducting interviews, collecting historical data and government records, and inspecting the subject property and adjoining properties, all parties undertaking all appropriate inquiries must be attentive to the fact that the primary objectives of the regulation are to identify the following types of information about the subject property:

- Current and past property uses and occupancies;
- Current and past uses of hazardous substances;
- Waste management and disposal activities that could have caused releases or threatened releases of hazardous substances;
- Current and past corrective actions and response activities undertaken to address past and on-going releases of hazardous substances;

- Engineering controls;
- Institutional controls; and
- Properties adjoining or located nearby the subject property that have environmental conditions that could have resulted in conditions indicative of releases or threatened releases of hazardous substances on, at, in, or to the subject property.

EPA notes that in the case of brownfields grantees, the scope of each of the activities listed above may be broader if the grant or cooperative agreement includes within its scope the assessment of a property for conditions indicative of releases or threatened releases of petroleum and petroleum products, controlled substances, or other contaminants.

The final performance factors for achieving the objectives set forth above are set forth in § 312.20(e) and require the persons conducting the inquiries to: (1) Gather the information that is required for each standard and practice

that is publicly available, obtainable from its source within reasonable time and cost constraints, and which can practically be reviewed, and (2) review and evaluate the thoroughness and reliability of the information gathered in complying with each standard and practice, taking into account information gathered in the course of complying with the other standards and practices of this subpart. In complying with § 312.20(f)(2), if the environmental professional or person conducting the inquiries determines through such review and evaluation that the information is either not thorough or not reliable, then further inquiries should be made to ensure that the information gathered is both thorough and reliable. The performance factors are provided as guidelines to be followed in conjunction with the final objectives for the all appropriate inquiries.

M. What Are Institutional Controls?

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.

The importance of identifying institutional controls during all appropriate inquiries is twofold. First, institutional controls are usually

necessary and important components of a remedy. Failure to abide by an institutional control may put people at risk of harmful exposure to hazardous substances. Second, an owner wishing to maintain protections from CERCLA liability as an innocent landowner, contiguous property owner, or bona fide prospective purchaser must fulfill ongoing obligations to: (1) Comply with any land use restrictions established or relied on in connection with a response action and (2) not impede the effectiveness or integrity of any institutional control employed in connection with a response action. For a more detailed discussion of these requirements please see EPA, Interim Guidance Regarding Criteria Landowners Must Meet in Order to Qualify for Bona Fide Prospective Purchaser, Contiguous Property Owner, or Innocent Landowner Limitations on CERCLA Liability (Common Elements, 2003).

Those persons conducting all appropriate inquiries may identify institutional controls through several of the standards and practices set forth in this rule. As noted, implementation of institutional controls may be accomplished through the use of several administrative and legal mechanisms, such as zoning 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 database, 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.

The final rule requires that all appropriate inquiries include a search for institutional controls placed upon the subject property as part of the requirements for reviewing federal, state, tribal, and local government records. A discussion of these requirements is provided in section IV.S below.

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

Proposed Rule

The proposed rule required environmental professionals, prospective landowners, and brownfields 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 proposed rule also required these persons to identify the sources of information consulted to address, or fill, the data gaps and then comment upon the significance of the data gaps with regard to the ability to identify conditions indicative of releases or threatened releases of hazardous substances on, at, in or to the subject property. The proposed rule defined a data gap as a lack of or an inability to obtain information required by the standards and practices listed in the proposed regulation, despite good faith efforts by the environmental professional or the prospective landowner or grant recipient to gather such information.

Public Comments

Some commenters raised concerns that the proposed definition of a data gap may result in difficulties in determining when an all appropriate inquiries investigation is complete. These commenters stated that the need to identify and comment on the significance of data gaps may render it difficult to complete an investigation, that could potentially affect a property owner's ability to claim protection from CERCLA liability. Other commenters asserted that because an investigation could be considered complete despite the existence of a data gap, a regulatory loophole exists (in the opinion of the commenters) that will result in the property owner's being able to claim protection from CERCLA liability even when the all appropriate inquiries investigation results in a failure to identify a release or threatened release at a property.

Some commenters stated that the proposed requirement to identify data gaps, or missing information, that may affect the environmental professional's ability to render an opinion regarding the environmental conditions at a property and comment on their significance in this regard will lend credibility to the inquiry's final report.

Final Rule

We are retaining the proposed definition of data gap and the proposed requirements for identifying and commenting on the significance of data gaps. For the purposes of today's final rule, a "data gap" is a lack of or inability to obtain information required by the standards and practices listed in the regulation, despite good faith efforts by the environmental professional or the prospective landowner (or grant recipient) to gather such information pursuant to the objectives for all appropriate inquiries. 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.

Commenters who asserted that the requirement to document data gaps would result in a "loophole" that would allow property owners to claim protection from CERCLA liability after conducting an incomplete all appropriate inquiries investigation 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 this preamble, 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 this 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 this 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 this 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 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.

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.

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

Proposed Rule

The environmental professional should identify and evaluate all evidence of releases or threatened releases on, at, in or to the subject property, in accordance with generally accepted good commercial and customary standards and practices. However, the proposed rule provided 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.

Public Comments

EPA received no significant comment on the proposed provision on the identification of extremely small quantities of contamination.

Final Rule

The final retains the provision 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.

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

Proposed Rule

CERCLA section 101(35)(B)(iii)(II) requires EPA to include in the standards and practices for all appropriate inquiries "interviews with past and present owners, operators, and occupants of the facility for the purpose of gathering information regarding the potential for contamination at the facility." The Agency proposed that the inquiry of the environmental professional include interviews with the current owner(s) and occupant(s) of the subject property. In addition, the proposed rule required that interviews be conducted with current and past facility managers with relevant knowledge of the property, as well as past owners, occupants, or operators,

and employees of current and past occupants of the property, as necessary, to meet the proposed objectives and performance factors. In the case of abandoned properties, the Agency proposed that the inquiry of the environmental professional include interviewing one or more owners or occupants of neighboring or nearby properties to obtain information on current and past uses of the property and other information necessary to meet the objectives and performance factors.

Public Comments

Several commenters asserted that the requirement to interview current and past owners and occupants of a property may be burdensome. Commenters gave several reasons for asserting that interviews may be burdensome. Some commenters said it is difficult to locate current and past owners and occupants. Other commenters questioned the accuracy of any information that would be provided by a current or past owner or occupant. One commenter expressed concern that the requirement to conduct interviews of current and past owners and occupants of a property could result in the environmental professional divulging information regarding the sale of the property against the prospective landowner's wishes.

In the case of the proposed interview requirements for abandoned properties, some commenters opposed the requirement to interview at least one owner or occupant of a neighboring property. Commenters stated that the proposed requirement was unreasonable and that it is impractical to attempt to find and contact neighboring property owners and occupants. Some commenters said that neighboring property owners and occupants can not be relied upon to provide accurate information about a property.

Final Rule

The requirements for conducting interviews of past and present owners, operators, and occupants of the subject property are included in § 312.23. The final rule identifies these interviews as being within the scope of the inquiry of the environmental professional. Therefore, all interviews must be conducted by the environmental professional or by someone under the supervision or responsible charge of the environmental professional. The intent is that an individual meeting the definition of an environmental professional (§ 312.10) must oversee the conduct of, or review and approve the results of, the interviews to ensure the interviews are conducted in compliance with the objectives and performance

factors (§ 312.20). This is to ensure that the information obtained from the interviews provides sufficient information, in conjunction with the results of all other inquiries, to allow the environmental professional to render an opinion with regard to conditions at the property that may be indicative of releases or threatened releases of hazardous substances (and pollutants, contaminants, petroleum and petroleum products, and controlled substances, if applicable).

The final rule requires the environmental professional's inquiry to include interviewing the current owner and occupant of the subject property. In addition, the rule provides that the inquiry of the environmental professional include interviews of additional individuals, including current and past facility managers with relevant knowledge of the property, past owners, occupants, or operators of the subject property, or employees of current and past occupants of the subject property, as necessary to meet the rule's objectives and in accordance with the performance factors. A primary purpose of the interviews portion of the all appropriate inquiries is to obtain information regarding the current and past ownership and uses of the property, and obtain information regarding the potential environmental conditions of the property. 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 individual's 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. Interviews with current and past owners and occupants may provide opportunities to collect information about a property that was not previously recorded nor well documented and may provide valuable perspectives on how to find or interpret information required to complete other aspects of the all appropriate inquiries. Information gathered during the interview portion of the all appropriate inquiries may in turn provide valuable information for the on-site visual inspection. Persons conducting the interviews of current and past owners

and occupants may want to spend some time during the interviews requesting information on the locations of operations or units used to store or manage hazardous substances on the property.

In the case of properties where there may be more than one owner or occupant, or many owners or occupants, the 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 petroleum products, 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.

In response to commenters who asserted that the proposed interview requirements are burdensome, we point out that the statutory criteria in CERCLA section 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 1 Environmental Site Assessment Process, 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.

In the case of abandoned properties, the final rule requires the inquiry of the environmental professional to include interviews with one or more owners or occupants of neighboring or nearby properties. In the case of abandoned properties, it most likely will be difficult to identify or interview current or past owners and occupants of the property. Therefore, the final rule requires that at least one owner or occupant of a neighboring property be interviewed to obtain information regarding past owners or uses of the property in cases where the subject property is abandoned and no current owner is available to be interviewed. 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." As is the case with interviews conducted with current and past owners and occupants of the property, interview questions should be developed prior to the conduct of the interviews, and tailored to gather information to achieve the rule's objectives and performance factors. The final rule contains no specific requirements with regard to the type or content of questions that must be asked during the interviews.

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, he or she may enlist the assistance of local government officials in identifying a neighboring property owner or occupant. 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.

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

Proposed Rule

Historical documents and records may contain information regarding past ownership and uses of a property that may be essential to assessing the potential for environmental conditions indicative of releases or threatened releases of hazardous substances to be present at the property. Historical documents and records, among others, may include chain of title documents, land use records, aerial photographs of the property, fire insurance maps, and records held at local historical societies. The proposed rule required that the inquiry of the environmental professional 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 governmental purposes.

Public Comments

Some commenters raised concerns regarding the proposed requirements to review historical records covering "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." Commenters said that the proposed historical scope of the records search is too extensive. Some commenters requested that in the final rule EPA adopt the provisions for historical records searches provided in the ASTM E1527-2000 standard. Several commenters requested that EPA explicitly require as part of the review of historical records a review of chain of title documents. The commenters asserted that a review of chain of title documents is the only reliable way to identify previous owners of a property.

Final Rule

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 final rule requires (as did the proposed rule) that historical records on the subject property be searched for information on the property covering a time period as far back in history as there is documentation that the property contained structures or was placed into use of some form. This provision follows the statutory language. In addition, the final rule requires that historical documents and information be reviewed to obtain necessary information for meeting the objectives and performance factors in § 312.20(e) and (f). If a search of historical sources of information results in an inability of the environmental professional to document previous uses and occupancies of the property as far back in history as it can be shown that the property contained structures or was placed into use of some form, and such information is not acquired elsewhere during the investigation then it must be documented as a data gap to the inquiries. The requirements of §§ 312.20(g) and 312.21(c)(2) are applicable to all instances in the all appropriate inquiries that result in data gaps.

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) reflects the statutory language provided in CERCLA section 101(35)(B)(iii). The statutory criterion provide 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." 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 response to commenters that requested that EPA adopt the provisions of the ASTM E1527-2000 standard for conducting searches of historical records, we assert that the scope of the historical records search in today's final rule is very similar to the scope of ASTM E1527 standard. The ASTM

E1527 standard, at section 7.3.1, requires that historical sources of information be searched to identify "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." Given that the language of both the ASTM E1527 standard and the requirements in the final rule for conducting historical records searches is very similar, we conclude that the intent is the same and the final rule represents no change from current good customary business practice. In addition, the final rule provides for sufficient flexibility both within the application of the performance factors to the historical records search requirements and in allowing the environmental professional to apply his or her judgment "in the context of the facts available at the time of the inquiry."

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 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.

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

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

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

Proposed Rule

The proposed rule required that prospective landowners and grantees, or environmental professionals on their behalf, search for environmental cleanup liens that are recorded under federal, tribal, state, or local law.

Environmental cleanup liens that are not recorded by government entities or agencies are not addressed by the language of the statute (the statute speaks only of "recorded liens"); therefore, the proposed rule required that only a search for recorded environmental liens be included in the all appropriate inquiries investigation.

Public Comments

Some commenters asked that EPA state more clearly that the responsibility for searching for environmental cleanup liens rests with the prospective landowner and not the environmental professional. A few commenters requested that the Agency provide some guidance on where to find recorded environmental cleanup liens.

Final Rule

EPA is finalizing the proposed requirements to search for recorded environmental cleanup liens without changes. The all appropriate inquiries investigation must include a search for recorded environmental cleanup liens. 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)).

Although some commenters requested that EPA be more explicit in the final rule in requiring that the search for recorded environmental cleanup liens be conducted by the prospective landowner (or grantee), we believe that the decision of who conducts the search may be 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.

We offer one caution about the conclusion that might be drawn if no recorded environmental cleanup liens are found. If EPA is conducting a cleanup at site at the time it is transferred or acquired, EPA is able to record a lien post acquisition. For example, one type of lien, often referred to as a windfall lien, has no statute of limitations and arises at the time EPA first spends Superfund money. States and localities may have similar mechanisms. Therefore, even if a recorded environmental cleanup lien is not found during the conduct of the all appropriate inquiries investigation, one may be recorded at a later date if EPA is undertaking a cleanup or response action at the property.

With regard to commenters who requested that EPA provide guidance on where to search for environmental cleanup liens, we advise that prospective landowners and grantees 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.

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

Federal, tribal, state and local government records may contain

information regarding environmental conditions at a property. In particular, government records, or data bases of such information, may include information on previously reported releases of hazardous substances, pollutants, contaminants, petroleum and petroleum products and controlled substances. Government records and available databases can provide valuable information on remedial actions and emergency response activities that may have been conducted at a particular property. Government records also may include information on institutional controls related to a particular property. For example, in the case of NPL sites, EPA Superfund records, including Action Memoranda and Records of Decision, may have information on institutional controls in place at such properties. Government records also may include information on activities or property uses that could cause releases or threatened releases to be present at a property.

Proposed Rule

The proposed rule required that federal, state, tribal and local government records be searched for information necessary to achieve the objectives and performance factors, including information regarding the use and occupancy of and the environmental conditions at the subject property and conditions of nearby or adjoining properties that could have an impact upon the environmental conditions of the subject property. The proposed rule included requirements to search federal, tribal, state, and local government records for information indicative of environmental conditions at the subject property.

The proposed rule also included requirements to review government records, or data bases of information contained in government records, for information about nearby and adjoining properties. Reviews of such records may provide valuable information regarding the potential impact to the subject property from hazardous substances and petroleum contamination migrating from contiguous or nearby properties. The proposed rule included required minimum search distances for government records searches of nearby properties.

To account for property-specific and regionally-specific conditions that can influence the appropriateness of the proposed search distances for any given type of record and property, the proposed rule allowed the environmental professional to adjust the applicable search distances when searching for information about off-site

properties by applying professional judgment. For example, appropriate search distances for properties located in rural settings may differ from appropriate search distances for urban settings. In addition, ground water flow direction, depth to ground water, arid weather conditions, the types of facilities located on nearby properties, and other factors may influence the degree of impact to a property from off-site sources. Therefore, the proposed rule allowed the environmental professional to adjust any or all of the proposed minimum search distances for any of the record types, based upon professional judgment and the consideration of site-specific conditions or circumstances when seeking to achieve the proposed objectives and performance factors for the required inquiries.

Public Comments

The Agency received a variety of comments in which commenters expressed concerns about the applicability or adequacy of specific types of government records included in the proposed rule (e.g., CERCLIS records, information on RCRA facilities, ERNS). A few commenters raised concerns about the availability of tribal records. Several commenters raised concerns regarding the availability of government records on institutional controls. Commenters also pointed out that, given the lack of available databases and other information on institutional controls, it may be particularly difficult to search for institutional controls associated with adjoining and nearby properties.

Final Rule

We are finalizing the requirements for reviewing federal, state, tribal, and local government data bases as proposed, with one exception. 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).

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").

Routine "chain of title" reports may not always contain information labeled as institutional or engineering controls. However, title companies may include, as part of the chain of title reports "restrictions of record on title" when such restrictions are recorded because of underlying environmental conditions at a property. Therefore, when requesting information on "institutional controls" or "engineering controls" about a property, prospective landowners, grantees, and environmental professionals may want to request information on "restrictions of record on title" as well, in case any available information on institutional or engineering controls is so labeled in the chain of title records. In addition to chain of title records, information on institutional controls and engineering controls may be recorded in local land records. Also, some states are beginning to create registries to track information on institutional and engineering controls. Therefore, prospective landowners and grantees should consider consulting these other sources of information in addition to chain of title records for information on institutional and engineering controls.

In response to the commenters who pointed out particular shortcomings with specific sources of information (e.g., CERCLIS, RCRIS, ERNS) we point out that the requirement to review government records explicitly provides

that the reviews be conducted in compliance with the objectives and performance standards. If a particular source of information cannot be accessed within a reasonable time frame or within reasonable costs, then the information should be sought from other sources. In addition, if a particular source of information will only provide information that can more easily or readily be found elsewhere, the particular source does not have to be obtained or consulted. If application of the objectives and performance standards to the requirement to review government records results in an inability to provide necessary information (or information identified as necessary in the objectives for the final rule), then the lack of information should be documented as a data gap in the final report. In addition, the environment professional should comment on the significance the lack of any information has on his or her ability to identify conditions at the property that are indicative of releases or threatened releases of hazardous substances (in compliance with § 312.21(c)(2)).

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 factors, 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 and performance factors of the final rule cannot be met and the result is a lack of information that may affect the environmental professional's ability to render an opinion regarding the environmental conditions of a property, the lack of information must be documented as a data gap in compliance with § 312.21(c)(2).

The final rule requires that the following types of government records or data bases of government records be reviewed to obtain information on the subject property and nearby properties necessary to meet the rule's objectives and performance standards:

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

2. Government records of activities, conditions, or incidents likely to cause or contribute to releases or threatened releases, including records documenting

regulatory permits that were issued to current or previous owners or operators at the property for waste management activities and government records that identify the subject property as the location of landfills, storage tanks, or as the location for generating and handling activities for hazardous substances, pollutants, contaminants, petroleum and petroleum products, or controlled substances.

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

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

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

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

The final rule requires that government records be searched to identify information relative to the objectives and in accordance with the performance factors on: (1) Adjoining and nearby properties for which there are governmental records of reported releases or threatened releases (e.g., properties currently listed on the National Priorities List (NPL), properties subject to corrective action orders under the Resource Conservation and

Recovery Act (RCRA), properties with reported releases from leaking underground storage tanks); (2) adjoining and nearby properties previously identified or regulated by a government entity due to environmental conditions at a site (e.g., properties previously listed on the NPL, former CERCLIS sites with notices of no further response actions planned (NFRAP)); and (3) adjoining and nearby properties that have government-issued permits to conduct waste management activities (e.g., facilities permitted to manage RCRA hazardous wastes).

In the case of government records searches for nearby properties, the 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.

In the case of all the government records listed above and in the final rule in § 312.26, the requirements of this criterion may be met by searching data bases containing the same government records mentioned in the list above that are accessible and available through government entities or private sources. The review of actual records is not necessary, provided that the same information contained in the government records and required to

meet the requirements of this criterion and achieve the objectives and performance factors for these regulations is attainable by searching available data bases.

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. Environmental professionals may consider one or more of the following factors when determining an alternative appropriate search distance:

- The nature and extent of a release;
- Geologic, hydrogeologic, or topographic conditions of the subject property and surrounding environment;
- Land use or development densities;
- The property type;
- Existing or past uses of surrounding properties;

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

- Other relevant factors.

The final rule requires environmental professionals to document the rationale for making any modifications to the required minimum search distances included in § 312.26 of the regulation.

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

Proposed Rule

The proposed rule required that an on-site visual inspection of the subject property be conducted as part of the all appropriate inquiries investigations, with one limited exception. The proposed on-site visual inspection requirements included requirements to inspect any facilities and improvements on the property as well as all areas where hazardous substances are or may have been used, stored, treated, handled, or disposed. In addition, the proposed rule included requirements to visually inspect adjoining properties. The proposal required that inspections of adjoining properties be conducted from the property line, public right-of-way, or other vantage point.

The proposed rule included a limited exception from the requirement to conduct the visual inspection "on-site." The proposed exception provided that in unusual circumstances where an on-site visual inspection cannot be performed because of physical limitations, remote and inaccessible location, or another inability to obtain access to the property, provided good faith efforts are taken to obtain such access and access to the property could not be obtained, a visual inspection could be conducted from an off-site

vantage point (e.g., property-line, airplane, public right-of-way). To qualify for the exception from the requirement to conduct the inspection on site, the proposed rule required that the environmental professional document the good faith efforts undertaken to gain access to the property and explain why such efforts were unsuccessful. The proposed rule also required that the environmental professional document what other sources of information were consulted to obtain information regarding the potential environmental conditions at the property and the significance of the failure to conduct the inspection on site on his or her ability to identify conditions indicative of releases or threatened releases of hazardous substances on, at, in, or to the subject property.

In the preamble to the proposed rule, EPA recommended that an environmental professional conduct the on-site visual inspection.

Public Comments

A few commenters stated that EPA should not recommend, as we did in the preamble to the proposed rule, that an individual meeting the definition of environmental professional conduct the on-site visual inspection. These commenters stated that anyone under the responsible charge or supervision of an environmental professional should be able to conduct the on-site visual inspection. Commenters stated, that by recommending in the preamble that the environmental professional conduct the on-site visual inspection, the Agency was effectively requiring an environmental professional to conduct the visual inspection. Other commenters expressed support for the Agency's recommendation.

A few other commenters thought the proposed exception from the requirement to conduct the visual inspection on site was "broad" and "would increase the likelihood of inspections not being performed and contamination not being detected." These commenters expressed a concern that any exception from the requirement to conduct an on-site visual inspection could open the door to abuse and result in properties being transferred without being inspected. Commenters raised concerns that owners of uninspected properties could obtain liability protection by claiming to have fulfilled the requirements of all appropriate inquiries without knowledge of on-going releases at a property.

Final Rule

The final rule, at § 312.27, retains the proposed requirement that a visual on-site inspection be conducted of the subject property. The final visual on-site inspection requirements include requirements to inspect the facilities and any improvements on the property, as well as visually inspect areas on the property where hazardous substances may currently be or in the past may have been used, stored, treated, handled, or disposed of. We continue to assert that, and commenters agreed, that every all appropriate inquiries investigation must include an on-site visual inspection of the property. The on-site inspection of a property most likely will be an excellent source of information regarding indications of environmental conditions on a property. The final rule requires that a visual on-site inspection of the subject property be conducted in all but a few very limited cases. In addition, the final rule retains the proposed requirement that in those cases where physical limitations restrict the portions of the property that may be visually inspected, that the physical limitations encountered during the visual on-site inspection (e.g., weather conditions, physical obstructions) must be documented.

We note that persons conducting all appropriate inquiries with monies provided in a grant awarded under CERCLA section 104(k)(2)(B) must, depending on the terms and conditions of the grant or cooperative agreement, include within the scope of the on-site visual inspection an inspection of the facilities, improvements, and other areas of the property where pollutants, contaminants, petroleum and petroleum products, or controlled substances may currently be or in the past may have been used, stored, treated, handled, or disposed.

The visual on-site inspection of a property during the conduct of all appropriate inquiries may be the most important aspect of the inquiries and the primary source of information regarding the environmental conditions on the property. In all cases, every effort must be made to conduct an on-site visual inspection of a property when conducting all appropriate inquiries.

We understand that a prospective landowner, grantee, or environmental professional, in some limited circumstances, may not be able to obtain on-site access to a property. Extreme and prolonged weather conditions and remote locations can impede access to a property. A prospective landowner, grantee or environmental professional also could be unable to gain on-site

access to a property if the owner refuses to provide access to the party, even after the party exercises all good faith efforts to gain access to the property (e.g., seeking assistance from state government officials). Such circumstances may arise in cases where a local government becomes a last resort purchaser of a potentially-contaminated property that has little economic value. The unique nature of such transactions may result in a local government facing an uncooperative or recalcitrant property owner. Unlike commercial property transactions between private parties, where the parties' economic and legal liability interests and the ability to abandon the transaction can work in favor of the purchasing party's ability to gain access to a property prior to acquisition, property transactions between a private party and a local government may not afford the local government the same leverage, even if it is in the public interest to attain ownership of the property. This situation may occur when the local government seeks to assess, clean up, and revitalize an area, but the owner of the property is unreachable, unavailable, or otherwise unwilling to provide access to the property. In such limited circumstances, the public benefit attained from a government entity gaining ownership of a property may outweigh the need to gain on-site access to the property prior to the transfer of ownership.

The final rule requires, in unusual circumstances, that the prospective landowner or grantee make good faith efforts to gain access to the property. However, the mere refusal of a property owner to allow the prospective property owner or grantee to have access to the property does *not* constitute an unusual circumstance, absent the making of good faith efforts to otherwise gain access. The final rule, at § 312.10, defines "good faith" as "the absence of any intention to seek an unfair advantage or to defraud another party; an honest and sincere intention to fulfill one's obligations in the conduct or transaction concerned."

In those unusual circumstances where a prospective landowner, a grantee, or an environmental professional, after undertaking good faith efforts, cannot gain access to a property and therefore cannot conduct an on-site visual inspection, the final rule requires that the property be visually inspected, or observed, by another method, such as through the use of aerial photography, or be inspected, or observed, from the nearest accessible vantage point, such as the property line or a public road that runs through or along the property. In

addition, the rule requires that the all appropriate inquiries report include documentation of efforts undertaken by the prospective landowner, grantee, or the environmental professional to obtain on-site access to the subject property and include an explanation of why good faith efforts to gain access to subject property were unsuccessful. The all appropriate inquiries report must include documentation of other sources of information that were consulted to obtain information necessary to achieve the objectives and performance factors. This documentation should include comments, from the environmental professional who signs the report, regarding any significant limitations on the ability of the environmental professional to identify conditions indicative of releases or threatened releases on, at, in, or to the subject property, that may arise due to the inability of the prospective landowner, grantee, or environmental professional to obtain on-site access to the property.

In those limited cases where an on-site visual inspection cannot be conducted prior to the date a property is acquired, we remind prospective landowners that protection from CERCLA liability depends upon the prospective landowner complying with all of the post-acquisition continuing obligations provided in the statute. Therefore, to ensure that adequate information is attained about a property to ensure that the property owner can fulfill these obligations, we recommend that once a property is purchased, the property owner conduct an on-site visual inspection of the property once the property is acquired, if it could not be conducted prior to acquisition. Such an inspection may provide important information necessary for the property owner to fully comply with the other statutory provisions, including on-going obligations, governing the CERCLA liability protections.

We disagree with the commenters who argued that the exception from the requirement to conduct the visual inspection on-site is "broad." We point out that the exception is limited to the requirement that the visual inspection be conducted on-site. In all cases where the exception applies, the visual inspection must still be conducted from another vantage point. In addition, the exception is limited to only those circumstances where all good faith efforts are made to gain access to the property. The final rule requires that all good faith efforts to gain access be documented and requires that the environmental professional comment on the consequences that the inability to gain access to the property may have on

his or her ability to render an opinion on property conditions that may be indicative of releases or threatened releases on, at, in, or to the property. The exception is very limited in scope and the documentation requirements should limit the use of the exception as well as provide the prospective landowner with useful information for determining the potential need for further investigations of the property after acquisition.

The final rule also requires that the all appropriate inquiries investigation include visual inspections of properties that adjoin the subject property. Visual inspections of adjoining properties may provide excellent information on the potential for the subject property to be affected by contamination migrating from adjoining properties. Visual inspections of adjoining properties may be conducted from the subject property's property line, one or more public rights-of-way, or other vantage point (e.g., via aerial photography). Where practicable, a visual on-site inspection is recommended and may provide greater specificity of information. The visual inspections of adjoining properties must include observing areas where hazardous substances currently may be, or previously may have been, stored, treated, handled, or disposed. Visual inspections of adjoining properties otherwise also must be conducted to achieve the objectives and performance goals for all the appropriate inquiries. Physical limitations to the visual inspections of adjoining properties should be noted.

As explained in the preamble to the proposed rule, EPA and the Negotiated Rulemaking Committee considered, when developing the proposed rule, requiring that all activities in the all appropriate inquiries investigation to be conducted by persons meeting the proposed definition of an environmental professional. Requiring that an environmental professional conduct all activities could ensure that all data collection and investigations are conducted in a manner and to a degree of specificity that allows the environmental professional to make best use of all information in forming opinions and conclusions regarding the environmental conditions at a property. However, after careful review of the specific activities included in the statutory criteria and conducting an assessment of the costs and burdens of such a requirement, EPA and the Committee concluded that it is not necessary for each and every regulatory requirement to be conducted by an environmental professional. As outlined

in section IV.H of this preamble, today's final rule, as did the proposed rule, allows for certain aspects of the inquiries to be conducted solely by the prospective landowner or grantee, while providing that all other aspects be conducted under the supervision or responsible charge of the environmental professional. Among the activities required to be conducted under the supervision or responsible charge of an environmental professional is the on-site visual inspection.

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

Although some commenters stated that EPA should not recommend that the visual inspection be conducted by a person meeting the definition of environmental professional, we point out that other commenters stated their support for our recommendation and some even stated that EPA should

require in the regulation that the inspection be conducted by an environmental professional. We remain convinced that the on-site visual inspection of the property can be the single most important source of information regarding the environmental conditions of a property and that an individual meeting the regulatory definition of environmental professional is best able to interpret such observations of a property and ascertain the probability of conditions indicative of releases or threatened releases of hazardous substances being present at the property. In addition, we point out that the definition of environmental professional included in the final rule is less stringent than the proposed definition. Therefore, commenter concerns regarding any significant cost burdens associated with the environmental professional conducting the on-site visual inspection may be alleviated. We emphasize that EPA is recommending that the on-site visual inspection be conducted by an individual who meets the definition of environmental professional included in the final rule; it is not a requirement that the inspection be conducted by an environmental professional. The rule requires only that the inspection be conducted by an individual who is under the supervision or responsible charge of an individual meeting the definition of environmental professional. EPA agrees that if the final rule required that the on-site visual inspection be conducted by an individual meeting the definition of an environmental professional, the requirement could impose undue burdens in certain circumstances. In addition, there may be circumstances that in the best professional judgment of an environmental professional, another person under the responsible charge of the environmental professional may be more qualified to conduct the on-site inspection. To allow for flexibility and the application of professional judgment to specific circumstances, EPA continues to recommend that an environmental professional conduct the on-site inspection, but the Agency is not requiring that the inspection be conducted by an environmental professional.

U. What Are the Requirements for the Inclusion of Specialized Knowledge or Experience on the Part of the "Defendant?"

Because the conduct of all appropriate inquiries is one element of a legal defense to CERCLA liability, the statute refers to the prospective landowner, or the user of the all appropriate inquiries

investigation, as the "defendant." This ensures that any information or special knowledge held by the prospective landowner with regard to a property and its conditions be included in the pre-acquisition inquiries and be considered, along with all information collected during the conduct of all appropriate inquiries, when an environmental professional renders a judgment or opinion regarding conditions indicative of environmental conditions indicative of releases or potential releases of hazardous substances on, at, in, or to the subject property. It is recommended that this information be revealed to the parties conducting the all appropriate inquiries so that any specialized knowledge may be taken into account during the conduct of the required aspects of the all appropriate inquiries.

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

Proposed Rule

The proposed rule retained, 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 proposed rule did not extend this requirement beyond what already was required under CERCLA and established through case law. The proposed rule required 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 proposed rule also required 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.

Public Comments

EPA did not receive significant comment on the proposed requirements for considering the specialized knowledge or experience on the part of the defendant. A few commenters mentioned that the proposed requirements would result in the all appropriate inquiries investigations having to include interviews with all previous owners and occupants of the property. These commenters may have mistakenly interpreted the proposed provisions as requiring that the specialized knowledge of all current owners and occupants be considered as part of the all appropriate inquiries investigation. We clarify that only the specialized knowledge of the prospective landowner or grantee, and the environmental professional overseeing the conduct of the inquiries need be considered.

Final Rule

The final rule retains the proposed provisions governing the consideration of specialized knowledge or experience on the part of the prospective landowner (or grantee) and the environmental professional conducting the all appropriate inquiries investigation on the part of the prospective landowner or grantee.

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. For example, in *Foster v. United States*, 922 F. Supp. 642 (D. D.C. 1996), the owner of a property formerly owned by the General Services Administration and contaminated by, among other things, lead, mercury and PCBs, brought an action against the United States and District of Columbia, prior owners or operators of the site. The plaintiff was

a principal in Long & Foster companies and purchased the property through a general partnership, and received it by quitclaim deed. The innocent landowner defense requires a property owner to demonstrate that when he or she purchased a property, he or she did not know and had no reason to know of contamination at, on, in, or to the property. The court rejected the plaintiff's claim to the innocent landowner defense based in part on the plaintiff's specialized knowledge. The court found that his specialized knowledge included his position at Long & Foster, which did hundreds of millions of dollars of commercial real estate transactions, and his position as a partner in at least 15 commercial real estate partnerships. The partnership was involved as an investor in a number of real estate transactions, some of which involved industrial or commercial or mixed-use property. The court ruled that "it cannot be said that [the partnership] is a group unknowledgeable or inexperienced in commercial real estate transactions." *Foster*, 922 F. Supp. at 656.

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

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

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

Congress included in the statutory criteria for all appropriate inquiries a requirement to consider the relationship of the purchase price of a property to the value of the property, if the property was not contaminated. The criteria was retained in the criteria included in the Brownfields Amendments from the all appropriate inquiries provisions of the innocent landowner defense established by Congress in the 1986 amendments to CERCLA.

Proposed Rule

The proposed rule required that the prospective landowner or grantee consider whether or not the purchase price of the property reflects the fair market value of the property, assuming that the property is not contaminated. The proposed rule required that the prospective landowner or grantee consider whether any differential between the purchase price and the value of the property is due to the presence of releases or threatened releases of hazardous substances at the property. There may be many reasons that the price paid for a particular property is not an accurate reflection of the fair market value. The all appropriate inquiries investigation need only include a consideration of whether a significant difference between the price paid for a property and the fair market value of a property, if the property were not contaminated, is an indication that the property may be contaminated.

Public Comments

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. Some commenters thought that a requirement that prospective landowners or environmental professionals consider the relationship of the purchase price of property to the value of the property could violate federal or state laws governing property appraisals. Some commenters argued that the all appropriate inquiries investigation should not include the requirement to consider the relationship of the purchase price to the value of the property because the fair market value

is not always easily ascertainable. Other commenters requested that the preamble to the final rule include a recommendation that an appraisal be performed to determine a property's fair market value. In addition, commenters requested that in cases where an appraisal is conducted to determine the fair market value of a property, the rule should require that it meet the Uniform Standards of Professional Appraisal Practice. Still other commenters supported including the requirement in the final rule, but asked the Agency to require prospective landowners to obtain a property appraisal conducted by a trained or certified real estate appraiser. Some commenters stated that prospective landowners should not be required to divulge information on the price paid for a property to the environmental professional or other third party.

Final Rule

The final rule retains the requirement to consider the relationship of the purchase price to the fair market value of the property, if the property were not contaminated. The requirement is part of the statutory criteria established by Congress and has been part of the statutory provisions governing all appropriate inquiries, within the innocent landowner defense, since 1986. Today's rule does not change the previously existing provision. As did the proposed rule, today's 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.

If the relationship of the purchase price to the fair market value of the property, assuming the property is not contaminated, is determined 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 and the determination made by or on the behalf of the prospective landowner 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 the information is not provided to the environmental professional and the environmental professional determines that the lack of such information affects his or her ability to identify conditions indicative of releases or threatened releases of hazardous substances on, at, in, or to the property, then the environmental professional should identify the lack of information as a data gap and comment on its significance in the written report for the all appropriate inquiries investigation.

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

In cases where the results of a formal appraisal are not available, the determination of fair market value may be made by comparing the price paid for a particular property to prices paid for similar properties located in the same vicinity as the subject property, or by consulting a real estate expert familiar with properties in the general locality and who may be able to provide a comparability analysis. The objective is not to ascertain the exact value of the property, but to determine whether or not the purchase price paid for the property generally is reflective of its fair market value. Significant differences in the purchase price and fair market value of a property should be noted and the reasons for any differences also should be noted.

Although some commenters requested that EPA be more explicit in the final rule in requiring that the comparison of the purchase price to the fair market value of the property be conducted by the prospective landowner or grantee

(and not the environmental professional), we believe that the decision of who conducts the comparison may be best left up to the judgment of the individual prospective landowner (or grantee) and environmental professional. The final rule provides in § 312.22 that the comparison of the purchase price to the fair market value of the property, if it were not contaminated, can fall outside the inquiries conducted by the environmental professional. The criteria to consider the relationship of the purchase price to the fair market value of the property, if it was not contaminated is not included as part of the requirements governing the "results of an inquiry by an environmental professional" (§ 312.21). Therefore, the requirement may be conducted by the prospective landowner or grantee, his or her attorney or agent, or the environmental professional. Given that a prospective landowner or grantee can conduct the comparison of the purchase price and the fair market value of the property or hire another agent other than the environmental professional to conduct this task, we conclude that commenter concerns regarding the prospective landowner (or grantee) having to divulge the price paid for a property to the environmental professional are unfounded.

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

Commonly known or reasonably ascertainable information includes information about a property that generally is known to the public within the community where the property is located and can be easily sought and found from individuals familiar with the property or from easily attainable public sources of information. As mentioned above, the Brownfields Amendments to CERCLA amended the innocent landowner defense previously added to CERCLA in 1986. In addition, the Brownfields Amendments added to CERCLA the bona fide prospective purchaser and the contiguous property owner liability protections. The 1986 amendments to CERCLA established, that among other elements necessary for a defendant to successfully assert the innocent landowner defense, a defendant must take into account commonly known or reasonably ascertainable information about the property. Congress retained this criterion as part of the all appropriate inquiries requirements included in the Brownfields Amendments. Today's rule does not change the nature or intent of

this requirement as it has existed in the statute since 1986.

Proposed Rule

The proposed rule required that all appropriate inquiries include the collection and consideration of commonly known information about the potential environmental conditions at a property. The proposed rule required both the prospective landowner or grantee and the environmental professional obtain and consider commonly known or reasonably ascertainable information during the conduct of the all appropriate inquiries investigation. The proposed rule also provided a list of potential sources of such information.

Public Comments

A few commenters expressed concern that the requirement to consider commonly known or reasonably ascertainable information about a property renders the all appropriate inquiries requirements too vague and open-ended. Commenters stated that the requirement is broad and may result in the need to interview a large number of people and consult a wide variety of sources of information. One commenter expressed a preference that the federal standards include only a checklist of specific sources of information that must be consulted. A few commenters thought the list of potential sources of commonly known information included in the proposed rule was too broad.

Final Rule

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 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 ascertainable 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 ascertainable) 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). The requirement is not meant to require exhaustive data collection efforts, as some commenters asserted. The intent of the requirement is to establish that a prospective landowner or grantee and an environmental professional conducting all appropriate inquiries on his or her behalf must make efforts to collect and consider information about a property that is commonly known within the local

community or that can be reasonably ascertained.

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

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

X. What Are the 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?"

Proposed Rule

The proposed rule required that the inquiries conducted by a prospective landowner (or grantee) and environmental professional take into account all the information collected during the conduct of the all appropriate inquiries in considering the degree of obviousness of and ability to detect the presence of a release or threatened release of hazardous substances at, in, on, or to a property. In addition, the proposed rule required the environmental professional to provide an opinion regarding additional appropriate investigation, if any may be

necessary in his or her opinion to determine the environmental conditions of the property.

Public Comments

A few commenters asserted that the proposed requirements regarding the degree of obviousness of the presence or likely presence of contamination at the property, and the ability to detect the contamination by appropriate inquiry were too open-ended. Also, a few commenters suggested that the final rule should include requirements to conduct sampling and analysis to meet the "ability to detect contamination by appropriate investigation" portion of the statutory criteria. However, commenters overwhelmingly agreed that the standards for all appropriate inquiries should not require sampling and analysis.

Final Rule

The final rule requires that persons conducting all appropriate inquiries consider all the information collected during the conduct of the inquiries in totality to ascertain the potential presence of a release or threatened release at the property. Persons conducting all appropriate inquiries, following the collection of all required information, must assess whether or not an obvious conclusion may be drawn that there are conditions indicative of a release or threatened release of hazardous substances (or other 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. In some cases (e.g., *Hemingway Transport Inc. v. Kahn*, 174 F.R. 148 (Bankr. D. Mass. 1994), and *Foster v. United States*, 922 F. Supp. 642 (D.D.C. 1996)), courts have ruled that if a defendant had done a bit more visual inspection or further investigation, based upon information available to the defendant prior to acquiring the property, it would have been obvious that the property was contaminated. In *Foster v. United States*, the court determined that the innocent landowner defense was not available based in part on the fact that the partnership presumed the site was free of contamination based upon cursory visual inspections despite evidence in the record that, at the time of the sale, the soil was visibly stained by PCB-contaminated oil. In addition, although the property was located in a run-down industrial area, the defendant did no investigation into the environmental conditions at the site prior to acquiring the property.

EPA also notes that in *U.S. v. Domenic Lombardi Realty, Inc.*, 290 F. Supp. 2d 198, 211 (D.R.I. 2003), the court held that the defendant did not qualify for the innocent landowner defense. The defendant could not show he had "no reason to know" of contamination at the property or that he had performed all appropriate inquiries in accordance with "good commercial

or customary practices." The court also found that the defendant had not performed even a minimal environmental assessment of the site despite having learned that the property had been used as an automobile scrapyard. The court noted the distinction between Phase I and Phase II environmental assessments and credited the testimony of the United States' expert who concluded that, under the circumstances of this case, the defendant should have conducted a Phase II assessment. *Id.* at 203-04.

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

considering whether or not to conduct sampling and analysis prior to or after acquiring a property. Today's final regulation does *not* require that sampling and analysis be conducted as part of the all appropriate inquiries investigation.

V. Statutory and Executive Order Reviews

A. Executive Order 12866: Regulatory Planning and Review

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

Pursuant to the terms of Executive Order 12866, it has been determined that today's final rule is a "significant regulatory action" because this rule contains novel policy issues, although it is not economically significant. As such, this action was submitted to OMB for review. Changes made in response to OMB suggestions or recommendations are documented in the docket for today's rule.

To estimate the economic effects of today's final rule, we conducted an evaluation of the potential effects of this rule on the universe of prospective landowners who may choose to comply with the provisions of today's final rule to obtain protection from CERCLA liability for potential releases and threatened releases of hazardous substances that may exist at properties they intend to purchase. The results of this analysis are included in the document titled "Economic Impact Analysis for the Final All Appropriate Inquiries Regulation," which is included in the docket for today's final rule. Based upon the results of the

Economic Impact Analysis (EIA), EPA has determined that this final rule will have an annual effect on the economy of less than \$100 million. The annualized benefits associated with the final rule have not been monetized but are identified and summarized in the EIA for the all appropriate inquiries rule.²

1. Methodology

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

The all appropriate inquiries regulation potentially will apply to most commercial property transactions. The requirements will be applicable to any public or private party, who may potentially claim protection from CERCLA liability as an innocent landowner, a bona fide prospective purchaser, or a contiguous property owner. However, the conduct of all appropriate inquiries, also known as environmental due diligence or Phase I Environmental Site Assessment, is not new to the commercial property market. Prior to the Brownfields Amendments to CERCLA, commercial property transactions often included an assessment of the environmental conditions at properties prior to the closing of any real estate transaction whereby ownership was transferred for the purposes of confirming the conditions at the property or to establish an innocent landowner defense should environmental contamination be discovered after the property was acquired. The process most prevalently used for conducting all appropriate inquiries, or environmental site assessments, is the process developed by ASTM International (formerly known as the American Society for Testing and Materials) and entitled "E1527, Standard Practice for Environmental Site Assessments: Phase I Environmental Site Assessment Process." In addition, some properties,

² The document titled "The Economic Impact Analysis for the Final All Appropriate Inquiries Regulation" includes (1) the EIA conducted for the proposed rulemaking and (2) the Addendum to the EIA. The cost estimates presented in the Addendum are the estimated costs of the final all appropriate inquiries regulation.

particularly in cases where the subject property is assumed not to be contaminated or was never used for industrial or commercial purposes, were assessed using a less rigorous process developed by ASTM International, sometimes referred to as a "transaction screen" and entitled "E1528, Standard Practice for Environmental Site Assessments: Transaction Screen Process."

Our first step in assessing the economic impacts of the rule was to establish a baseline to represent the relevant aspects to the commercial real estate market in the absence of any changes in regulations. Because under existing conditions almost all commercial property transactions are accompanied by either an environmental site assessment (ESA) conducted in accordance with ASTM E1527-2000 or a transaction screen as specified in ASTM E1528, it was assumed these practices would continue even in the absence of the all appropriate inquiries regulation. The numbers of each type of assessment were estimated on the basis of industry data for recent years, with recent growth rates in transactions assumed to continue for the 10-year period covered by the EIA. An adjustment in the relative numbers of ESAs and transaction screens was made to account for the fact that, under the rule, an ESA will provide more certain protection from liability. This adjustment was made by comparing shifts between the two procedures that occurred when the Brownfields Amendments established the ASTM E1527-2000 standard as the interim standard for all appropriate inquiries, and thus as one requirement for qualifying as an innocent landowner, bona fide prospective purchaser, or contiguous property owner.

We then considered the requirements included in the final rule and compared them to the requirements for environmental site assessments conducted under the ASTM E1527-2000 and ASTM E1528 standards.

When compared to the ASTM E1527-2000 standard (i.e., the baseline standard), today's final rule is expected to result in a reduced burden for the conduct of interviews in those cases where the subject property is abandoned; increased burden in those cases where past owners or occupants need to be interviewed; increased burden associated with documenting recorded environmental cleanup liens; increased burden for documenting the reasons for the price and fair market value of a property in those cases where the purchase price paid for the subject property is significantly below the fair

market value of the property; and increased burden for recording information about the degree of obviousness of contamination at a property.

To estimate the changes in costs resulting from the rule, we developed a costing model. This model estimates the total costs of conducting site assessments as the product of costs per assessment, numbers of assessments per year, and the number of years in the analysis. The costs per assessment, in turn, are calculated by dividing each assessment into individual labor activities, estimating the labor time associated with each, and assigning a per-hour labor cost to each activity on the basis of the labor category most appropriate to that activity. Labor times and categories are assumed to depend on the size and type of property being assessed, with the nationwide distribution of properties based on data from industry on environmental sites assessments and brownfield sites.³ The estimates and assignments of categories are made based on the experience of professionals who have been involved in large numbers of site assessments, and who are therefore skilled in cost estimation for the relevant activities. Other costs, such as reproduction and the purchase of data, are added to the labor costs to form the estimates of total costs per assessment. These total costs, stratified by size and type of property, are then multiplied by estimated numbers of assessments of each size and type to generate our estimates of total annual costs. The model was tested by comparing its results to industry-wide estimates of average price of conducting assessments under baseline conditions, and generally found to agree. The difference between the estimated cost to comply with the final rule and the estimated cost in the baseline constitutes our estimate of the incremental regulatory costs.

The EIA provides a qualitative assessment of the benefits of the all appropriate inquiries rule. The benefits discussed are those that may be attributed to an increased level of certainty with regard to CERCLA liability provided to prospective purchasers of potentially contaminated properties, including brownfields, who comply with the provisions of the rule and the other statutory provisions associated with the liability protections. The basic premise for associating certain benefits to the rule is the expectation

that the level of certainty provided by the liability protections may result in increased brownfields property transactions. However, it is difficult to predict how many additional transactions may occur that involve brownfields properties in direct response to the increased certainty of the liability protections. It also is difficult to obtain data on changes in behaviors and practices of prospective landowners in response to the liability protections. Therefore, EPA made no attempt to quantify potential benefits or compare the benefits to estimated incremental costs.

The Agency believes that increasing property transactions involving brownfields and other contaminated and potentially contaminated properties and improving information about environmental conditions at these properties may provide additional indirect benefits such as increased numbers of cleanups, reduced use of greenfields, potential increases in property values, and potential increases in quality of life measures (e.g., decreases in urban blight, reductions in traffic, congestion, and reduced pollution due to mobile source emissions). However, as stated above, the benefits of the rule are considered only qualitatively, due to the difficulty of predicting how many additional brownfields and contaminated property transactions may occur in response to the increased certainty of liability protections provided by the rule, as well as the difficulty in getting data on changes in behaviors and practices in response to the availability of the liability protections. EPA is confident that the new liability protections afforded to prospective landowners, if they comply with the all appropriate inquiries provisions, will result in increased benefits. EPA is not able to quantify, with any significant level of confidence, the exact proportion of the benefits attributed only to the availability of the liability protections and the all appropriate inquiries regulations. For these reasons, the costs and benefits could not be directly compared.

2. Summary of Regulatory Costs in Proposed Rule

For a given property, the costs of compliance with the all appropriate inquiries rule relative to the baseline depend on whether that property would have been assessed, in absence of the all appropriate inquiries regulation, with an ASTM E1527–2000 assessment process or with the simpler ASTM E1528 transaction screen. EPA estimated the average incremental cost

of the proposed rule relative to conducting an ASTM E1527–2000 to be between \$41 and \$47. For the small percentage of cases for which a transaction screen would have been preferred to the ASTM E1527–2000 in the baseline, but which would, as a result of the proposed rule, require an assessment in compliance with the all appropriate inquiries rule, the average incremental cost was estimated to be between \$1,448 and \$1,454. We estimated that approximately 97 percent of property transactions will bear only the incremental cost of the rule relative to the ASTM E1527–2000 process. Therefore, the weighted average incremental cost of the proposed rule, per transaction, was estimated to be fairly low, between \$84 and \$89.

3. Public Comments on EIA for Proposed Rule

EPA received a number of public comments on the EIA conducted to assess the potential costs and impacts of the proposed rule. We summarized the public comments received related to the cost and economic impacts in the document titled “Addendum to Economic Impact Analysis for the Final All Appropriate Inquiries Regulation” (Addendum to the EIA). This document is included in the docket for today’s final rule. The Addendum to the EIA also summarizes EPA’s responses to the comments received that addressed the estimated costs and economic impacts.

Many commenters generally agreed with EPA’s conclusion that the average incremental cost increase per transaction associated with the requirements of the proposed rule would be minimal. Some commenters mentioned that the EIA conducted for the proposed rule underestimated the incremental costs associated with the proposed rule. However, only a few commenters provided an explanation as to why they thought our cost estimates were low or provided information regarding which particular activities would result in an incremental increase in the activities and costs associated with conducting an environmental site assessment, if conducted in compliance with the requirements of the proposed rule. Most commenters did not provide specific reasons for their claims of cost increases over the ASTM E1527–2000 standard. A few commenters suggested that the EIA for the proposed rule underestimated the level of effort necessary for locating and interviewing past owners or occupants, with one commenter providing an estimated level of effort of one to three hours for this task.

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

4. Estimate of Costs Associated With the Final Rule

EPA made one revision to the analysis of cost impacts associated with the requirements of the proposed and final rule in response to specific issues raised by commenters. EPA agrees with the commenters who asserted that locating past owners or occupants of a property may be more time consuming than locating the current owners or occupants, as was assumed in the analysis of costs conducted for the proposed rule. Locating past owners or occupants could require as little as one 5-minute phone call (e.g., if the current owner has the contact information for the past owner) or it could require multiple phone calls that could take in excess of one hour. For the purpose of estimating the cost under the final rule, EPA estimates the incremental burden for locating past owners or occupants to be, on average, 0.5 hours per interview regardless of the property type or size. EPA did not account for this incremental burden in our analysis of the costs associated with the proposed rule. EPA also recognizes that in some cases the environmental professional will need to complete the full interview with the current owner before determining that it is necessary to interview a past owner. In other words, the environmental professional may need to complete the interview with the current owner, and then perform a more focused interview of a past owner to fill data gaps. EPA estimates that the incremental burden for interviewing past owners or occupants will be 0.5 hours for undeveloped and residential properties, one hour for commercial and industrial properties (of all sizes except large industrial), and 1.5 hours for large industrial properties. Therefore, EPA estimates that the total incremental level of effort for locating and interviewing past property owners or occupants will range from one hour to two hours depending on the property type or size.

The additional incremental hour burden, however, will not be incurred in the case of every site assessment. EPA expects that the interview with past owners or occupants will be conducted only for properties with a higher than average owner or occupant turnover rate. To derive the number of potentially affected properties, we assume that the environmental professional will interview only the current property owner if the owner was in the possession of the subject property for more than two years. We assume that after two years of owning a property, the current property owner should have a reasonably good knowledge of its

condition. EPA estimates that 19 percent of Phase I ESAs conducted in a given year are conducted on properties that were sold at least once in the previous two years (for a detailed explanation on the derivation of this estimate, see the Addendum to the EIA). Using the assumption that 15 percent of all properties are abandoned properties (see Section 5.6.5.2 of EIA) which would not be affected by the requirement to interview past owners or occupants, we revised our original cost estimate to account for non-abandoned properties that were sold over the past two years. Therefore, for the purpose of our revised cost analysis, we estimate that 16 percent of properties will require an additional interview with past owners or occupants.

Except for the increase in the level of effort for the interview task for non-abandoned properties, all other parameters used in modeling our cost estimates are the same as presented in the EIA conducted for the proposed rule. To derive the incremental average cost per transaction and the total annual cost of the final rule, we employed the methodology explained in detailed in Chapters 7 and 8 of the EIA conducted for the proposed rule. Based on our analysis, the cost of a Phase I ESA under the final regulation will increase, on average, between \$52 and \$58. The estimated average cost for a Phase I ESA thus will range between \$2,185 and \$2,190.⁴

Using our revised incremental cost estimate for conducting interviews of past owners or occupants, we revised our estimated total annual cost of the final rule and our incremental total annual cost estimate. Our revised total annual cost estimate for all activities included in the all appropriate inquiries investigations conducted under the final rule is between \$693.5 and \$695.3 million (calculated using a discount rate of three percent). Our revised estimate of the incremental total annual cost of the final rule is between \$29.7 million and \$31.4 million. A more detailed explanation of our revised cost estimates, including an additional sensitivity analysis performed in response to the public comments, is included in the document titled "Addendum to the Economic Impact Analysis for the Final All Appropriate Inquiries Regulation." This document is

⁴ We assumed that the environmental professionals will need to complete the full interview with the current owner before conducting an interview with the past owners or occupants. To the extent that this may not always be the case, the average incremental cost (and by extension, the average cost for an AAI Phase I ESA) is overestimated.

in the public docket for today's final rule.

B. Paperwork Reduction Act

The information collection requirements contained in this final rule were submitted for approval to the Office of Management and Budget under the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.* The information collection requirements are not enforceable until OMB approves them. The Information Collection Request (ICR) document prepared by EPA has been assigned EPA ICR Number 2144.02.

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

The activities associated with today's rule that go beyond current customary and usual business practices include interviews with neighboring property owners and/or occupants in those cases where the subject property is abandoned, documentation of all environmental cleanup liens in the Phase I Environmental Site Assessment report, discussion of the relationship of purchase price to value of the property in the report, and consideration and discussion of whether additional environmental investigation is warranted. Paperwork burdens are estimated to be 546,179 hours annually, with a total cost of \$29,583,206 annually. The estimated average burden hours per response is estimated to be approximately one hour (or 25 hours per response, assuming a transition from a transaction screen). The estimated average cost burden per response is estimated to be either \$67 or \$1,479,

depending on whether, under baseline conditions, an ASTM E1527–2000 process or a transaction screen (ASTM E1528) would have been used.

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

An agency may not conduct or sponsor, and a person is not required to respond to a collection of information unless it displays a currently valid OMB control number. The OMB control numbers for EPA’s regulations in 40 CFR are listed in 40 CFR part 9. This ICR is approved by OMB, and the Agency will publish a technical amendment to 40 CFR part 9 in the **Federal Register** to display the OMB control number for the approved information collection requirements contained in this final rule.

C. Regulatory Flexibility Act

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

For the purposes of assessing the impacts of today’s rule on small entities, small entity is defined as: (1) A small business that is defined by the Small Business Administration by category of business using the North American Industrial Classification System (NAICS) and codified at 13 CFR 121.201; (2) a small governmental jurisdiction that is a government of a city, county, town, school district or special district with a population of less

than 50,000; and (3) a small organization that is any not-for-profit enterprise which is independently owned and operated and is not dominant in its field.

Since all non-residential property transactions could be affected by today’s rule, if it is promulgated, large numbers of small entities could be affected to some degree. However, we estimate that the effects, on the whole, will not be significant for small entities. We estimate that, for the majority of small entities, the average incremental cost of today’s rule relative to conducting an ASTM E1527–2000 Phase I Environmental Site Assessment will be between \$52 and \$58. When we annualize the incremental cost of \$58 per property transaction over ten years at a seven percent discount rate, we estimate that the average annual cost increase per establishment per property transaction will be \$8. Thus, the cost impact to small entities is estimated to not be significant. A more detailed summary of our analysis of the potential impacts of today’s rule to small entities is included in “Economic Impacts Analysis of the Final All Appropriate Inquiries Regulation.” This document is included in the docket for today’s rule.

After considering the economic impacts of today’s final rule on small entities, I certify that this action will not have a significant economic impact on a substantial number of small entities. We estimate that, on average, 266,000 small entities may purchase commercial real estate in any given year and therefore could potentially be impacted by today’s final rule. Though large numbers of small entities could be affected to some degree, we estimated that the effects, on the whole, would not be significant for small entities. We estimate that, for the majority of small entities, the average incremental cost of today’s rule relative to conducting an ASTM E1527–2000 will be between \$52 and \$58. For the small percentage of cases for which a transaction screen would have been preferred to the ASTM E1527–2000 in the baseline, but which now will require an assessment in compliance with the rule, the average incremental cost of conducting an environmental site assessment will be between \$1,459 and \$1,465. When we annualize the incremental cost per property transaction over ten years at a seven percent discount rate, we estimate that for the majority of small entities the average annual cost increase per establishment per property transaction will be approximately \$8. For the small percentage of entities transitioning from transaction screens to the all appropriate inquiries requirements of

the final rule, the average annual cost increase per establishment per property transaction will be \$209.⁵

D. Unfunded Mandates Reform Act

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

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

Today’s rule contains no federal mandates (under the regulatory provisions of Title II of the UMRA) for

⁵ For a very small percentage of entities transitioning from transaction screens to the all appropriate inquiries requirements, the maximum increase per establishment per property transaction is estimated to be approximately \$2,845. When we annualize this incremental cost per property transaction over ten years at a seven percent discount rate, we estimate that the maximum annual cost increase per establishment per property transaction will be \$405. We estimate that approximately one fifth of one percent of the properties transitioning from a transaction screen to a Phase I ESA will have an impact of this magnitude each year.

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

E. Executive Order 13132: Federalism

Executive Order 13132, entitled "Federalism" (64 FR 43255, August 10, 1999), requires EPA to develop an accountable process to ensure "meaningful and timely input by State and local officials in the development of regulatory policies that have federalism implications." "Policies that have federalism implications" is defined in the Executive Order to include regulations that have "substantial direct effects on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government."

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

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

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

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

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

Today's rule is not subject to the Executive Order because it is not economically significant as defined in Executive Order 12866.

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

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

I. National Technology Transfer and Advancement Act

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

Today's final rule is based upon a proposed rule that was developed with the assistance of a regulatory negotiation committee comprised of various affected stakeholder groups and modified slightly, based upon public comments received in response to the proposed rule. When developing the proposed rule, EPA considered using the existing standard developed by ASTM International as the federal standard for all appropriate inquiries. This standard is known as the ASTM E1527-2000 standard ("Standard Practice for Environmental Site Assessment: Phase I Environmental Site Assessment Process"). However, when we proposed the federal standards for all appropriate inquiries, EPA determined that the ASTM E1527-2000 standard is inconsistent with applicable law.

In CERCLA section 101(35)(B), Congress included ten specific criteria to be used in promulgating the all appropriate inquiries rule. The 2000 version of the ASTM Phase I Environmental Site Assessment Process does not address all of the required criteria. For example, the ASTM International standard does not provide for interviews of past owners, operators, and occupants of a facility. The statute, however, states that the federally promulgated standard "shall include * * * interviews with past and present owners, operators, and occupants of the facility for the purpose of gathering information regarding the potential for contamination at the facility." CERCLA section 101(35)(B)(iii)(II). In addition, as outlined in the preamble to the proposed rule (69 FR 52541) the ASTM E1527-2000 standard also does not meet other statutory requirements. As a result, use of the ASTM E1527-2000 standard would be inconsistent with applicable law.

In today's final rule, EPA is referencing the updated 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"). The Agency has determined that this voluntary consensus standard is consistent with today's final rule and is compliant with the statutory criteria for all appropriate inquiries. Persons conducting all appropriate inquiries may use the procedures included in the ASTM E1527-05 standard to comply with today's final rule.

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

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

Given that environmental justice communities are significantly impacted by brownfields, and the federal standards for all appropriate inquiries may play a primary role in encouraging

the assessment and cleanup of brownfields sites, EPA made it a priority to obtain input from representatives of environmental justice interest groups during the development of today's rulemaking. The Negotiated Rulemaking Committee tasked with developing the all appropriate inquiries proposed rule included three representatives from environmental justice advocacy groups. Each representative played a significant role in the negotiations and in the development of the proposed rule. Today's final rule includes no significant changes to the proposed rule and in particular, includes no changes that will significantly or disproportionately impact environmental justice communities.

K. Congressional Review Act

The Congressional Review Act, 5 U.S.C. 801 *et seq.*, as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. EPA will submit a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the **Federal Register**. A major rule cannot take effect until 60 days after it is published in the **Federal Register**. This action is not a "major rule" as defined by 5 U.S.C. 804(2). This rule will be effective November 1, 2006.

List of Subjects in 40 CFR Part 312

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

Dated: October 21, 2005.

Stephen L. Johnson,
Administrator.

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

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

Subpart A—Introduction

Sec.

312.1 Purpose, applicability, scope, and disclosure obligations.

Subpart B—Definitions and References

312.10 Definitions.

312.11 References.

Subpart C—Standards and Practices

312.20 All appropriate inquiries.

312.21 Results of inquiry by an environmental professional.

312.22 Additional inquiries.

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

312.24 Reviews of historical sources of information.

312.25 Searches for recorded environmental cleanup liens.

312.26 Reviews of federal, state, tribal and local government records.

312.27 Visual inspections of the facility and of adjoining properties.

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

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

312.30 Commonly known or reasonably ascertainable information about the property.

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.

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

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

Subpart A—Introduction

§ 312.1 Purpose, applicability, scope and disclosure obligations.

(a) *Purpose.* The purpose of this section is to provide standards and practices for "all appropriate inquiries" for the purposes of CERCLA sections 101(35)(B)(i)(I) and 101(35)(B)(ii) and (iii).

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

(1) Persons seeking to establish:

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

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

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

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

(c) *Scope.* (1) Persons seeking to establish one of the liability protections under paragraph (b)(1) of this section must conduct investigations as required in this part, including an inquiry by an environmental professional, as required under § 312.21, and the additional inquiries defined in § 312.22, to identify

conditions indicative of releases or threatened releases, as defined in CERCLA section 101(22), of hazardous substances, as defined in CERCLA section 101(14).

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

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

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

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

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

Subpart B—Definitions and References

§ 312.10 Definitions.

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

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

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

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

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

Date of acquisition or purchase date means: the date on which a person acquires title to the property.

Environmental Professional means:

(1) a person who possesses sufficient specific education, training, and experience necessary to exercise professional judgment to develop opinions and conclusions regarding conditions indicative of releases or threatened releases (see § 312.1(c)) on, at, in, or to a property, sufficient to meet the objectives and performance factors in § 312.20(e) and (f).

(2) Such a person must:

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

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

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

(iv) Have the equivalent of ten (10) years of full-time relevant experience.

(3) An environmental professional should remain current in his or her field through participation in continuing education or other activities.

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

as part of the inquiry identified in § 312.21(b).

(5) A person who does not qualify as an environmental professional under the foregoing definition may assist in the conduct of all appropriate inquiries in accordance with this part if such person is under the supervision or responsible charge of a person meeting the definition of an environmental professional provided above when conducting such activities.

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

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

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

§ 312.11 References.

The following industry standards may be used to comply with the requirements set forth in §§ 312.23 through 312.31:

(a) The procedures of ASTM International Standard E1527–05 entitled "Standard Practice for Environmental Site Assessments: Phase I Environmental Site Assessment Process."

(b) [Reserved]

Subpart C—Standards and Practices

§ 312.20 All appropriate inquiries.

(a) "All appropriate inquiries" pursuant to CERCLA section 101(35)(B) must be conducted within one year prior to the date of acquisition of the subject property and 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) Notwithstanding paragraph (a) of this section, the following components of the all appropriate inquiries must be conducted or updated within 180 days of and prior to the date of acquisition of the subject property:

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

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

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

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

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

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

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

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

(3) Notwithstanding paragraph (b)(2) of this section, the following components of the inquiries were conducted or updated within 180 days of and prior to the date of acquisition of the subject property:

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

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

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

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

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

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

in § 312.1(b) and the environmental professional, defined in § 312.10.

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

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

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

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

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

(i) Current and past property uses and occupancies;

(ii) Current and past uses of hazardous substances;

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

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

(v) Engineering controls;

(vi) Institutional controls; and

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

(2) In the case of persons identified in § 312.1(b)(2), the standards and practices for All Appropriate Inquiries set forth in this part are intended to result in the identification of conditions indicative of releases and threatened releases of hazardous substances, pollutants, contaminants, petroleum and petroleum products, and controlled substances (as defined in 21 U.S.C. 802) on, at, in, or to the subject property. In performing the all appropriate inquiries,

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

(i) Current and past property uses and occupancies;

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

(iii) Waste management and disposal activities;

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

(v) Engineering controls;

(vi) Institutional controls; and

(vii) Properties adjoining or located nearby the subject property that have environmental conditions that could have resulted in conditions indicative of releases or threatened releases of hazardous substances, pollutants, contaminants, petroleum and petroleum products, and controlled substances (as defined in 21 U.S.C. 802) to the subject property.

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

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

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

(g) To the extent there are data gaps (as defined in § 312.10) in the information developed as part of the inquiries in paragraph (e) of this section that affect the ability of persons (including the environmental professional) conducting the all

appropriate inquiries to identify conditions indicative of releases or threatened releases in each area of inquiry under each standard and practice such persons should identify such data gaps, identify the sources of information consulted to address such data gaps, and comment upon the significance of such data gaps with regard to the ability to identify conditions indicative of releases or threatened releases of hazardous substances [and in the case of persons identified in § 312.1(b)(2), hazardous substances, pollutants, contaminants, petroleum and petroleum products, and controlled substances (as defined in 21 U.S.C. 802)] on, at, in, or to the subject property. Sampling and analysis may be conducted to develop information to address data gaps.

(h) Releases and threatened releases identified as part of the all appropriate inquiries should be noted in the report of the inquiries. These standards and practices however are not intended to require the identification in the written report prepared pursuant to § 312.21(c) of quantities or amounts, either individually or in the aggregate, of hazardous substances pollutants, contaminants, petroleum and petroleum products, and controlled substances (as defined in 21 U.S.C. 802) that because of said quantities and amounts, generally would not pose a threat to human health or the environment.

§ 312.21 Results of inquiry by an environmental professional.

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

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

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

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

(2) An identification of data gaps (as defined in § 312.10) in the information developed as part of the inquiry that affect the ability of the environmental professional to identify conditions indicative of releases or threatened releases of hazardous substances [and in the case of inquiries conducted for persons identified in § 312.1(b)(2) conditions indicative of releases and threatened releases of pollutants, contaminants, petroleum and petroleum products, and controlled substances (as defined in 21 U.S.C. 802)] on, at, in, or to the subject property and comments regarding the significance of such data gaps on the environmental professional's ability to provide an opinion as to whether the inquiry has identified conditions indicative of releases or threatened releases on, at, in, or to the subject property. If there are data gaps such that the environmental professional cannot reach an opinion regarding the identification of conditions indicative of releases and threatened releases, such data gaps must be noted in the environmental professional's opinion in paragraph (c)(1) of this section; and

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

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

"[I, We] declare that, to the best of [my, our] professional knowledge and belief, [I, we] meet the definition of Environmental Professional as defined in § 312.10 of this part."

"[I, We] have the specific qualifications based on education, training, and experience to assess a property of the nature, history, and setting of the subject property. [I, We] have developed and performed the all appropriate inquiries in conformance with the standards and practices set forth in 40 CFR Part 312."

§ 312.22 Additional inquiries.

(a) Persons identified under § 312.1(b) must conduct the inquiries listed in

paragraphs (a)(1) through (a)(4) below and may provide the information associated with such inquiries to the environmental professional responsible for conducting the activities listed in § 312.21:

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

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

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

(4) As required by § 312.30, and if not otherwise obtained by the environmental professional, commonly known or reasonably ascertainable information about the subject property.

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

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

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

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

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

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

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

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

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

§ 312.24 Reviews of historical sources of information.

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

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

§ 312.25 Searches for recorded environmental cleanup liens.

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

(b) All information collected regarding the existence of such environmental cleanup liens associated with the subject property by persons to whom this part is applicable per § 312.1(b) and not by an environmental professional, may be provided to the environmental professional or retained by the applicable party.

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

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

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

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

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

(3) CERCLIS records;

(4) Public health records;

(5) Emergency Response Notification System records;

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(d) The search distance from the subject property boundary for reviewing government records or databases of government records listed in paragraph (c) of this section may be modified based upon the professional judgment of the environmental professional. The rationale for such modifications must be documented by the environmental professional. The environmental professional may consider one or more of the following factors in determining an alternate appropriate search distance:

(1) The nature and extent of a release;

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

(3) Land use or development densities;

(4) The property type;

(5) Existing or past uses of surrounding properties;

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

(7) Other relevant factors.

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

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

(1) A visual on-site inspection of the subject property and facilities and improvements on the subject property,

including a visual inspection of the areas where hazardous substances may be or may have been used, stored, treated, handled, or disposed. Physical limitations to the visual inspection must be noted.

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

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

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

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

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

(3) Documentation of other sources of information regarding releases or threatened releases at the subject property that were consulted in accordance with § 312.20(e). Such documentation should include comments by the environmental

professional on the significance of the failure to conduct a visual on-site inspection of the subject property with regard to the ability to identify conditions indicative of releases or threatened releases on, at, in, or to the subject property, if any.

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

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

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

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

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

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

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

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

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

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

(c) To the extent necessary to achieve the objectives and performance factors of § 312.20(e) and (f), persons to whom this part is applicable per § 312.1(b) and the environmental professional must gather information from varied sources whose input either individually or taken together may provide commonly known or reasonably ascertainable information about the subject property; the environmental professional may refer to one or more of the following sources of information:

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

(2) Local and state government officials who may have knowledge of, or information related to, the subject property;

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

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

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

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

(b) Persons to whom this part is applicable per § 312.1(b) and

environmental professionals conducting an inquiry of a property on behalf of such persons must take into account the information collected under § 312.23 through 312.30 in considering the

ability to detect contamination by appropriate investigation. The inquiry of the environmental professional should include an opinion regarding

additional appropriate investigation, if any.

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