



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

JUN 8 2011

THE INSPECTOR GENERAL

**MEMORANDUM**

**SUBJECT:** Close-out of OIG Report No. 11-P-0107, *EPA Must Implement Controls to Ensure Proper Investigations Are Conducted at Brownfields Sites*

**TO:** Mathy Stanislaus, Assistant Administrator  
Office of Solid Waste and Emergency Response

We have reviewed your final responses to the subject report dated March 23, 2011, and May 19, 2011. We also reviewed your staff's May 25, 2011, email agreeing to a final revision in OSWER's corrective action plan for the subject report. The OIG has now received a complete final response to the subject report. We will designate that we have received a complete response and close this report in the Inspector General's assignment tracking system.

We acknowledge your efforts and commitment to address the OIG recommendations. The following describes the Agency's agreed-to actions on each recommendation and the estimated completion dates.

**Recommendation 1:**

*"Establish EPA accountability for rule-compliant AAI reports that are funded by Brownfields Assessment grants, including ARRA-funded AAI reports."*

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.

### **Estimated Completion Dates**

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

### **Recommendation 2:**

*“Develop a plan to review post-final-rule AAI reports to determine the reports’ compliance with AAI documentation requirements.”*

In addition to the corrective actions for Recommendation 1, 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.

### **Estimated Completion Date:**

September 1, 2012: Regional Project Officers, beginning with FY11 Assessment Grants, will review grantee compliance with the AAI Checklist and AAI report documentation requirements covered in the checklist by annually 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 with grants awarded in 2011.

### **Recommendation 3:**

*“Establish EPA criteria for disallowing federal costs for noncompliant AAI reports produced under Brownfields Assessment grants and take action to disallow costs as appropriate.”*

OSWER 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. A review and determination will 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.).

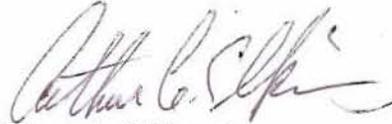
### **Estimated Completion Dates:**

July 30, 2011: 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.

September 30, 2011: Final Term and Condition distributed to FY11 Grantees

OSWER's March and May 2011 final responses contained separate comments from the EPA Office of General Counsel (OGC). A table with the OGC's comments and OIG's response is attached as an appendix.

If OSWER finds it necessary to modify any of the agreed-to corrective actions or planned milestones, the OIG should be consulted in advance. If you or your staff have any questions, please contact Wade Najjum, Assistant Inspector General, at (202) 566-0827, or Carolyn Copper at (202) 566-0829.



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**OIG Comments on OGC March 23, 2011 and May 19, 2011 response.**

<b>OGC Comment/Opinion</b>	<b>OIG Response</b>
<p><b>“1. Data Gap Reporting Requirements</b></p> <p>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.””</p>	<p>The OGC opinion does not recognize the potential misunderstanding and confusion that EPA training protocols may have caused and that we disclose in our report. We agree that EPA training materials do not “instruct environmental professionals to make an affirmative statement when there are no data gaps.” However, we do not agree that lack of an “affirmative statement” means that the EPA training statements on data gaps avoid confusion, misunderstanding, and convey requirements regarding what grantees must report. For example, the AAI training materials we reviewed state that “no discussion of data gaps” was a “common problem” in 2009 and a “deficiency” in AAI reports in 2007. While OIG acknowledges that there is no obligation in the AAI reporting requirement to make an affirmative statement regarding the absence of data gaps, EPA’s training materials and other communications imply data gaps should be addressed.OIG believes EPA has an obligation to ensure clear and correct communication on the AAI rule data gap reporting requirements in all EPA fact sheets, training materials, and publicly available communications and documents.</p>
<p><b>“2. Compliance with ASTM Standards</b></p> <p>The AAI rule provides that certain ASTM</p>	<p>The AAI regulation, (see 40 CFR, 312.11 References) states:</p>

<sup>1</sup> **OGC Comment/Opinion:** “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.”

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 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

"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."

Furthermore, the terms and conditions for Brownfields Assessment Grants state:

As required by CERCLA §104(k)(2)(B)(ii) and CERCLA §101(35)(B), the CAR shall ensure that a "Phase I" site characterization and assessment carried out under this agreement will be performed in accordance with EPA's standard for all appropriate inquiries. The CAR shall utilize the practices in ASTM standard E1527-05 "Standard Practices for Environmental Site Assessment: Phase I Environmental Site Assessment Process," or EPA's All Appropriate Inquiries Final Rule.

To the extent that an AAI Environmental Professional (EP) chooses to use the ASTM standard, the EP should adhere to that standard throughout their review. To the extent that there are inconsistencies between the ASTM and AAI standards' requirements, the grant agreement should clarify how the EP should comply.

<sup>2</sup> **OGC Comment/Opinion:** "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."

<p>terms and conditions of an assessment grant.</p> <p>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.”</p>	
<p><b>“3. The Material Noncompliance Standard (or Grant Terms and Conditions</b></p> <p>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.</p> <p>OGC is aware of OIG's concern that the Agency has not articulated a standard for "material noncompliance" for AAI</p>	<p>We acknowledge OGC’s acceptance that the Agency has not articulated a standard for material noncompliance for AAI requirements in the context of Brownfields grants. In response to our final report, the Agency agreed 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 will occur. In our final report, OIG is clear that, “<i>If conditions merit</i>, EPA can take back funds from noncompliant grantees.” [emphasis added]. In our report we provided evidence that EPA has the authority to disallow costs. We do not direct or make reference to the specific criteria EPA should use to disallow costs. We stated, “EPA may, under Title 40 CFR section 31.43(a)(1)-(3), remedy materially noncompliant cooperative agreement terms and conditions by any or all of the following:</p> <ul style="list-style-type: none"> <li>• Temporarily withholding payments</li> <li>• Disallowing all or part of cost activities</li> <li>• Initiating a whole or partial suspension or termination</li> </ul> <p>EPA may also, under CERCLA section 104(k)(7)(C) and the cooperative agreement terms and conditions, take such actions as:</p> <ul style="list-style-type: none"> <li>• Terminating the grant</li> <li>• Requiring the grantee to repay funds received</li> <li>• Pursuing other legal remedies available to EPA”</li> </ul>

<p>requirements in the context of brownfields grants. However, minor discrepancies in an AAI report would not warrant recovering federal funds or terminating a grant.”</p>	
<p><b>“4. Scope of Investigations under the AAI Rule</b></p> <p>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.”</p>	<p>According to EPA records, one purpose of AAI is to “<i>assess the potential liability for any contamination present at the property</i>” (see Brownfields Fact Sheet EPA 560-F-07-234, April 2007, <a href="http://www.epa.gov/brownfields/aai/lenders_factsheet.pdf">http://www.epa.gov/brownfields/aai/lenders_factsheet.pdf</a>). OIG references to liability protection issues are consistent with this EPA record. Also according to EPA records, “<i>To be eligible for liability protection under CERCLA as an innocent landowner, contiguous property owner or bona fide prospective purchaser, prospective property owners must: Conduct All Appropriate Inquiries in compliance with 40 CFR Part 312, prior to acquiring the property</i>” (see Brownfields Fact Sheet EPA 560-F-09-026 April 2009, <a href="http://epa.gov/brownfields/aai/aicerclafs.pdf">http://epa.gov/brownfields/aai/aicerclafs.pdf</a>).</p> <p>If OGC believes the Brownfields fact sheets available to the public are incorrect or misleading, it should work with OSWER/OBLR to remedy that situation immediately.</p>
<p><b>“5. Declarations by the Environmental Professional</b></p> <p>Throughout the report, OIG states that EPs "self-certify" that AAI requirements have been met (OIG report cover sheet and pages 5 &amp; 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</p>	<p>We believe that the EP declaration process lacks EPA oversight and review. The OIG was not attempting to create or change a legal standard through our use of the term ‘self-certify’. We acknowledge that the terms declaration and statement are legally preferred terms. We believe EPA needs to perform oversight of the AAI reports and not rely on the EP declaration.</p>

<sup>3</sup> **OGC Comment/Opinion:** “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 or environmental due diligence process, which. In contrast to some other types, does not require an assessment of liability. See 70 FR at 66072.”

<p>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.""</p>	
<p><b>“6. Disclosure Obligations in the AAI Rule</b></p> <p>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,</p> <p>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.</p> <p>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</p>	<p>The final rule specifically provides:</p> <p>40 CFR Section 312.1 Purpose, applicability, scope and disclosure obligations (d) “Disclosure obligations”, states: “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. <u>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.</u>”</p> <p>Further:</p> <p>40 CFR, 312.21 “Results of inquiry by an environmental professional” (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</p>

<sup>4</sup> **OGC Comment/Opinion:** “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.”

provision of the AAI final rule as a disclosure requirement.”

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.”

Insofar as the intent of the AAI final rule was to avoid creating any new disclosure requirements, it did reinforce the need to comply with existing disclosure requirements. Yet, the regulation requires environmental professionals to “document in a written report” an opinion on environmental conditions. While this may not be a new disclosure requirement, it can certainly be confused with one. Nonetheless, we believe EPA needs to perform oversight of the AAI reports and confirm the inclusion of an opinion from the EP concerning environmental conditions.