



U.S. ENVIRONMENTAL PROTECTION AGENCY
OFFICE OF INSPECTOR GENERAL

Catalyst for Improving the Environment

Evaluation Report

EPA Must Implement Controls to Ensure Proper Investigations Are Conducted at Brownfields Sites

Report No. 11-P-0107

February 14, 2011

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Abbreviations

AAI	All appropriate inquiries
ARRA	American Recovery and Reinvestment Act of 2009
CERCLA	Comprehensive Environmental Response, Compensation, and Liability Act
CFR	Code of Federal Regulations
CNMI	Commonwealth of the Northern Mariana Islands
EP	Environmental professional
EPA	U.S. Environmental Protection Agency
OBLR	Office of Brownfields and Land Revitalization
OGC	Office of General Counsel
OIG	Office of Inspector General
OSWER	Office of Solid Waste and Emergency Response
PO	Project officer
RCRA	Resource Conservation and Recovery Act



At a Glance

Catalyst for Improving the Environment

Why We Did This Review

We conducted this review to evaluate how the U.S. Environmental Protection Agency (EPA) is ensuring that Brownfields Assessment grantees adhere to all appropriate inquiries (AAI) requirements.

Background

Grantees awarded EPA Brownfields Assessment grants must meet AAI requirements. AAI is the process of evaluating a property for potential environmental contamination and assessing potential liability for contamination. To ensure a proper investigation, grantees must conduct AAI in compliance with federal regulations put into effect by EPA on November 1, 2006, and issue a report on findings.

For further information, contact our Office of Congressional, Public Affairs and Management at (202) 566-2391.

The full report is at:
www.epa.gov/oig/reports/2011/20110214-11-P-0107.pdf

EPA Must Implement Controls to Ensure Proper Investigations Are Conducted at Brownfields Sites

What We Found

EPA does not review AAI reports submitted by grantees to assure that they comply with federal requirements. Rather, EPA has relied on the environmental professional conducting the AAI to self-certify that requirements are met. Of the 35 AAI reports we reviewed, from three EPA regions, none contained all the required documentation elements. This occurred because the Agency does not have management controls requiring EPA project officers to conduct oversight of AAI reports. Management controls regarding EPA oversight of Brownfields grants funded by the American Recovery and Reinvestment Act of 2009 (ARRA) are also missing. EPA has issued specific guidance and management controls for ARRA grant activities. However, the guidance and controls do not address oversight of AAI reports.

Because of EPA's lack of oversight and reliance on environmental professionals' self-certifications, AAI investigations not meeting federal requirements may go undetected by Agency staff. The Office of Inspector General found instances of noncompliance that were not detected by Agency staff. Improper AAI investigations introduce risk that the environmental conditions of a property have not been properly or adequately assessed, which may lead to improper decisions about appropriate uses of brownfields properties. Ultimately, threats to human health and the environment could go unrecognized.

Noncompliant AAI investigations may result in future grant denials and possible government reimbursement. The AAI reports the OIG reviewed were generated from \$2.14 million in grant awards. If conditions merit, EPA is authorized to take back funds from noncompliant grantees. The OIG questions the value of the reports we reviewed.

What We Recommend

We recommend that EPA establish accountability for compliant AAI reports, to include those conducted under ARRA Brownfields grants; develop a plan to review AAI reports to determine the reports' compliance with AAI documentation requirements; and establish criteria to determine whether noncompliant grantees should return federal grant money. The Agency did not clearly agree or disagree with OIG recommendations. In its final response to the report, the Agency needs to agree or disagree with recommendations and, as appropriate, provide a corrective action plan to address the recommendations.



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

THE INSPECTOR GENERAL

February 14, 2011

MEMORANDUM

SUBJECT: EPA Must Implement Controls to Ensure Proper Investigations
Are Conducted at Brownfields Sites
Report No. 11-P-0107

FROM: Arthur A. Elkins, Jr. 
Inspector General

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

This is our report on the subject evaluation conducted by the Office of Inspector General (OIG) of the U.S. Environmental Protection Agency (EPA). This report contains the findings from our evaluation of Brownfields Assessment grantees and their adherence to all appropriate inquiries requirements and corrective actions that the OIG recommends. This report represents the opinion of the OIG and does not necessarily represent the final EPA position. Final determinations on matters in this report will be made by EPA managers in accordance with established resolution procedures.

The estimated cost of this report, calculated by multiplying the project's staff days by the applicable daily full cost billing rates in effect at the time, is \$519,875.

Action Required

In accordance with EPA Manual 2750, you are required to provide a written response to this report within 90 calendar days of the report date. Your 90-day response should include agreement or disagreement with OIG recommendations and appropriate corrective actions, along with estimated or actual milestone completion dates for all recommendations. Your 90-day response will be posted on the OIG's public website, along with our comments on your response. Your response should be provided in an Adobe PDF file that complies with the accessibility requirements of section 508 of the Rehabilitation Act of 1973, as amended. We have no objections to the further release of this report to the public. This report will be available at <http://www.epa.gov/oig>.

If you or your staff have any questions regarding this report, please contact Wade Najjum, Assistant Inspector General, at (202) 566-0832 or najjum.wade@epa.gov; or Carolyn Copper, Director for Program Evaluation, Hazardous Waste Issues, at (202) 566-0829 or copper.carolyn@epa.gov.

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Purpose

The purpose of this Office of Inspector General (OIG) review was to evaluate how the U.S. Environmental Protection Agency (EPA) is ensuring that Brownfields Assessment grantees adhere to all appropriate inquiries (AAI) requirements. EPA Brownfields Assessment grantees must meet AAI requirements to comply with grant terms and conditions and federal regulations. We sought to answer the question, “Are Brownfields grantees meeting EPA’s AAI Rule requirements to investigate and disclose¹ environmental conditions and are purchasers/owners maintaining continuing obligations² at brownfield properties?”

Due to priority issues identified during the course of our review, we did not complete an evaluation of continuing obligations at brownfields properties. Therefore, those issues are not addressed in this report.

Background

Brownfields are real property, the expansion, redevelopment, or reuse of which may be complicated by the presence or potential presence of a hazardous substance, pollutant, or contaminant. EPA’s Brownfields Program awards grants for the assessment and cleanup of these properties. Assessment grants provide funding to inventory, characterize, assess, and conduct planning and community involvement activities related to brownfields properties. AAI, also called “environmental due diligence,” is the process of evaluating a property for potential environmental contamination. AAIs also assess the potential liability for any contamination present at the property. Parties awarded federal Brownfields Assessment grants must conduct AAIs in accordance with federal law and regulations to obtain certain landowner liability protections under Superfund.³ From 2002 through 2009, EPA’s Brownfields Program awarded 1,354 assessment grants totaling \$306.8 million. This total includes \$25.8 million in American Recovery and Reinvestment Act of 2009 (ARRA) funds.

In November 2006, EPA put into effect final regulations, or a rule, establishing the federal requirements for conducting and documenting proper AAI investigations. The AAI investigation seeks to identify potential environmental conditions or problems at a property. It must involve reviews of historical records, interviews with persons knowledgeable of the property, and visual inspection of a property.

¹ Title 40 Code of Federal Regulations section 312.21(c)(1) requires environmental professionals to document, “*An opinion as to whether the inquiry has identified conditions indicative of releases or threatened releases of hazardous substances.*” The OIG considers this a disclosure of environmental conditions, where they exist.

² AAI reports do not speak to continuing obligations. This is because it applies after a property is purchased.

³ Specifically, the Comprehensive Environmental Response, Compensation, and Liability Act, or CERCLA.

Grantees are required to ensure that the investigation is performed in accordance with EPA's final rule. They may follow the standards set forth in ASTM International's E1527-05 *Standard Practice for Environmental Site Assessments: Phase I Environmental Site Assessment Process*. This ASTM standard and EPA's final rule both require that an environmental professional (EP) must conduct or oversee the AAI investigation. Grantees hire EPs to undertake the investigations. To ensure the quality of all appropriate inquiries, the final rule includes specific educational and experience requirements for an EP. EPA's final rule states that the EP must document results in a written report and include:

- An *opinion* statement regarding the identification of conditions indicative of releases or threatened releases of hazardous substances on, at, or to the subject property
- An identification of *data gaps* that may affect the ability of the EP to identify conditions indicative of releases or threatened releases of hazardous substances on, at, or to the subject property, as well as significance of the gaps
- *Qualifications and signature* of the EP, including qualifications statement

EPA's Office of Brownfields and Land Revitalization (OBLR) is the national program office and manager of the Brownfields Program. OBLR is responsible for awarding grants to qualified entities through a competitive process and establishing national guidance for the program. Within each of the 10 EPA regional offices, EPA Brownfields project officers (POs) have responsibility for oversight and monitoring compliance with Brownfields grant terms and conditions awarded to grantees in their jurisdictions.

Noteworthy Achievements

OBLR has provided states, federal agencies, local governments, nonprofits, industry groups, and the private sector with AAI and continuing obligations training. In November 2009, EPA provided training opportunities at the 2009 National Brownfields Conference. Specific training sessions at the conference included "CERCLA Liability and All Appropriate Inquiry Training for Tribes" and "Liability Protection: Progress Toward an ASTM Continuing Obligations Standard." OBLR has issued several publicly available fact sheets on AAI requirements. In March 2010, OBLR held a listening session on the AAI rule so that OBLR could listen to the views of stakeholders and the general public on the current AAI standards and practices.

Scope and Methodology

We conducted our review in accordance with generally accepted government auditing standards. Those standards require that we plan and perform the evaluation to obtain sufficient, appropriate evidence to provide a reasonable basis for our findings and conclusions. We believe that the evidence obtained provides a reasonable basis for our findings and conclusions based on our evaluation objectives. We performed our review from January through October 2010.

We conducted our review in EPA headquarters, Regions 1 and 5, and two U.S. territories located in EPA Region 2 (Puerto Rico) and Region 9 (Commonwealth of the Northern Mariana Islands, or CNMI). We selected Regions 1 and 5 because of the high dollar value of grants awarded to these regions from fiscal years 2002 through 2008. These regions also had a high number of grants per PO (high workload), which we believed could impact grant oversight opportunities. We selected the territory locations based on the potential for lower levels of EPA grant oversight and limited access to resources as compared with locations within the continental United States. We were unable to review AAI reports from Puerto Rico (Region 2) because its grantees had not yet completed any AAI reports.

The scope of AAI reports we reviewed included only those that were to adhere to EPA's final November 2006 requirements. From Regions 1, 5, and 9 (CNMI), we selected a total of eight community-wide Assessment grants. Community-wide Assessment grants address more than one site within a community. Seven grants from Regions 1 and 5 were randomly selected, and one grant from CNMI was judgmentally selected. These eight Assessment grants represented \$2.14 million in grant awards and generated 35 AAI reports. Table 1 shows the regional distribution of grants and AAI reports we selected and reviewed.

Table 1: Regional distribution of reports and grants OIG reviewed

	No. of AAI reports	No. of grants
Region 1	16	5
Region 5	10	2
Region 9	9	1
Total	35	8

Source: OIG analysis.

We visited Regions 1 and 5 and interviewed POs and Brownfields Program managers about EPA's management controls and their grants management. We also interviewed the PO and manager responsible for the Region 9 CNMI grant. We reviewed EPA's *Guidance to Recipients for Implementing the Brownfields Assessment, Revolving Loan Fund (RLF) & RLF Supplemental, Cleanup and Job Training Cooperative Agreements Awarded Under the American Recovery and Reinvestment Act of 2009* and interviewed POs in Regions 1 and 5 to identify EPA's management controls for AAI reports funded by ARRA grants.

All of the selected AAI reports stated that the EPs conducted the AAI investigation in compliance with the ASTM standard, which is allowed under EPA rules. We reviewed the reports for the following AAI final rule and ASTM⁴ standard documentation requirements:

1. EP Qualification Statement [*requirement of FINAL RULE Title 40 Code of Federal Regulations (CFR) section 312.21(d)*]

As required by Title 40 CFR section 312.21(d), the report shall include the following statements of the EP(s) responsible for conducting the AAI assessment and preparation of the report.

[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.

2. EP Signature(s) [*requirement of FINAL RULE Title 40 CFR section 312.21(d)*]

The EP(s) responsible for the AAI assessment shall sign the report.

3. EP Statement on Data Gaps [*requirement of FINAL RULE Title 40 CFR section 312.21(c)(2)*]

The report shall identify and comment on significant data gaps⁵ that affect the ability of the EP to identify conditions indicative of release or threatened release.

4. EP Opinion Statement (in Conclusion section) [*requirement of ASTM E1527-05 sections 12.8, 12.8.1, 12.8.2*]

The report shall include a conclusion section that summarizes all recognized environmental conditions connected with the property. The report shall include one of the following statements:

⁴ Compliance with ASTM requirements is included because all 35 reports the OIG reviewed sought to comply with the AAI requirements using the ASTM standard. The AAI final rule does not address whether the AAI rule or the ASTM standard provide the compliance standard, and EPA has not issued a legal opinion on this matter.

⁵ In 2007 and 2009, Brownfields Program staff provided AAI training information stating, “no discussion of data gaps” was a “common problem” in 2009 and “deficiency” in AAI reports in 2007. The 2009 training information also provided that under the final rule, “documentation of data gaps is no longer discretionary.”

We have performed a Phase I Environmental Site Assessment in conformance with the scope and limitations of ASTM Practice E 1527 of [*insert address or legal description*], the property. Any exceptions to, or deletions from, this practice are described in Section [] of this report. This assessment has revealed no evidence of recognized environmental conditions in connection with the property.

or

We have performed a Phase I Environmental Site Assessment in conformance with the scope and limitations of ASTM Practice E 1527 of [*insert address or legal description*], the property. Any exceptions to, or deletions from, this practice are described in Section [] of this report. This assessment has revealed no evidence of recognized environmental conditions in connection with the property except for the following: (*list*).

Results of Review

EPA does not review AAI reports to assure the reports meet EPA's AAI final rule requirements. None of the 35 AAI reports we reviewed, generated from \$2.14 million in grant awards, contained all the required elements to document that AAI was done in compliance with federal requirements. This occurred because the Agency does not have management controls requiring EPA POs to conduct oversight of AAI reports to assure they meet federal documentation requirements. The POs that we interviewed do not conduct oversight of AAI reports to assure compliance with federal requirements. EPA relies on EPs to self-certify compliance with federal AAI requirements. Missing controls for AAI report review also apply to EPA oversight of Brownfields grants funded by ARRA. According to EPA, grantees who do not comply with federal requirements for proper AAI investigations may be ineligible for future grants. Improper AAI investigations create risk that the environmental conditions of a property have not been properly or adequately assessed. Consequently, decisions about uses of redeveloped or reused brownfields properties may be based on improper assessments. Ultimately, threats to human health and the environment could go unrecognized.

AAI Reports Do Not Meet Documentation Standards for Investigations

None of the 35 AAI reports we reviewed contained all the required elements for documenting and reporting that AAI investigations meet federal requirements. There was variability in the level of noncompliance in individual reports. However, all the reports were noncompliant with some aspect of the requirements for proper documentation of an AAI investigation. Specifically:

1. EP Qualifications Statement: All 35 reports failed to include the required statement to certify the qualifications of the EP. 16 of the 35 reports (46 percent) included deviations from the required qualifications statement. Among the 16, either no statement was included, or the required statement was abbreviated or modified. The remaining 19 reports (54 percent) generally contained all three required sentences of the statement, but included wording that was inconsistent. For example, several statements used the terms “we” and “our” when only one EP signed the qualifications statement.

2. EP Signature(s): Nine of the 35 reports (26 percent) were not signed by the responsible EP.

3. EP Statement on Data Gaps: Seven of the 35 reports (20 percent) did not include a statement on data gaps.

4. EP Opinion Statement (in Conclusion section): All 35 reports failed to include the required EP opinion statement in the Conclusion section. Of this number, 33 reports, or 94 percent, included deviations from the required opinion statement, e.g., missing sentences, abbreviated or modified sentences, replacing “I” with the name of the environmental firm, or stating “general” conformance. The remaining two reports generally contained all parts of the statement, but also included some minor deviations, e.g., rewording or additional wording and omissions that do not alter the meaning of the statement.

Modifications and departures from use of required language for EP qualification statements and signatures fails to assure that a qualified EP conducted or oversaw the site investigation as required. The discrepancies in the opinion statements and missing statements on data gaps encountered in the investigation fail to assure that the work performed was sufficient to identify environmental conditions at the site. These discrepancies introduce a risk that potential threats to human health and the environment may fail to be recognized.

If conditions merit, EPA can take back funds from noncompliant grantees. We question the value of the reports generated from the \$2.14 million in federal grant awards. 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:

- Temporarily withholding payments
- Disallowing all or part of cost activities
- Initiating a whole or partial suspension or termination

EPA may also, under CERCLA section 104(k)(7)(C) and the cooperative agreement terms and conditions, take such actions as:

- Terminating the grant
- Requiring the grantee to repay funds received
- Pursuing other legal remedies available to EPA

EPA Does Not Review AAI Reports for Compliance with Federal Rules

EPA does not review AAI reports for requirements, and it has no requirements or guidance for conducting oversight of AAI reports. EPA relies on self-certification by an EP to ensure compliance, consistent with the intent and requirements of the AAI rule. The rule requires that AAI reports include a declaration (signed by the EP) that activities performed by, or under the supervision of, the EP were performed in conformance with the rule. EPA's AAI rule does not require that EPA POs review AAI reports. OBLR's *Assessment Grant Administrative Manual* does not describe duties for POs in AAI report review. An OBLR manager stated, "as a general rule, nobody" reads through the AAI reports. This manager also stated that OBLR is not responsible for oversight of AAI reports. POs stated that they do not review AAI reports for requirements because such reviews are not their responsibility, but rather are the responsibility of either the states or EPs. The results of our review demonstrate shortcomings in EPA's approach of relying on self-certification to ensure that federal requirements for AAI investigations are met and assuming that EPs are adhering to their responsibilities.

EPA Lacks Controls to Ensure AAI Requirements Are Met for ARRA Work

In fiscal year 2009, EPA's Brownfields Program awarded 89 Assessment grants, totaling \$25.8 million, from ARRA funds.⁶ EPA has issued guidance and implemented management controls for ARRA funds. ARRA guidance directs that funds are spent and accounted for properly and efficiently, and that some results and outcomes are timely and accurately documented. EPA's Brownfields Recovery Act guidance requires additional reporting steps for ARRA grantees. Steps include detailing progress on interim measures such as reporting on when assessments start and loan/subgrants are signed. However, EPA does not have guidance, and has not implemented new controls, to assure that deliverables from ARRA-funded Brownfields grants, such as AAI reports, adhere to federal requirements. The shortcomings we found in the non-ARRA AAI reports we reviewed could extend to the AAI reports on ARRA-funded Brownfields grants.

Conclusions

EPA's lack of oversight and reliance on EPs' self-certifications creates risk that AAI investigations not meeting federal requirements may go undetected by

⁶ This information can be found at http://www.epa.gov/brownfields/grant_announce/recovact5509.pdf.

Agency staff. Our findings demonstrate that a sample of AAI reports, generated from \$2.14 million in federal grant awards, did not meet federal requirements for documenting that a proper AAI investigation was conducted. These instances of noncompliance went undetected. Noncompliant AAI investigations may result in future grant denials and possible government reimbursement. Improper AAI investigations introduce risk that the environmental conditions of a property have not been properly or adequately assessed. Consequently, decisions about appropriate uses of redeveloped or reused brownfields properties may be based on improper assessments. Ultimately, threats to human health and the environment could go unrecognized. EPA should properly account for and award federal grant funds to rule-abiding grantees to demonstrate its environmental protection priorities and values, and to promote compliance with federal grant requirements.

Recommendations

We recommend that the Assistant Administrator for Solid Waste and Emergency Response:

1. Establish EPA accountability for rule-compliant AAI reports that are funded by Brownfields Assessment grants, including ARRA-funded AAI reports.
2. Develop a plan to review post-final-rule AAI reports to determine the reports' compliance with AAI documentation requirements.
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.

Agency Response and OIG Evaluation

The Office of Solid Waste and Emergency Response (OSWER) provided Agency comments. The Agency's comments included legal analysis provided by the Office of General Counsel (OGC). A summary of the legal comments was included in OSWER's comments. We reviewed the Agency's comments and made changes to the report, where appropriate. Appendix A provides the full text of OSWER's comments and the OIG's response. The OGC legal analysis is not included in the report because it was not designated for distribution outside of EPA. The Agency informed the OIG that it plans to issue the legal analysis in their 90-day response to the final report.

OSWER's response to OIG recommendations 1, 2, and 3 was incomplete. OSWER stated a "willingness to work" with the OIG in addressing the recommendations but did not provide corrective action plans and milestone dates. In its 90-day response to this report, OSWER needs to agree or disagree with recommendations and provide appropriate corrective action plans and

estimated or actual milestone completion dates for recommendations 1, 2, and 3. In a meeting prior to issuing this final report, we informed the Agency of our evaluation of its response and the additional information it needs to provide us in its 90-day response.

In its comments, OSWER requested that the following sections of the report be deleted, modified, or clarified:

- OSWER requested that the OIG clarify that “self certification” by an EP does not require EPs to certify the results of the AAI. We did not make this change because our report does not state that EPs certify the “results of the AAI investigation.” Rather, our finding is that EPA relies on the self-certification of EPs to ensure compliance with federal AAI requirements.
- OSWER requested that we remove references in our report to “a disclosure requirement regarding environmental conditions at a site” and “continuing obligations.” OSWER stated that, “there is nothing in the AAI rule that requires disclosure of environmental conditions of a property.” First, our report does not state a requirement to disclose “environmental conditions of a property.” Second, our report contains one reference to “disclose” in this context. Specifically, in stating the purpose of our work (see OIG report page 1), we ask, “Are Brownfields grantees meeting EPA’s AAI Rule requirements to investigate and disclose environmental conditions and are purchasers/owners maintaining continuing obligations at brownfield properties?” Also, we note that Title 40 CFR section 312.1(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. 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.” Also, Title 40 CFR section 312.21(c)(1) requires EPs to document, “*An opinion as to whether the inquiry has identified conditions indicative of releases or threatened releases of hazardous substances.*” This requirement for EPs to document an opinion on environmental conditions can be a disclosure of environmental conditions where they exist. We also disagree with OSWER’s comment that we change OIG references to “continuing obligations.” We are aware that continuing obligations are a separate issue from AAI. Nothing in our report states otherwise. Further, the OIG report states that the OIG did not evaluate continuing obligations

issues. However, we clarified references to continuing obligations in the final report to avoid potential confusion.

- OSWER requested that we revise our report to clarify that references to AAI reports including an assessment of potential liability for any contamination present at a site may not be applicable in all instances. The frequency with which potential liability assessments are included in AAI reports was not a focus of the OIG's work. Therefore, we do not have independent information to support such a statement.
- OSWER requested that the OIG report clarify that, in many instances, Brownfields Assessment grantees will not be purchasing or owning the subject property and, as such, liability protection as a bona fide prospective purchaser, an innocent landowner, or a contiguous property owner would not be applicable. The OIG's work did not focus on how frequently liability protections would be needed for Brownfields grantees. Therefore, we do not have independent information to support such a statement.
- OSWER also requested that we address our references to specific language being required for the EP opinion statements. OSWER's concern is that specific language is not a requirement under EPA's AAI final rule. All 35 AAI reports we reviewed sought to comply with the AAI requirements using the ASTM standard, which is allowed. 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. The OIG was diligent in clearly identifying AAI and ASTM standards used in evaluating the reports we reviewed and making the distinction between these standards in our draft report. In the final report, we added language to clarify why we evaluated the ASTM requirement.
- OSWER also requested that we clarify that data gaps must only be addressed in AAI reports when the lack of information precludes the EP from reaching necessary conclusions regarding conditions indicative of releases or threatened releases. The specific reporting requirement related to data gaps is provided in Title 40 CFR section 312.21(c)(2) of the final rule, and requires EPs to identify data gaps. The OIG's finding on data gaps is based on EPA Brownfields Program communications in 2007 and 2009 training information that "no discussion of data gaps" is a "common problem"(2009) and "deficiency"(2007) in AAI reports. The 2009 training information also provided that under the final rule, "documentation of data gaps is no longer discretionary." 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. We have clarified this issue in our final report.

Finally, EPA's comments stated, "Unlike cleanup and remediation activity under Superfund, RCRA [Resource Conservation and Recovery Act] or emergency response authorities, EPA does not directly supervise assessment or cleanup activity funded under our Brownfields Cooperative Agreements. Rather, those activities are supervised under the appropriate State or Tribal Response Program, which would ensure that the activity is completed properly and is protective of human health and the environment." Based on our work, we believe this statement could be wrongly interpreted to mean that State and/or Tribal Response Programs supervise AAI work. The information we obtained from EPA's Brownfields Program staff shows that EPA regional Brownfields POs are responsible for verifying with the grantee that AAI rule was met.

Status of Recommendations and Potential Monetary Benefits

RECOMMENDATIONS						POTENTIAL MONETARY BENEFITS (in \$000s)	
Rec. No.	Page No.	Subject	Status ¹	Action Official	Planned Completion Date	Claimed Amount	Agreed-To Amount
1	8	Establish EPA accountability for rule-compliant AAI reports that are funded by Brownfields Assessment grants, including ARRA-funded AAI reports.	U	Assistant Administrator for Solid Waste and Emergency Response			
2	8	Develop a plan to review post-final-rule AAI reports to determine the reports' compliance with AAI documentation requirements.	U	Assistant Administrator for Solid Waste and Emergency Response			
3	8	Establish EPA criteria for disallowing federal costs for noncompliant AAI reports produced under Brownfields Assessment grants and take action to disallow costs as appropriate.	U	Assistant Administrator for Solid Waste and Emergency Response			

¹ O = recommendation is open with agreed-to corrective actions pending
 C = recommendation is closed with all agreed-to actions completed
 U = recommendation is undecided with resolution efforts in progress

OSWER Response to Draft Report

MEMORANDUM

SUBJECT: OIG Draft Evaluation Report: EPA Must Implement Controls to Ensure Proper Investigations are Conducted at Brownfields Sites

FROM: Mathy Stanislaus
 Assistant Administrator

TO: Arthur Elkins, Jr.
 Inspector General

Thank you for the opportunity to review and comment on the draft Office of Inspector General (OIG) report entitled “EPA Must Implement Controls to Ensure Proper Investigations Are Conducted at Brownfields Sites.” We appreciate the Office of Inspector General’s efforts in evaluating grantee compliance with certain requirements related to the conduct of All Appropriate Inquiries (AAI), and we have appreciated the opportunities to discuss this with OIG.

As was discussed during the recent meeting between our Offices, the Office of General Counsel (OGC) has identified several aspects of the draft report that warrant further examination by OIG, and I have attached their legal analysis of these issues.

OIG Response 1: The OGC legal analysis is not included in our report because it was not designated for distribution outside of EPA.

If you or OIG legal counsel would like to discuss these, OGC has indicated its willingness to do so. Similarly, we would appreciate the opportunity to discuss with you further the general statements in the draft report regarding disallowing costs related to specific deficiencies in AAI reports or documentation.

OIG Response 2: OIG staff met with Agency staff to discuss these comments and the OGC analysis on January 10, 2011.

We agree with the positions set forth in OGC’s memorandum, which help place the AAI rule in to the proper context in relation to the nature of brownfields funded assessments and cleanups. Unlike cleanup and remediation activity under Superfund, RCRA or emergency response authorities, EPA does not directly supervise assessment or cleanup activity funded under our Brownfields Cooperative Agreements. Rather, those activities are supervised under

the appropriate State or Tribal Response Program, which would ensure that the activity is completed properly and is protective of human health and the environment

OIG Response 3: We disagree with the above paragraph as it applies to AAI investigations. The information we obtained from EPA’s Brownfields Program staff shows that EPA regional Brownfields POs are responsible for verifying with the grantee that AAI rule was met. If State and Tribal Response Programs are to be supervising AAI activities, that is not a common understanding in the Brownfields Program.

As is set forth in the attached opinion, we recommend that the following sections of the Report be deleted, modified or clarified: (1) The references to “self certification” by environmental professionals should clarify that the AAI rule does not require the environmental professional to certify the results of the AAI when signing the report. Rather, the environmental profession must sign the report to document that the signatory meets the requirements of an environmental professional, and that the activities performed were done in conformance with the federal requirements. The environmental professional is not “certifying” the environmental conditions at a property;

OIG Response 4: The Agency has mischaracterized the OIG statements pertaining to “self-certification.” The OIG report does not state that EPs certify “the results of the AAI investigation,” or the “environmental conditions of a property.” Rather, the OIG’s stated finding is that EPA relies on the self-certification of EPs to ensure compliance with federal AAI requirements. The OIG strives to communicate in plain language. In plain language, the declarations that the AAI rule requires EPs to include and sign can also be considered self-certifications. Specifically, Title 40 CFR section 312.21(d) states:

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.

(2) references to a disclosure requirement regarding environmental conditions at a site. There is nothing in the AAI rule that requires disclosure of environmental conditions of a property;

OIG Response 5: Our report does not state a requirement to disclose “environmental conditions of a property.” In addition, our report contains one reference to “disclose” in this context. Specifically, in disclosing the purpose of our work (see OIG report page 1), we ask, “Are Brownfields grantees meeting EPA’s AAI Rule requirements to investigate and disclose environmental conditions and are purchasers/owners maintaining continuing obligations at brownfield properties?” Title 40 CFR section 312.21(c)(1) requires EPs to document, “*An opinion as to whether the inquiry has identified conditions indicative of releases or threatened releases of hazardous substances.*” We believe this requirement for EPs to document an opinion on environmental conditions can be a disclosure of environmental conditions, where they exist.

Also, Title 40 CFR section 312.1(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. 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.”

(3) references to the necessity for AAI reports to address “continuing obligations” at brownfield sites. “Continuing obligations” is a phrase used by EPA to describe required activities to maintain liability protection, and an AAI report would not speak to this;

OIG Response 6: The OIG is aware that the issue of continuing obligations is separate from AAI. Nothing in the OIG report states otherwise. When the OIG announced its work in this area, we had plans to look at how continuing obligations requirements were being met. However, the OIG stated in its draft report to OSWER, “Due to priority issues identified during the course of our review, we did not complete an evaluation of continuing obligations at brownfield properties. Therefore, those issues are not addressed in this report.” This statement remains in this final report. We also added clarifying references to continuing obligations in the final report to avoid potential confusion.

(4) Clarify that references to AAI reports including an assessment of potential liability for any contamination present at a site may not be applicable in all instances. AAI reports can be relevant to liability, because they provide an assessment of site conditions, including the presence of contamination. The AAI rule does not, however, require those conducting AAI to undertake analysis or make determinations regarding the liability of any party;

OIG Response 7: The frequency with which potential liability assessments are included in AAI reports was not a focus of the OIG’s work. Therefore we do not have independent information to support such a statement.

(5) clarification that, in many instances, brownfields assessment grantees will not be purchasing or owning the subject property and, as such, liability protection as a bona fide prospective purchaser, an innocent landowner, or a contiguous property owner would not be applicable;

OIG Response 8: The OIG’s work did not focus on how frequently liability protections would be needed for Brownfields grantees. Therefore, we do not have independent information to support such a statement.

(6) references to specific language being required for the environmental professional opinion statement. There is not a requirement that prescribed wording or language be used in the opinion statement;

OIG Response 9: This comment reflects a concern associated with the fact that the AAI rule does not require the opinion statement requirement per the ASTM standard.

The OIG’s report clearly states that the specific wording used in our evaluation of the opinion statements is an ASTM requirement. The AAI regulation, which allows use of either AAI or ASTM standards (see Title 40 CFR section 312.11, “References”), states:

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.”

All 35 reports that the OIG reviewed sought to comply with the AAI requirements using the ASTM standard. The final rule does not address whether the AAI rule or the ASTM standard provides the compliance standard, and EPA has not issued a legal opinion on this matter. The OIG clearly designated in its draft and final reports the items that specifically pertain to the AAI and ASTM standard. The OIG added additional clarification language on why the ASTM standard requirement was evaluated in the final report.

(7) clarification that “data gaps” must only be addressed when the lack of information precludes the environmental professional from reaching necessary conclusions regarding conditions indicative of releases or threatened releases. If conclusions can be reached in the absence of data, the AAI report would not need to address these data gaps.

OIG Response 10: The specific reporting requirement related to data gaps is provided in Title 40 CFR section 312.21(c)(2) of the final rule. Specifically:

II. 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...on, at, in, or to the subject property and, comments regarding the significance of these data gaps.

Further, EPA's Brownfields Program communicated in 2007 and 2009 training information that "no discussion of data gaps" is a "common problem" in 2009 and "deficiency" in AAI reports in 2007. The 2009 training information also provided that under the final rule, "documentation of data gaps is no longer discretionary." In our opinion, this represents an EPA interpretation that the data gaps requirement includes stating that there were no data gaps when that is the case. We have clarified this issue in the final report.

Additionally, the draft report recommended that we "establish EPA criteria for disallowing federal costs for noncompliant AAI reports produced under Brownfields site assessment grants and take action to disallow cost as appropriate." While OSWER does not want to suggest to the public that failure to meet every technical requirement of AAI might require that costs be disallowed, we agree that we should work with OIG to establish appropriate criteria, to alert grantees to potential bases for disallowance of costs. We look forward to working with your staff regarding this recommendation.

OIG Response 11: In its 90-day response, OSWER needs to provide corrective actions plan and estimated or actual milestone completion dates for OIG recommendation 3.

Finally, the draft report identified 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. In response to these findings, OBLR will develop and distribute, and conduct appropriate outreach and training, to Brownfields Assessment Grantees and to Regional Brownfields program staff additional guidance related to the rule's documentation requirements, and we will work with your Office on the specifics of this corrective action.

OIG Response 12: OSWER has not clearly responded to OIG recommendations 1 and 2. In its 90-day response, OSWER needs to state concurrence/nonconcurrence with these recommendations and provide a corrective action plan, including estimated or actual milestone completion dates for these recommendations.

Again, thank you for the opportunity to provide our comments and to transmit the Office of General Counsel's comments and input. We remain available to discuss these items further, and to develop appropriate action items as noted above.

Distribution

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