



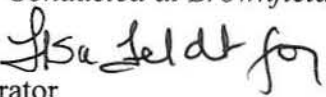
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
WASHINGTON, D.C. 20460

MAY 19 2011

OFFICE OF  
SOLID WASTE AND  
EMERGENCY RESPONSE

**MEMORANDUM**

SUBJECT: OSWER Revised Response to "EPA Office of Inspector General (OIG) Evaluation Report, *EPA Must Implement Controls to Ensure Proper Investigations Are Conducted at Brownfields Sites*" (Report No. 11-P-0107)

FROM: Mathy Stanislaus   
Assistant Administrator

TO: Arthur A. Elkins, Jr.  
EPA Inspector General

Thank you for the opportunity to publicly respond to the findings and recommendations of the Office of Inspector General (OIG) in the above referenced report. As was referenced in our earlier response, the All Appropriate Inquiry (AAI) regulation is an important component of the CERCLA Brownfields amendments. The rule provides a framework for the public to document compliance with the all appropriate inquiry standard, and compliance with the regulation serves as a basis for qualifying for liability protection for qualified landowners seeking to clean and revitalize brownfields sites.

While we continue to disagree with some of the assumptions and conclusions in the Report, the OIG has provided constructive recommendations. OSWER concurs partly or fully with all of the three recommendations, and following are our responses to these recommendations and our proposed milestone schedule for implementing the identified corrective action. OSWER also attaches, to be part of the publicly released response, a legal opinion provided by the Agency's Office of General Counsel which provides important and useful clarification and corrections to some items in the report. OSWER incorporates this opinion by reference into this response, as it clarifies important information about the purpose of and compliance with the AAI rule, and we appreciate that the public will be able to read the opinion in addition to this response, to ensure that there is no confusion about the rule's purpose and requirements. Specifically, the legal opinion corrects and clarifies aspects of the OIG report regarding : (1) data gap reporting requirements; (2) compliance with ASTM standards; (3) the material noncompliance standard for grant terms and conditions; (4) the scope of investigations; (5) declarations by environmental professionals; and (6) disclosure obligations. OGC provided its opinion on these items in the interest of providing legal clarity regarding EPA's

understanding of these requirements for those conducting AAI using brownfields assessment grants.

## Background

Numerous communities, states, nonprofit organizations and tribal governments benefit from the provisions of the Small Business Liability Relief and Brownfields Revitalization Act, one provision of which speaks to the All Appropriate Inquiry requirement. The amendments to CERCLA address, among other things, eligibility for brownfields grant funding and steps to be taken by entities to demonstrate that they are not liable under CERCLA. The amendments thus provided a critically important avenue for entities that were not responsible for contamination at a specific site, to acquire the site and begin the process of assessing, cleaning and revitalizing the site and putting it back into productive use for the benefit of the community. Simply described, the All Appropriate Inquiry process is an initial, basic investigation regarding the known current and historic environmental conditions at a site. While entities must comply with the AAI rule to be eligible to receive EPA Brownfields Grant funding, and EPA makes eligibility determinations in that regard, EPA does not make determinations regarding liability protections afforded by the statute. To maintain the provided liability protections, entities must take additional steps beyond the scope of the All Appropriate Inquiry, as set forth in the CERCLA amendments. For additional background information, please see: <http://www.epa.gov/brownfields/aai/aaicerclafs.pdf>

## I. OSWER Response to OIG Report Recommendations

**OIG Recommendation:** EPA should establish accountability for compliant AAI reports, to include those conducted under ARRA Brownfields grants.

**OSWER Response:** The OIG final report identifies deficiencies in the consistency and completeness of some of the documentation reviewed in the Regions' project files. In particular, the report expresses a concern that some AAI reports do not include a signature of a qualified Environmental Professional, and may not include the required statements regarding the qualifications of the person signing the report or the stipulation that the AAI investigation was conducted in compliance with the requirements established under CERCLA and included in the AAI final rule at 40 CFR 312.21(d). Note that the Office of General Counsel has addressed the issue of the relationship between AAI and the ASTM standard, and corrected some conclusions of the OIG report in this regard.

OSWER concurs with this recommendation and agrees that all AAI reports should include a signature of the environmental professional that directed or oversaw the inquiries and should include the statements required in the AAI final rule at 40 CFR 312.21. In response to these findings, from this date through the end of the fiscal year, and on a continuing basis, OSWER will develop outreach materials and conduct appropriate training for brownfields assessment grantees and to Regional Brownfields program staff to increase compliance with these requirements. OSWER has conducted initial training for current and potential future grantees at the Brownfields Conference in April 2011. OSWER also will provide all FY2011 assessment grantees with a factsheet explaining these requirements. In addition, OSWER will develop a checklist enumerating the need for these documentation requirements and will

distribute the checklist to all assessment grantees at the time of grant award for all 2011 grants and beyond.

**Milestones and Schedule for Completion:**

- |  |                                 |
|--|---------------------------------|
| 1. Finalize Checklist  | July 1, 2011                    |
| 2. Post Fact Sheet and Checklist on OBLR website   | July 15, 2011                   |
| 3. Distribute Factsheet and Checklist to Assessment Grantees, beginning with FY2011 grantees | September 2011                  |
| 4. Distribute Training Materials to Regions  | October 2011                    |
| 5. Conduct Training at Regional Grantee Meetings and Conferences                             | 4 <sup>th</sup> Quarter FY 2012 |

**OIG Recommendation:** Develop a plan to review AAI reports to determine the reports' compliance with AAI documentation requirements.

**OSWER Response:** OSWER concurs with this recommendation. It is important to note that EPA employees do not review the specific analysis and conclusions of the AAI reports, which will generally involve sites that will be assessed and cleaned under the supervision of a state or tribal environmental response program. Brownfields grant Project Officers generally monitor grantee compliance with the terms and conditions of the brownfields cooperative agreements, and grantees are responsible for meeting the terms and conditions of the cooperative agreements. Property owners for whom an AAI assessment may be conducted are responsible for ensuring that all conditions for obtaining CERCLA liability protections are met, if such protection may be claimed. The purpose of the AAI rule and the amendments to CERCLA is to provide the process and guidance for obtaining the liability protections, which ultimately is incumbent upon the party seeking the protections.

In addition to the corrective action listed under the response to the first recommendation above, OSWER will request that Regional EPA Project Officers for Brownfields Assessment Cooperative Agreements conduct annual reviews of a random sampling of the awarded assessment grants under which AAI investigations would be completed, to ensure that AAI reports submitted to the EPA Region as deliverables include a completed and signed checklist prepared and signed by the grantee. OSWER will initiate that request and process beginning with the grants awarded in 2011

**Milestones and Schedule for Completion:**

1. Regional Project Officers, beginning with FY11 Assessment Grants, will review grantee compliance with the AAI Checklist annually by reviewing a random sample of grants representing 10 percent of assessment grants under which at least one assessment was conducted during the fiscal year, beginning in FY12 (completed by September 1, 2012)
2. Regional Project Officers in each Region will then audit / review at least one AAI report from the random sample of assessments reviewed each year to determine grantee compliance with the documentation requirements covered by the checklist (completed by September 1, 2012).

**OIG Recommendation:** Establish criteria to determine if noncompliant grantees should return federal grant money.

**OSWER Response:** OSWER partially concurs with this recommendation and will work with OGC and the OARM Grants Administration Division to develop criteria that, in the instance of a material and affirmative noncompliance with a grant term and condition, will guide when an action to disallow costs should be initiated. The Office of General Counsel has addressed this issue in its attached memorandum. OSWER does not concur with this recommendation to the extent that it is based on a conclusion that failure on the part of a grantee to meet every technical requirement of an AAI investigation is sufficient to determine that grantee costs should be disallowed. It is OSWER's opinion that failure to meet every technical requirement of the AAI rule will not result in a material negative effect on the intended outcome of the assessment grant or to the brownfields program and therefore does not warrant the disallowance of costs. Rather, a review and determination would be needed to conclude that the failure or omission materially impacted the intended outcome of the cooperative agreement award (site assessment or cleanup, e.g.).

**Milestones and Schedule for Completion:**

1. Draft Term and Condition addressing when non-compliance with the AAI rule under a Brownfields Assessment Grant could result in a material and affirmative effect upon the grant or program and result in the disallowance of costs      July 30, 2011
2. Final Term and condition distributed to FY11 Grantees      September 2011

OSWER welcomes the opportunity to continue working with OIG, the Office of General Counsel, and our Regional Brownfields Programs to implement these recommendations and to continue to strengthen and grow the Agency's Brownfields and Land Revitalization Program.

Attachment: OGC Legal Opinion

cc: David R. Lloyd (OSWER)  
John Michaud (OGC)




UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
WASHINGTON, D.C. 20460

**MEMORANDUM**

Subject:      OIG Final Evaluation Report: EPA Must Implement Controls to Ensure Proper  
                  Investigations Are Conducted at Brownfields Sites

Date:          March 3, 2011

From:          John Michaud   
                  Deputy Associate General Counsel

To:            Mathy Stanislaus  
                  Assistant Administrator

The Office of Solid Waste and Emergency Response (OSWER) has requested the Office of General Counsel (OGC) to review and comment on the final Office of Inspector General (OIG) report, released February 14, 2011, entitled "EPA Must Implement Controls to Ensure Proper Investigations Are Conducted at Brownfields Sites" (OIG report). OGC reviewed earlier drafts of the OIG report and provided comments to OSWER that were incorporated into their responses to the draft report. Those comments were not designated for distribution outside of EPA. Because we are concerned about the accuracy of several aspects of the final OIG report, and at OSWER's request, we are authorizing the public release of this document in conjunction with the Agency's response to the final report.

The final report makes a number of statements that OGC believes incorrectly characterize the requirements of the All Appropriate Inquiries (AAI) final rule at 40 CFR part 312. These statements relate to the following aspects of the AAI final rule: (1) data gap reporting requirements; (2) compliance with ASTM standards; (3) the material noncompliance standard for grant terms and conditions; (4) the scope of investigations; (5) declarations by environmental professionals; and (6) disclosure obligations. OGC is responding to these statements in the interest of providing legal clarity regarding EPA's understanding of these requirements for those conducting AAI using brownfields assessment grants.

OGC is not commenting on the recommendations in the OIG report or otherwise addressing questions of policy or implementation. OGC appreciates the cooperative relationship that has been maintained among each of the offices throughout this process and looks forward to that relationship continuing.

## **1. Data Gap Reporting Requirements**

The OIG final report identified seven reports that did not include a statement on data gaps (OIG report page 3). In response to OSWER's comments that a statement on data gaps is not necessarily required, OIG stated, "In our opinion, the Brownfields Program has communicated an expectation that the data gaps requirement includes stating that there were no data gaps when that is the case" (OIG report pages 10-11). OGC wishes to clarify that the requirement to identify data gaps in an AAI report is limited to those gaps "that affect the ability of the environmental professional to identify conditions indicative of releases or threatened releases of hazardous substances ...." 40 CFR 312.21(c)(2). The informal training materials on which OIG based its opinion do not create new obligations for those conducting AAI for purposes of a brownfields assessment grant that are not in the AAI rule itself.<sup>1</sup> There is no obligation in the current AAI reporting requirements to make an affirmative statement that there are no data gaps when an AAI investigation does not uncover them. EPA considered the data-gap reporting requirements at length when drafting the AAI rule and determined that they struck the appropriate balance. Standards and Practices for All Appropriate Inquiries, Final Rule, 70 FR 66070, at 66088-89 (Nov. 1, 2005). It was legally incorrect for the OIG to conclude that the absence of a statement on data gaps in seven of the reports OIG reviewed in and of itself constitutes noncompliance for purposes of an assessment grant.

## **2. Compliance with ASTM Standards**

The AAI rule provides that certain ASTM standards "may be used to comply with" federal AAI requirements. 40 CFR 312.11. All 35 of the reviewed reports were done under an ASTM standard. With one exception, OIG evaluated the reports for compliance with the AAI final rule rather than the ASTM standard. With respect to the requirement to include an opinion statement by the environmental professional (EP) in the report, OIG concluded that all 35 reports failed to include the exact wording of the opinion statement prescribed by the ASTM standard (OIG report page 6).

The AAI rule requires an opinion by the EP, but, unlike the ASTM standard, the AAI rule does not prescribe the exact language the EP should use in making a conclusion about conditions at the site. Compare 40 CFR 312.21(c) and ASTM International Standard E1527-05 § 12.8.<sup>2</sup> All 35 reviewed reports did include an opinion statement, but they did not use the exact phrasing of the ASTM standard. In responding to OSWER's comment that these reports were compliant with the AAI rule, OIG stated, "The Final Rule does not address whether the AAI rule requirements or the ASTM standard serve as the compliance standard when a grantee has selected ASTM, and EPA has not issued a legal opinion on this matter" (OIG report page 10).

OGC would like to take this opportunity to respond to this question. Although the AAI rule provides that certain ASTM standards "may be used to comply with" federal AAI requirements, 40 CFR 312.11, OGC believes this wording makes clear that the standard for compliance

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<sup>1</sup> In any case, OGC reviewed these materials and has determined that they are consistent with the regulatory text. At no place in the training materials does EPA instruct environmental professionals to make an affirmative statement when there are no data gaps.

<sup>2</sup> EPA chose not to include more specific requirements for the content of AAI reports because it believed that those conducting AAI should have the flexibility "to design and develop the format and content of a written report that will meet the ... grantee's[] objectives and information needs ...." 70 FR at 66078.

remains the AAI rule itself. Reports done under an ASTM standard that meet the federal AAI requirements but may be noncompliant with the ASTM standard are nonetheless compliant with the AAI rule for purposes of determining compliance with the terms and conditions of an assessment grant.

OGC believes OIG was correct to evaluate the reports against the AAI rule's requirements, and it was incorrect to apply the ASTM standard with respect to the opinion statements. It was legally incorrect for OIG to conclude that an EP opinion statement that does not track the exact wording in the ASTM standard in and of itself constitutes noncompliance for purposes of an assessment grant.

### **3. The Material Noncompliance Standard for Grant Terms and Conditions**

As a more general concern, OGC believes the OIG report, in discussing the repercussions of noncompliance, does not fully take into account that the regulatory standard for disallowing costs or terminating grants is when the grant recipient "materially fails to comply" with the terms and conditions of an award (including statutory requirements). 40 CFR 30.62(a); 40 CFR 31.43(a). The statutory termination and repayment provisions at CERCLA 104(k)(7)(C) are permissive rather than mandatory. EPA would, therefore, use the standard of material noncompliance in the regulations to determine if terminating a grant or repaying funds is warranted for failure to follow the AAI rule. Further, recipients would have an opportunity to dispute EPA's initial determinations under 40 CFR 30.63 and 40 CFR 31.70. For example, the findings in the OIG report indicating that several reports were noncompliant because they failed to include the required EP Qualifications Statement when they used the terms "we" and "our" when only one EP signed the statement (OIG report page 6) do not rise to the level of material noncompliance that could be sustained in a dispute.

OGC is aware of OIG's concern that the Agency has not articulated a standard for "material noncompliance" for AAI requirements in the context of brownfields grants. However, minor discrepancies in an AAI report would not warrant recovering federal funds or terminating a grant.

### **4. Scope of Investigations under the AAI Rule**

OIG stated in its final report that AAI includes "assessing potential liability for contamination" at a site (OIG report cover sheet and page 1). This statement is incorrect. In contrast to other types of environmental due diligence, neither the statutory criteria nor the AAI rule call on environmental professionals to assess potential liability. CERCLA 101(35)(B)(iii).<sup>3</sup> AAI is primarily a factual inquiry into the past uses and ownership of a site to determine whether there is a risk of contamination at the property. Environmental professionals who conduct AAI are not trained or authorized to assess liability or make other types of legal determinations. The OSWER "fact sheets" from which OIG drew this language do not create new obligations for those conducting AAI that are not in the AAI rule itself.

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<sup>3</sup> The OIG report refers to AAI as "environmental due diligence" (OIG report page 1). It is important to clarify that AAI is not synonymous with this term but is rather one type of environmental due diligence process, which, in contrast to some other types, does not require an assessment of liability. See 70 FR at 66072.

## 5. Declarations by the Environmental Professional

Throughout the report, OIG states that EPs “self-certify” that AAI requirements have been met (OIG report cover sheet and pages 5 & 7). In response to OSWER’s objection to the use of this term, OIG stated, “[O]ur finding is that EPA relies on the self-certification of EPs to ensure compliance with federal AAI requirements” (OIG report page 9). The term “self-certify” may be legally significant (e.g., with respect to environmental engineering licensure). EPA discussed this issue in the preamble to the AAI final rule and intentionally chose not to use this term in the rule. 70 FR at 66078. OGC appreciates the importance of communicating in plain language and notes that the preamble suggests using the terms “declaration” or “statement.” *Id.* It is incorrect to characterize the signed statement of the EP as any type of “certification.”

## 6. Disclosure Obligations in the AAI Rule

The OIG report states that the requirement to include in an AAI report “an opinion as to whether the inquiry has identified conditions indicative of releases or threatened releases of hazardous substances,” 40 CFR 312.21(c), could be considered a requirement to disclose environmental conditions (OIG report footnote 1). OSWER commented that the AAI final rule contains no disclosure requirements, and OIG responded by citing the above provision and 40 CFR 312.1(d). EPA considered this issue in the preamble to the final rule and determined,

The documentation requirements ... are primarily intended to enhance the inquiries by requiring the [EP] to record the results of the inquiries and his or her conclusions ... and to provide a record of the [EP]’s inquiry. Today’s rule contains no new requirements to notify or submit information to EPA or any other governmental entity.

70 FR at 66077 (emphasis added).<sup>4</sup> To clarify this point, the final rule contains subsection 312.1(d), which is a savings clause providing that nothing in the AAI rule limits or expands disclosure requirements under other laws. This provision does not create new disclosure obligations. It is incorrect to characterize any provision of the AAI final rule as a disclosure requirement.

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<sup>4</sup> EPA uses the AAI final rule as the framework for conducting brownfields assessments, because it is required to do so by statute. CERCLA 104(k)(2)(B)(ii). Outside of the grants context, the AAI final rule is part of a self-implementing framework enacted by Congress for obtaining liability protections under CERCLA. EPA believes parties conducting AAI for this purpose have an adequate incentive to ensure that the investigation is done properly, because “the burden of potential CERCLA liability ultimately falls upon the property owner or operator.” 70 FR at 66082.




UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
WASHINGTON, D.C. 20460

MAR 21 2011

OFFICE OF  
SOLID WASTE AND  
EMERGENCY RESPONSE

MEMORANDUM

SUBJECT: EPA Office of Inspector General (OIG) evaluation report, *EPA Must Implement Controls to Ensure Proper Investigations Are Conducted at Brownfields Sites* (Report No. 11-P-0107)

FROM: Mathy Stanislaus  
Assistant Administrator 

TO: Arthur Elkins  
Inspector General

Thank you for the opportunity to publicly respond to the findings and recommendations of the Office of Inspector General (OIG) in the above referenced report. As was referenced in our earlier response, the All Appropriate Inquiry (AAI) regulation is an important component of the CERCLA Brownfields amendments. The rule provides a framework for the public to document compliance with the all appropriate inquiry standard, and compliance with the regulation serves as a basis for qualifying for liability protection for qualified landowners seeking to clean and revitalize brownfields sites.

While we continue to disagree with some of the assumptions and conclusions in the Report, the OIG has provided constructive recommendations. OSWER concurs partly or fully with all of the three recommendations, and following are our responses to these recommendations and our proposed milestone schedule for implementing the identified corrective action. OSWER also attaches, to be part of the publicly released response, a legal opinion provided by the Agency's Office of General Counsel which provides important and useful clarification and corrections to some items in the report. OSWER incorporates this opinion by reference into this response, as it clarifies important information about the purpose of and compliance with the AAI rule, and we appreciate that the public will be able to read the opinion in addition to this response, to ensure that there is no confusion about the rule's purpose and requirements. Specifically, the legal opinion corrects and clarifies aspects of the OIG report regarding : (1) data gap reporting requirements; (2) compliance with ASTM standards; (3) the material noncompliance standard for grant terms and conditions; (4) the scope of investigations; (5) declarations by environmental professionals; and (6) disclosure obligations. OGC provided

its opinion on these items in the interest of providing legal clarity regarding EPA's understanding of these requirements for those conducting AAI using brownfields assessment grants.

## Background

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## **I. OSWER Response to OIG Report Recommendations**

**OIG Recommendation:** EPA should establish accountability for compliant AAI reports, to include those conducted under ARRA Brownfields grants.

**OSWER Response:** The OIG final report identifies deficiencies in the consistency and completeness of some of the documentation reviewed in the Regions' project files. In particular, the report expresses a concern that some AAI reports do not include a signature of a qualified Environmental Professional, and may not include the required statements regarding the qualifications of the person signing the report or the stipulation that the AAI investigation was conducted in compliance with the requirements established under CERCLA and included in the AAI final rule at 40 CFR 312.21(d). Note that the Office of General Counsel has addressed the issue of the relationship between AAI and the ASTM standard, and corrected some conclusions of the OIG report in this regard.

OSWER concurs with this recommendation and agrees that all AAI reports should include a signature of the environmental professional that directed or oversaw the inquiries and should include the statements required in the AAI final rule at 40 CFR 312.21. In response to these findings, from this date through the end of the fiscal year, and on a continuing basis, OSWER will develop outreach materials and conduct appropriate training for brownfields assessment grantees and to Regional Brownfields program staff to increase compliance with these requirements. OSWER will conduct initial training for current and potential future grantees at the Brownfields Conference in April 2011. OSWER also will provide all FY2011 assessment grantees with a factsheet explaining these requirements. In addition, OSWER will develop a

checklist enumerating the need for these documentation requirements and will distribute the checklist to all assessment grantees at the time of grant award for all 2011 grants and beyond.

**OIG Recommendation:** Develop a plan to review AAI reports to determine the reports' compliance with AAI documentation requirements.

**OSWER Response:** OSWER concurs with this recommendation. It is important to note that EPA employees do not review the specific analysis and conclusions of the AAI reports, which will generally involve sites that will be assessed and cleaned under the supervision of a state or tribal environmental response program. Brownfields grant Project Officers generally monitor grantee compliance with the terms and conditions of the brownfields cooperative agreements, and grantees are responsible for meeting the terms and conditions of the cooperative agreements. Property owners for whom an AAI assessment may be conducted are responsible for ensuring that all conditions for obtaining CERCLA liability protections are met, if such protection may be claimed. The purpose of the AAI rule and the amendments to CERCLA is to provide the process and guidance for obtaining the liability protections, which ultimately is incumbent upon the party seeking the protections.

In addition to the corrective action listed under the response to the first recommendation above, OSWER will request that Regional EPA Project Officers for Brownfields Assessment Cooperative Agreements conduct annual reviews of a random sampling of the awarded assessment grants under which AAI investigations would be completed, to ensure that AAI reports submitted to the EPA Region as deliverables include a completed and signed checklist prepared and signed by the grantee. OSWER will initiate that request and process beginning with the grants awarded in 2011, during the summer and fall of CY 2011.

**OIG Recommendation:** Establish criteria to determine if noncompliant grantees should return federal grant money.

**OSWER Response:** OSWER partially concurs with this recommendation and will work with OGC and the OARM Grants Administration Division to develop criteria that, in the instance of a material and affirmative noncompliance with a grant term and condition, will guide when an action to disallow costs should be initiated. The Office of General Counsel has addressed this issue in its attached memorandum. OSWER does not concur with this recommendation to the extent that it is based on a conclusion that failure on the part of a grantee to meet every technical requirement of an AAI investigation is sufficient to determine that grantee costs should be disallowed. It is OSWER's opinion that failure to meet every technical requirement of the AAI rule will not result in a material negative effect on the intended outcome of the assessment grant or to the brownfields program and therefore does not warrant the disallowance of costs. Rather, a review and determination would be needed to conclude that the failure or omission materially impacted the intended outcome of the cooperative agreement award (site assessment or cleanup, e.g.).

OSWER welcomes the opportunity to continue working with OIG, the Office of General Counsel, and our Regional Brownfields Programs to implement these recommendations and to continue to strengthen and grow the Agency's Brownfields and Land Revitalization Program.

Attachment: OGC Legal Opinion

cc: David R. Lloyd (OSWER)  
John Michaud (OGC)




UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
WASHINGTON, D.C. 20460

**MEMORANDUM**

Subject:     OIG Final Evaluation Report: EPA Must Implement Controls to Ensure Proper  
              Investigations Are Conducted at Brownfields Sites

Date:        March 3, 2011

From:        John Michaud   
              Deputy Associate General Counsel

To:          Mathy Stanislaus  
              Assistant Administrator

The Office of Solid Waste and Emergency Response (OSWER) has requested the Office of General Counsel (OGC) to review and comment on the final Office of Inspector General (OIG) report, released February 14, 2011, entitled "EPA Must Implement Controls to Ensure Proper Investigations Are Conducted at Brownfields Sites" (OIG report). OGC reviewed earlier drafts of the OIG report and provided comments to OSWER that were incorporated into their responses to the draft report. Those comments were not designated for distribution outside of EPA. Because we are concerned about the accuracy of several aspects of the final OIG report, and at OSWER's request, we are authorizing the public release of this document in conjunction with the Agency's response to the final report.

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OGC is not commenting on the recommendations in the OIG report or otherwise addressing questions of policy or implementation. OGC appreciates the cooperative relationship that has been maintained among each of the offices throughout this process and looks forward to that relationship continuing.

## 1. Data Gap Reporting Requirements

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## 2. Compliance with ASTM Standards

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OGC would like to take this opportunity to respond to this question. Although the AAI rule provides that certain ASTM standards "may be used to comply with" federal AAI requirements, 40 CFR 312.11, OGC believes this wording makes clear that the standard for compliance

<sup>1</sup> In any case, OGC reviewed these materials and has determined that they are consistent with the regulatory text. At no place in the training materials does EPA instruct environmental professionals to make an affirmative statement when there are no data gaps.

<sup>2</sup> EPA chose not to include more specific requirements for the content of AAI reports because it believed that those conducting AAI should have the flexibility "to design and develop the format and content of a written report that will meet the ... grantee's[] objectives and information needs ...." 70 FR at 66078.

remains the AAI rule itself. Reports done under an ASTM standard that meet the federal AAI requirements but may be noncompliant with the ASTM standard are nonetheless compliant with the AAI rule for purposes of determining compliance with the terms and conditions of an assessment grant.

OGC believes OIG was correct to evaluate the reports against the AAI rule's requirements, and it was incorrect to apply the ASTM standard with respect to the opinion statements. It was legally incorrect for OIG to conclude that an EP opinion statement that does not track the exact wording in the ASTM standard in and of itself constitutes noncompliance for purposes of an assessment grant.

### **3. The Material Noncompliance Standard for Grant Terms and Conditions**

As a more general concern, OGC believes the OIG report, in discussing the repercussions of noncompliance, does not fully take into account that the regulatory standard for disallowing costs or terminating grants is when the grant recipient "materially fails to comply" with the terms and conditions of an award (including statutory requirements). 40 CFR 30.62(a); 40 CFR 31.43(a). The statutory termination and repayment provisions at CERCLA 104(k)(7)(C) are permissive rather than mandatory. EPA would, therefore, use the standard of material noncompliance in the regulations to determine if terminating a grant or repaying funds is warranted for failure to follow the AAI rule. Further, recipients would have an opportunity to dispute EPA's initial determinations under 40 CFR 30.63 and 40 CFR 31.70. For example, the findings in the OIG report indicating that several reports were noncompliant because they failed to include the required EP Qualifications Statement when they used the terms "we" and "our" when only one EP signed the statement (OIG report page 6) do not rise to the level of material noncompliance that could be sustained in a dispute.

OGC is aware of OIG's concern that the Agency has not articulated a standard for "material noncompliance" for AAI requirements in the context of brownfields grants. However, minor discrepancies in an AAI report would not warrant recovering federal funds or terminating a grant.

### **4. Scope of Investigations under the AAI Rule**

OIG stated in its final report that AAI includes "assessing potential liability for contamination" at a site (OIG report cover sheet and page 1). This statement is incorrect. In contrast to other types of environmental due diligence, neither the statutory criteria nor the AAI rule call on environmental professionals to assess potential liability. CERCLA 101(35)(B)(iii).<sup>3</sup> AAI is primarily a factual inquiry into the past uses and ownership of a site to determine whether there is a risk of contamination at the property. Environmental professionals who conduct AAI are not trained or authorized to assess liability or make other types of legal determinations. The OSWER "fact sheets" from which OIG drew this language do not create new obligations for those conducting AAI that are not in the AAI rule itself.

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<sup>3</sup> The OIG report refers to AAI as "environmental due diligence" (OIG report page 1). It is important to clarify that AAI is not synonymous with this term but is rather one type of environmental due diligence process, which, in contrast to some other types, does not require an assessment of liability. See 70 FR at 66072.

## 5. Declarations by the Environmental Professional

Throughout the report, OIG states that EPs “self-certify” that AAI requirements have been met (OIG report cover sheet and pages 5 & 7). In response to OSWER’s objection to the use of this term, OIG stated, “[O]ur finding is that EPA relies on the self-certification of EPs to ensure compliance with federal AAI requirements” (OIG report page 9). The term “self-certify” may be legally significant (e.g., with respect to environmental engineering licensure). EPA discussed this issue in the preamble to the AAI final rule and intentionally chose not to use this term in the rule. 70 FR at 66078. OGC appreciates the importance of communicating in plain language and notes that the preamble suggests using the terms “declaration” or “statement.” *Id.* It is incorrect to characterize the signed statement of the EP as any type of “certification.”

## 6. Disclosure Obligations in the AAI Rule

The OIG report states that the requirement to include in an AAI report “an opinion as to whether the inquiry has identified conditions indicative of releases or threatened releases of hazardous substances,” 40 CFR 312.21(c), could be considered a requirement to disclose environmental conditions (OIG report footnote 1). OSWER commented that the AAI final rule contains no disclosure requirements, and OIG responded by citing the above provision and 40 CFR 312.1(d). EPA considered this issue in the preamble to the final rule and determined,

The documentation requirements ... are primarily intended to enhance the inquiries by requiring the [EP] to record the results of the inquiries and his or her conclusions ... and to provide a record of the [EP]’s inquiry. Today’s rule contains no new requirements to notify or submit information to EPA or any other governmental entity.

70 FR at 66077 (emphasis added).<sup>4</sup> To clarify this point, the final rule contains subsection 312.1(d), which is a savings clause providing that nothing in the AAI rule limits or expands disclosure requirements under other laws. This provision does not create new disclosure obligations. It is incorrect to characterize any provision of the AAI final rule as a disclosure requirement.

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<sup>4</sup> EPA uses the AAI final rule as the framework for conducting brownfields assessments, because it is required to do so by statute. CERCLA 104(k)(2)(B)(ii). Outside of the grants context, the AAI final rule is part of a self-implementing framework enacted by Congress for obtaining liability protections under CERCLA. EPA believes parties conducting AAI for this purpose have an adequate incentive to ensure that the investigation is done properly, because “the burden of potential CERCLA liability ultimately falls upon the property owner or operator.” 70 FR at 66082.