

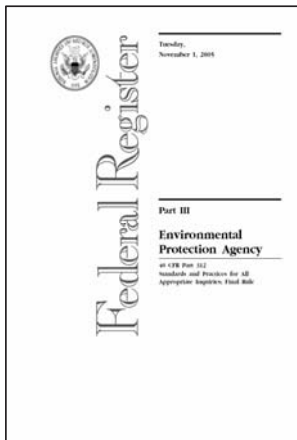


Executive Summary

Preparing for Parallel Changes: AAI & ASTM E 1527

November 2006

The environmental due diligence industry is in an unprecedented period of transition. The market barely had time to read EPA's final "All Appropriate Inquiries" rule (*40 CFR Part 312*) released on November 1, 2005, when they were hit with another significant development two weeks later: a revised ASTM Phase I E 1527 standard. The federal rule, which recognizes the E 1527-05 standard as an acceptable guidance document for satisfying AAI and took effect on November 1, 2006, gave Phase I consultants less than one year to familiarize themselves with the new requirements. The following Executive Summary, based on EDR's 2005/2006 Due Diligence at Dawn workshop series, covers the fundamentals of meeting the new federal pre-transaction requirements, and the details of CERCLA's post-transaction continuing obligations.



Agency Administrator Stephen L. Johnson unveiled the long-awaited rule with much fanfare in his keynote address at the National Brownfields Conference in Denver, Colorado on November 2, 2005, tipping his hat to the 25 stakeholders who participated in the regulatory negotiation process throughout 2003.

The rule's development period also included close collaboration between EPA and ASTM. It was to the mutual benefit of both parties for the ASTM E 1527 standard to receive EPA's blessing in the federal rule as sufficient protocol for meeting AAI. In order to satisfy EPA that the ASTM E 1527 standard was "at least as stringent" as the AAI rule, the 2000 version needed to go through a series of revisions. This process required that certain elements of the AAI rule

(e.g., EPA's "environmental professional" qualifications) be incorporated verbatim into ASTM E 1527-05. In their final forms, some key differences between the two documents remain, but a property purchaser may follow either E 1527-05 or the AAI rule in order to meet the first step necessary to qualify for CERCLA liability protection. The following sections document the key areas of change to the ASTM standard that were necessary to bring the process in sync with an environmental inquiry under the AAI rule.

Purpose

The first obvious change to the ASTM E 1527 standard necessary to make the practice consistent with the scope of the AAI rule pertains to *Section 1.1, Purpose*. The Phase I Task Group expanded the applicability of the stan-

AAI & ASTM E 1527

The 2002 Small Business Liability Relief and Brownfield Revitalization Act (the Brownfields Law) set the wheels in motion for the first federal environmental due diligence rule. Under the Brownfields Law, any property purchasers seeking to qualify for CERCLA liability protection must conduct AAI prior to taking title in order to raise a defense as any of the following:

- Innocent landowner;
- Contiguous property owner; or
- Bona fide prospective purchaser.

After a four-year development period, including a fall 2004 public comment period, U.S. Environmental Protection

TEN FACTS ABOUT AAI • TEN FACTS ABOUT AAI • TEN FACTS ABOUT AAI

1. To qualify for any of the CERCLA liability protections, ten components of AAI must be satisfied, including "an inquiry by an environmental professional."
2. Certain components must be conducted by a qualified EP, but other steps may be the responsibility of the "user."
3. The AAI rule does not require the user to provide information to the EP, but it is the EP who bears responsibility for developing opinions and documenting findings.
4. The EP's report should document what was/was not provided, which ten steps were not addressed in the inquiry, if any.
5. The AAI rule assigns a one-year shelf life from the date of property purchase for the environmental inquiry, with a 180-day shelf life for certain components.
6. "Environmental professionals" have new qualifications to meet in terms of licensing, education and relevant experience.
7. AAI is only the first step to establishing the ability to qualify for CERCLA liability protection - "continuing obligations" apply after purchase.
8. Sampling is not required under AAI, but is suggested as an option for filling data gaps.
9. The effective date of the AAI rule was November 1, 2006.
10. Corporations, lenders, developers, investors and other affected sectors are evaluating their environmental due diligence policies to determine whether to adopt AAI.



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Congress' Statutory Language for Mandatory Components of "All Appropriate Inquiry"

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

Source: *Federal Small Business Liability Relief and Brownfields Revitalization Act*, signed into law on January 11, 2002.

dard from its original purpose as a tool for permitting a user to qualify for the traditional innocent landowner defense. Now, E 1527's scope also encompasses the two new landowner liability protections under the 2002 Brownfields Law:

- the bona fide prospective purchaser, and
- the contiguous property owner protections.

The E 1527-05 standard includes Appendix X1, a 10-page legal appendix (*Legal Background to Federal Law and the Practices on Environmental Assessments in Commercial Real Estate Transactions*) that reflects updates made in response to CERCLA's amendments under the 2002 Brownfields Law. Within the appendix is current information on CERCLA's requirement for AAI; the statutory definition of hazardous substances; a background on CERCLA's exclusion for petroleum products and petroleum; and an updated case law interpretation of AAI in commercial real estate transactions.

Another key change to the scope of E 1527 is the deletion of references to the

ASTM E 1528 Transaction Screen standard. Previously, the standard indicated upfront in *Section 1.1* that the purpose of the E 1527 practice, "as well as Practice E 1528," was to allow a user to satisfy one of the requirements needed to qualify for the innocent landowner defense to CERCLA liability. Now, under the provisions of the 2002 Brownfields Law, a property purchaser can no longer follow E 1528 and hope to qualify for CERCLA liability protection. As a result, the ASTM Task Group divorced the two practices, and on March 6, 2006, ASTM issued a revised E 1528 standard that reflects its new purpose as a transactional environmental screening tool outside the scope of CERCLA-related concerns (E 1528-06).

An important element of the E 1527 standard that did not change, however, is the definition of "recognized environmental condition (or REC)." The goal of the Phase I ESA is still to identify "the presence or likely presence of any hazardous substances or petroleum products on a property..." The corresponding terminology under the AAI rule is that the purpose of the investigation is to identify "conditions indicative of releases or threatened

releases of hazardous substances, as defined in CERCLA section 101(22)..."

Distribution of Responsibilities

The conduct of AAI is a ten step, two-party process, to be completed not just by the environmental professional, but also by the person seeking to qualify for CERCLA liability protection (i.e., the "user"). The ten steps date back to the 2002 Brownfields Law (see shaded text box). Although the user's responsibilities under AAI were always part of a Phase I ESA under the E 1527 standard, they were routinely overlooked. The EPA rule is now clearly stating that the user is uniquely responsible for bringing certain information to the table; namely, a search for environmental cleanup liens, specialized knowledge about the property, and a consideration of the purchase price to the fair market value of the property, if not contaminated. The EP, on the other hand, shoulders responsibility for the core components of a Phase I: the environmental inquiry, the site visit, interviews, and a review of current and historical sources about the property and surrounding area. In addition, both the EP and the user share responsibility for considering two other elements of AAI: any "commonly known" information about the property and the "degree of obviousness of contamination."

Although the rule does not require the user to share information with the EP, it is the EP who ultimately bears responsibility for developing opinions and documenting findings about "releases or threatened releases of hazardous substances" at the target property. As such, the EP's report should expressly state which required information from the user was provided, as well as what was not. Property purchasers must be aware of the types of information that need to be provided to the EP upfront, and perhaps more importantly, understand that a failure to do so could jeopardize the ability to qualify for CERCLA liability protection down the

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Distribution of Responsibilities for AAI Components

Duties of EP

1. Environmental inquiry
2. Visual inspections of the facility and adjoining properties
3. Interviews with past and present owners, operators and occupants
4. Reviews of historical sources
5. Reviews of federal, state, tribal and local government records

Duties of "User"

6. Searches for recorded environmental cleanup liens
7. Consideration of "specialized knowledge" of the subject property and adjoining properties
8. Consideration of the relationship of the purchase price to the value of the property, if not contaminated

Duties Shared by EP and "User"

9. Consideration of commonly known information about the property
10. Consideration of the "degree of obviousness of contamination"

Source: 40 CFR Part 312, Nov. 1, 2005.

road. To assist in educating clients about the emphasis on user's responsibilities, E 1527-05 includes a new appendix (X3) containing a questionnaire to be completed by the user, expressly stating that:

"Failure to provide this information could result in a determination that 'all appropriate inquiry' is not complete."

The *User Questionnaire* specifically outlines a property purchaser's obligations under AAI for providing the following information to the environmental professional:

- a. environmental cleanup liens filed or recorded against the site;
- b. activity and use limitations in place on the site;

- c. specialized knowledge or experience related to the property or nearby property;
- d. relationship of the purchase price being paid for the property to its value if not contaminated;
- e. commonly known or reasonable ascertainable information about the property; and
- f. any obvious indications pointing to the presence or likely presence of contamination at the property.

If a property owner is forced to prove in court that AAI was met, the environmental professional's Phase I report must demonstrate that the federal rule was followed and all ten AAI elements were conducted. To avoid liability, environmental professionals should get in the habit of discussing with their clients whether these user responsibilities will be satisfied—and by whom—as well as adjusting the scope of work accordingly. The scope should make it clear, for example, whether the responsibility for finding environmental cleanup liens under (a) above will fall on the user's shoulders or whether this responsibility is being transferred to the environmental professional. As always, the language in the scope of work is a valuable tool for managing exposure to liability by spelling out exactly what the client's expectations are for the Phase I.

Emphasis on AULs

One significant focus of the pre-transaction environmental inquiry outlined under the AAI rule is on activity and use limitations (or AULs). Encompassing engineering and institutional controls (ECs and ICs) that are placed on sites with residual contamination, AULs play a significant role in a property purchaser's ability to qualify for CERCLA liability protection under the 2002 Brownfield Amendments. If an AUL exists on a property, the owner will be held responsible for being aware of these restrictions, as

well as complying with them over time. EPA is steering significant efforts now toward ensuring that AULs in place at contaminated properties are enforced. The new Phase I standard (E 1527-05) includes an entirely new section, entitled *Significance of Activity and Use Limitations* (Section 5) to emphasize the importance to property owners of complying with any AULs that may exist on their properties. It is important for consultants to note that under the AAI rule and E 1527-05, the responsibility for identifying AULs during the environmental investigation is shared by the environmental professional and the user. Section 6.2 of E 1527-05 expressly states that:

"Unless added by a change in the scope of work to be performed by the environmental professional, this practice does not impose on the environmental professional the responsibility to undertake a review of recorded land title records and judicial records for environmental liens or activity and use limitations."

Many environmental professionals, however, are expecting that under the AAI rule, their clients will transfer the user responsibility for liens searches to them, and will adjust their scope of work and Phase I rate upwards accordingly. In addition, the environmental professional is also responsible for determining whether the Phase I is being conducted in a state that maintains a publicly available list or registry of engineering or institutional controls. If so, the responsibility for searching such records falls to the environmental professional (per Section 312.26 of the final AAI rule and Section 8.2.1 of E 1527-05).

Professional Qualifications

One of the most significant changes to come about as the result of the AAI rule's consensus-based negotiations is a specific definition of "environmental professional." Prior to the release of the new

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standard, ASTM's traditional definition of an environmental professional was: "a person possessing sufficient training and experience necessary to conduct site reconnaissance, interviews, and other activities in accordance with this practice..." Now, ASTM has changed this section of the standard to mirror EPA's regulatory language, stating that an EP is "a person meeting the education, training and experience requirements as set forth in 40 CFR Part 312.10(b)." The federal definition, which gives consultants four avenues for meeting the new professional qualifications, has been pulled into E 1527-05 in its entirety as *Appendix X2*. To qualify, a person must satisfy one of the following:

1. hold a current PE or PG license or registration from a state, tribe, or U.S. territory and the equivalent of three years of full-time relevant experience;
2. be licensed or certified by the federal government, a state, tribe or U.S. territory to perform environmental inquiries and the equivalent of three years of full-time relevant experience;
3. have a Baccalaureate or higher degree from an accredited institution of higher education in a discipline of engineering or science and the equivalent of five years of full-time relevant experience; and
4. have the equivalent of ten years of full-time relevant experience.

Under the new language in the AAI rule and E 1527-05, junior level staff may still participate in the conduct of AAI-compliant Phase I ESAs, provided their work is being conducted "under supervision or responsible charge" of a qualified environmental professional. On each project, there must be at least one individual who does satisfy the new professional qualifications, and is responsible for completing the following steps of the compliant Phase I:

- conducting the site visit and interviews, or, at a minimum, being involved in

- planning these steps of the analysis;
- reviewing and interpreting the information on which the report is based;
- overseeing the report writing;
- developing opinions of the impact on the property of conditions identified in the *Findings* section of the report;
- developing an opinion regarding additional appropriate investigation, if any, to detect the presence of hazardous substances or petroleum products; and
- signing off on a report that declares he/she meets the definition of environmental professional as defined in §312.10 of 40 CFR Part 312, possesses specific qualifications appropriate to conduct a Phase I at the subject property, and that he/she developed and performed AAI in accordance with the standards and practices set forth in 40 CFR Part 312.

Records Review

To bring the E 1527-00 standard in line with the federal AAI rule, the following four changes were necessary:

- Revisions to search distances for certain federal government records;
- Mandatory search of federal/state/tribal IC and EC registries;
- Mandatory review of tribal records; and
- Transition from the discretionary to mandatory review of local records.

The revisions to search distances for certain government records are generally viewed as relatively minor compared to the other three categories. Specific AAI-related search distances for the following were incorporated into E 1527-05:

- Delisted NPL sites list (1/2 mile); and
- Federal CERCLIS NFRAP site list modified from property/adjoining to 1/2-mile search radius

The mandatory search for ICs and ECs is reflective of the new focus on AULs discussed earlier in this Executive Summary. If the Phase I is conducted in a

state that maintains a publicly available list or registry of ICs or ECs, the environmental professional must search these records.



Another key change in the government records review process is the addition of a mandatory search of tribal records. Although tribal records may be hard to come by in many areas of the country, the AAI rule and now ASTM E 1527-05 have both expanded all state records searches to also include any available tribal records. EPs are now required to assess whether any tribal sources of the following types of records exist for the subject property or surrounding area:

- hazardous waste sites,
- landfills and solid waste disposal site lists,
- LUST and UST sites,
- voluntary cleanup sites, and
- brownfield sites.

EPA's preamble to the AAI rule states that tribal records need only be searched and reviewed, however, in instances where the subject property is located on or near tribal-owned lands.

Perhaps one of the most significant changes in the scope of the government records review is the mandatory search for local government records. The 2000 text of the E 1527 standard required that "one or more additional state sources or local sources of environmental records may be checked..." To satisfy the AAI rule, this language has been tightened to

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state that: “local records and/or additional state or tribal records *shall be checked...*” The transition from “may” to “shall” reflects the AAI rule’s strict language that “federal, tribal, state, and local government records or data bases of government records of the subject property and adjoining properties *must be reviewed.*” As a result, to the extent that reasonably ascertainable local records are available, it will be difficult for consultants to defend a charge of overlooking them in their research based on the language in *40 CFR Part 312*—and now, E 1527-05.



Historical Use Information

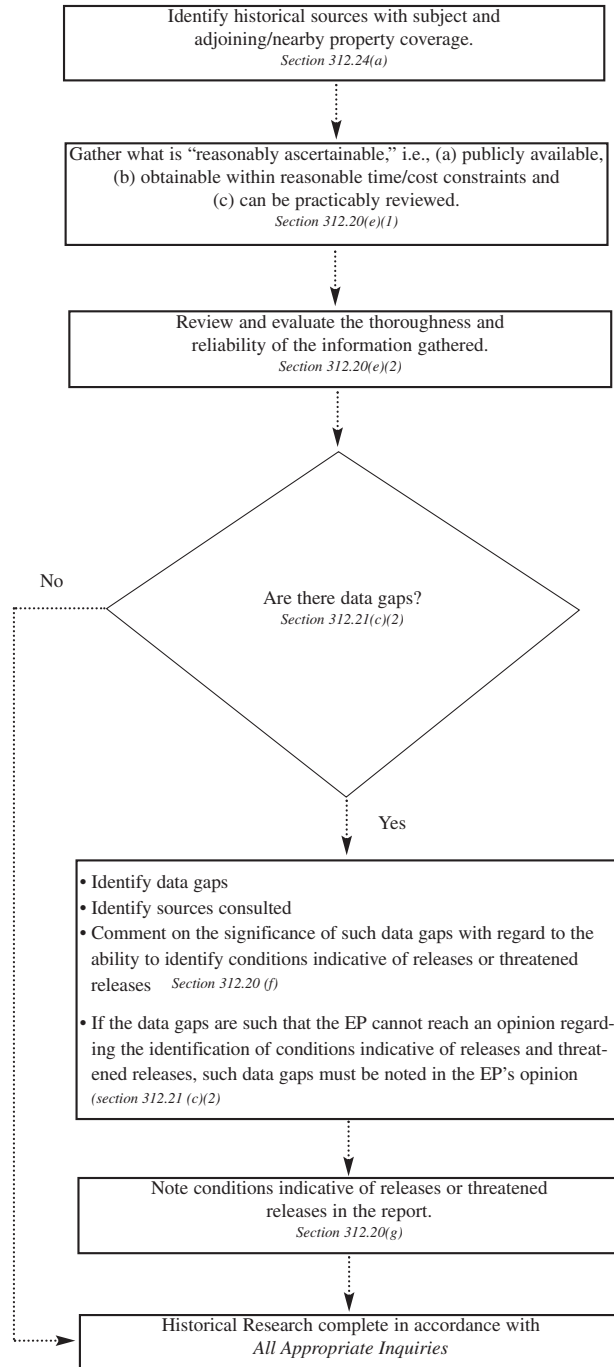
The new E 1527 standard reflects only minor changes to the historical research section. It is still up to the consultant’s professional judgment to decide which historical sources should be used. Although the eight standard historical sources remain unchanged from E 1527-00, the term “other historical sources” was broadened to include:

- internet sites,
- community organizations,
- local libraries,
- historical societies, and
- current owners/occupants of neighboring properties.

This language was added to reflect the AAI rule’s emphasis on considering “commonly known” information about the property at the local level (see AAI Criterion 9 in table on p. 3).

In addition to the standard documentation of data failure during historical

HISTORICAL RESEARCH UNDER 40 CFR PART 312 - STANDARDS FOR CONDUCTING ALL APPROPRIATE INQUIRIES



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research, the E 1527-05 standard adds a new level of scrutiny. In any area of the Phase I, a failure to meet the requirements of the AAI rule triggers “data gaps” documentation requirements. An environmental professional must now consider whether a data failure exists that significantly affects the ability to identify RECs and, if so, the EP must meet the AAI rule’s requirements for considering and documenting such gaps in the analysis. Although the environmental professional is granted a great deal of leeway in determining which historical sources to use and how far back in time to go, the language in the AAI rule emphasizes an iterative process of conducting full research, attempting to fill gaps and then opining on the effect any gaps may have on the EP’s ability to reach conclusions about the property.

For purchasers, it is critical to hire a qualified EP with proven knowledge of local historical sources. Attempting to complete a continuous record of past land uses based on all reasonably ascertainable historical sources will be more critical than ever to avoid having to document data gaps and form opinions about the effect a gap may have on the Phase I’s findings. To aid in the process of determining whether a particular data gap is significant, the revised ASTM standard provides several specific examples for EPs to follow. For a schematic on the thought process involved in conducting historical research under the AAI rule, see the accompanying figure on p. 5.



Site Reconnaissance

As far as visiting the property, the AAI rule requires that a visual inspection of the subject property and adjoining properties be conducted, preferably by someone who meets the rule’s stringent EP definition. EPA’s language about who conducts the site visit, however, is a recommendation in the preamble rather than a requirement in the AAI rule itself. Consultants are now asking themselves whether it is necessary to change their practices if they rely on staff members to walk the property who do not meet the EP definition. Those who contract with EPs are also starting to ask questions about the qualifications of the professional assigned responsibility for site visits. Regardless of how EPs respond to EPA’s recommendation, it appears certain that if a Phase I comes under the scrutiny of a court, one of the elements that will be judged is whether the site visit was conducted by a qualified EP. It is therefore critical during this period of transition that Phase I firms recognize any added

risk that may be associated with using junior staff or local subcontractors who do not meet the new professional qualifications to conduct site visits.

Another key area of change to the site visit in E 1527-05 involves a new emphasis in the AAI rule on the area surrounding the target property. The 2000 language stated: “To the extent that current uses of adjoining properties are visually and/or physically *observed*...”. The word “observed” has been replaced with “observable” in E 1527-05 to emphasize that the environmental professional must examine any conditions over the property’s boundary that may be indicative of “releases or threatened releases of hazardous substances.” It was EPA’s opinion during the revisions to the E 1527-00 standard that the phrase “to the extent...observed” did not adequately convey that the EP is responsible for observing conditions at adjoining properties during the site visit. It is now critical that the professional being sent to inspect the target property pay attention to any conditions over the property line that would be considered “observable” and may be indicative of RECs at the target property.

Interviews

To reflect the same level of stringency as the AAI rule, the interviews section of ASTM E 1527-00 had to be revised in two areas. First, a mandatory requirement

Property Timeline



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to interview “past and present owners, operators, and occupants” of the subject property was added. The 2005 standard now states that:

“Interviews with past owners, operators, and occupants of the property who are likely to have material information regarding the potential for contamination at the property shall be conducted to the extent that they have been identified and that the information likely to be obtained is not duplicative of information already obtained from other sources.”

How far the EP goes in interviewing past owners, operators and occupants, however, will be up to the EP to decide based on professional experience, and other information uncovered during the Phase I.

Second, the standard was revised to mirror the AAI rule’s mandatory requirement that, in certain special cases, neighboring property owners must be interviewed. This is one area where the AAI rule begins to extend beyond the scope of the old E 1527-00 standard. Now, if a Phase I is being conducted on an abandoned property, and if there is “evidence of the unauthorized uses or uncontrolled access to the property,” then interviews with one or more neighboring property owners or occupants must be conducted. Previously, interviews with neighbors were discretionary. This is still the case for Phase Is on properties that do not meet the EPA’s definition of abandoned:

“Property that can be presumed to be deserted, or an intent to relinquish possession can be inferred from the general disrepair or lack of activity thereon...”

To Sample or Not to Sample?

Sampling is suggested in the rule as one option that can be taken when an EP is attempting to fill data gaps. EPA clearly states, however, that sampling is not required to satisfy AAI. As such, the E 1527-05 standard maintains the previ-

ous language that: *“This practice does not include any testing or sampling of materials.”*

The rule leaves the burden on the EP to determine the significance of data gaps, and recommend additional investigation, if necessary, when considering the “obviousness of contamination” at the property under AAI criterion 10, (see table on p. 3). When contemplating whether or not to sample, it is therefore critical for the property purchaser to know that he or she will be held responsible for managing any contamination responsibly, and that CERCLA liability protection could be forfeited if sampling is not conducted—either before or after purchase. Certainly, as always, there is a business advantage to conducting sampling prior to the purchase of the property to identify all potential environmental concerns upfront (see the “Appropriate Care” section beginning on p. 8 of this Executive Summary for additional information on sampling decisions).

Report Preparation

Under the AAI rule, a report prepared in compliance with *40 CFR Part 312* will contain three components:

1. declarations that the EP definition was met and the Phase I was conducted in compliance with the federal rule;
2. documentation of data gaps and a discussion of their significance; and
3. an opinion on whether the inquiry has identified conditions indicative of releases or threatened releases of hazardous substances at the property.

The E 1527-05 standard now includes the declaration language lifted directly from the AAI rule, as well as the federal definition for data gaps:

“a lack of or inability to obtain information required by the standards and practices listed in the regulation despite good faith efforts by the EP or prospective landowner to gather such information.”

The EP’s report must identify data gaps and document any steps taken to fill them. Also, the EP must comment on the significance of the data gaps, and on whether or not the gaps affect the EP’s ability to form an opinion about the environmental condition of the target property. Data gaps may pertain to any component of AAI that was not satisfied, such as a 40-year gap in the property’s history (see p. 6), failure of the user to provide information (see p. 2), an inability to interview the current owner, or any other element of AAI that, for some reason, could not be satisfied.

Phase I Shelf Life

The AAI rule also made a notable change to the shelf life of a Phase I ESA. The final rule allows for information in prior Phase I reports to be used, but all information must be collected or updated to within one year of the date that the owner takes title. In addition, the following components must be current to within 180 days of the property’s acquisition date:

- Interviews with past and present owners;
- Searches for recorded environmental cleanup liens;
- Reviews of government records;
- Visual inspections of the facility and adjoining properties; and
- The declaration by the EP that AAI was followed.



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Although information from past reports can be used, EPA makes it clear that considerations of the following components must be updated to reflect the current transaction: “specialized knowledge” about the property, the relationship between the current purchase price and the value of the property if it was not contaminated, and any commonly known information about the property. To reflect the AAI rule, E 1527-00’s Section 4.7.2, which contained language about using a prior Phase I ESA in its entirety under certain conditions (e.g., no material changes to the property), has been eliminated. For reports older than one year, the information cannot be used without current investigation. For property purchasers and their EPs, this revision likely means fewer updates of old reports. EPA’s language in the AAI rule and its preamble will make it difficult for prospective purchasers to rely on older reports for their due diligence and hope to qualify for CERCLA liability protection.

Transition to AAI and E 1527-05

The transition to the new requirements is already underway, and will continue to gain momentum after the rule’s November 1, 2006 effective date as the market gets more comfortable with the AAI rule and E 1527-05. During this critical period, it is essential for EPs to make the necessary changes to staffing, report templates, contract language, and their Phase I processes to minimize any exposure to professional liability. In addition, property purchasers need to be aware of the new liability protections, the new emphasis on user obligations, the provisions regarding the Phase I ESA report shelf life, and any added level of effort associated with Phase I work. While an AAI-compliant Phase I may not be appropriate for every transaction, if CERCLA liability protection is being sought, the purchaser has some new elements of the environmental investigation to satisfy.



Beyond Due Diligence: AAI & Appropriate Care

In addition to defining a new standard of care for pre-transaction environmental due diligence, another critical element of the AAI rule is the emphasis on “continuing obligations” over the course of property ownership. In the preamble to the AAI rule, EPA is adamant that AAI is the first, but not the only, step to CERCLA liability protection:

“Conducting all appropriate inquiries alone does not provide a landowner with protection against CERCLA liability.”

The AAI rule’s preamble further states that the ability to qualify for liability protection must be maintained...and can, in fact, be lost:

“persons conducting AAI...are not entitled to the CERCLA liability protections provided for innocent landowners, bona fide prospective purchasers and contiguous property owners, unless they also comply with all of the continuing obligations...”

Even if a property purchaser hires a qualified EP and has an AAI-compliant Phase I conducted prior to taking title, CERCLA liability protection can be lost at any time during ownership of the property if continuing obligations are not maintained.

What Are They?

Continuing obligations, as defined in the 2002 Brownfield Amendments, consist of the following:

- complying with land use restrictions and institutional controls;
- taking “reasonable steps” with respect to hazardous substances releases;
- providing full cooperation, assistance, and access to persons that are authorized to conduct response action or natural resource restoration;
- complying with information requests and administrative subpoenas; and
- providing all legally required notices.

Under the continuing obligations language of the law, a property owner must act responsibly with respect to any onsite contamination, as well as complying with any restrictions on the property’s use (e.g., ICs or ECs) due to contamination. The Phase I report takes on new significance under the AAI rule for uncovering the information needed to determine an owner’s obligations over time.

Land Use Restrictions and ICs

One of the most significant components of complying with continuing obligations involves not violating any land use restrictions. Institutional controls are the mechanism often used to enforce land use restrictions that limit a property’s use due to contamination left onsite. Under the new CERCLA liability law, a property owner must be able to demonstrate that he/she did not interfere with the integrity or effectiveness of any controls placed on the property. These controls may include zoning restrictions, covenants, easements, deed notices, or restrictions recorded on title. Regardless of what they are called, land use restrictions communicate to the landowner that due to some amount of contamination still on the property, its use is limited. This may mean there is a section of the property that cannot be developed or that use of the groundwater is restricted or prohibited. If the owner ignores these types of restrictions, his/her CERCLA liability protection will be jeopardized.

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Reasonable Steps

The property owner must also exercise “appropriate care” with respect to hazardous substances on the property by taking “reasonable steps” to:

- Stop any continuing release,
- Prevent any threatened future release, and
- Prevent or limit human, environmental or natural resource exposure to hazardous substances.

If there has been a release at the site, the owner cannot do anything to make contamination worse at the property over the course of ownership. One critical point to remember is that these obligations pertain to contamination that may be known at the time of purchase, as well as to any release that might be discovered after taking title, including the migration of contamination from a contiguous property. If, for example, contaminated soil or groundwater is present at the property and the owner breaks ground and the release spreads, it could have serious impacts on his/her liability protection.

New Role of the Phase I ESA

Phase I ESAs, if done properly, will provide the purchaser with the basic information for identifying any continuing obligations that must be met. For instance, did the Phase I identify a REC at the property, uncover an institutional control or detect that contamination is present? Are there any material data gaps that need to be filled post-purchase (e.g., by sampling) to determine the potential for continuing obligations? Does the client have enough information in the Phase I to satisfy the requirement to stop continuing releases, prevent future releases and limit human, environmental or natural resource exposure?

The types of Phase I findings that may trigger continuing obligations include:

EPA’s Language on AAI and Continuing Obligations¹

“None of the other statutory requirements for the liability protections is satisfied by the results of the all appropriate inquiries...”

“Landowners must comply with all the statutory requirements to obtain protection from liability...”

“Conducting all appropriate inquiries alone does not provide a landowner with protection against CERCLA liability...”

“...the conduct of all appropriate inquiries prior to purchasing a property is only one requirement to which a purchaser must comply to claim protection from CERCLA liability once the purchase has taken place. The statute requires that persons, after acquiring a property, comply with continuing obligations to take reasonable steps to stop ongoing releases at the property, prevent any threatened future releases, and prevent or limit any human, environmental, or natural resource exposure to any previously released hazardous substances...”

“...a fulfillment of the all appropriate inquiries requirements does not, by itself, provide a person with a protection from or defense to CERCLA liability...”

“An inability to identify a release or threatened release during the conduct of all appropriate inquiries does not negate the landowner’s ongoing or continuing responsibilities under the statute, including the requirements to take reasonable steps to stop the release, prevent a threatened release, and prevent exposure to the release once the landowner has acquired a property...”

“Failure to identify an environmental condition or identify a release or threatened release of a hazardous substance on, at, in or to a property during the conduct of all appropriate inquiries, does not relieve a landowner from complying with other post-acquisition statutory requirements for obtaining the landowner liability protections...”

“The failure to detect a release during the conduct of all appropriate inquiries does not exempt a landowner from his or her post-acquisition continuing obligations under other provisions of the statute...”

“A person’s inability to obtain information regarding a property’s ownership or use prior to acquiring a property can affect the landowner’s ability to claim a protection from CERCLA liability after acquiring the property, if a lack of information results in the landowner’s inability to comply with any other post-acquisition statutory obligations that are necessary to assert protection from CERCLA liability...”

¹Source: 40 CFR Part 312 *Standards and Practices for All Appropriate Inquiries and Notice of Public Meeting To Discuss Standards and Practices for All Appropriate Inquiries; Proposed Rules* (Federal Register/Vol.69, No. 165/Thursday, August 26, 2004).

Executive Summary CONT'D

- institutional controls/land use restrictions;
- engineering controls;
- continuing releases;
- recognized environmental conditions; and
- data gaps.

In light of the need to meet continuing obligations, the Phase I findings could affect what is done on the property—or not done. Or where a new structure is placed. Or the type of development that can be built there. If there is any contamination on site, under CERCLA, nothing the owner does at the property over time can make things worse or cause human, environmental or natural resource exposure to the contamination. As such, it is more critical than ever to have a quality Phase I conducted that will arm the owner with the information necessary to comply with any continuing obligations.

Data Gaps and Sampling

Continuing obligations have important implications with respect to data gaps and decisions about sampling. Although an owner can meet AAI even if the Phase I report has data gaps that were documented and scrutinized, it is important for the owner and his/her consultant to consider any data gaps after purchase to determine whether more work should be conducted to fill them. If there is any chance of contamination on the property, the courts will hold the owner responsible for knowing about it. Planned land use will play a role in decisions about sampling. If, for example, the owner intends to lease the property and not make any major changes to the site, then

filling data gaps or even conducting sampling may not be as critical. If there is visibly stained soil on the property, but the owner did not want to sample before the transaction, it may be a good idea after purchase to get a solid handle on the area of contamination as a proactive means for preserving CERCLA liability protection. Any data gaps that are material to the fulfillment of continuing obligations should be closed post-acquisition to preserve the owner's ability to qualify for CERCLA liability protection. Environmental consultants are already writing scopes of work to help clients plan for complying with continuing obligations, using the Phase I as a starting point.

Why Landowners Should Care About Continuing Obligations

There are six important reasons why every property owner should be aware of continuing obligations, particularly owners of properties with environmental issues—and why consultants should start educating their clients about these obligations:

- 80% of CERCLA cleanups now have some form of IC or EC;
- Many states have Superfund-equivalent programs with a continuing obligations component;
- Compliance with continuing obligations is tied with a broader trend toward public corporations being pressured to exercise good environmental stewardship and manage their environmental liabilities responsibly;
- EPA's position is that future CERCLA case law will be made on the basis of

continuing obligations, and whether property owners should have known about the need to comply with them;

- EPA has already committed resources to ensuring that continuing obligations are met, including IC compliance; and
- Attention by regulators translates into liability for owners.

Based on the attention being placed on continuing obligations, the growing use of risk-based cleanups, EPA's commitment to ensuring that land use restrictions are tracked and enforced, and the recent emphasis on responsible corporate behavior, it will be risky for property owners to ignore what the law requires over the course of property ownership. Having a plan in place for complying with continuing obligations can be a prudent tool for property owners to demonstrate that they were not negligent in behaving responsibly with respect to contamination at a property, and environmental consultants have a valuable role to play in developing such a plan.

ASTM's New Task Group

The recent attention being placed on continuing obligations under the 2002 Brownfields Law gave rise to a new task group at ASTM, which is now developing a standard practice for continuing obligations. Formed in October 2005, the Task Group is writing a document that will establish a clear link between the Phase I ESA and continuing obligations, as well as outline the requirements that must be met by landowners in specific circumstances. Notably, EPA has already pledged active involvement in the development of this new standard, and may eventually require any brownfields grantees to establish that they have full information about a property from the Phase I ESA, as well as demonstrate that they are following the ASTM continuing obligations standard over the course of ownership.



Executive Summary CONT'D

Both consultants and property owners are being held to a higher standard after AAI is conducted, particularly at sites with residual contamination. For public companies, today's new era of corporate transparency adds another level of urgency for acting responsibly in terms of contamination and land use controls at their properties. Ignoring these obligations could lead to bad publicity, lawsuits, inaccurate financial reporting, loss of confidence by stakeholders, and significant cleanup costs. As the ASTM standard takes shape, consultants will have a structure to work with in framing what property owners should be doing in specific cases.

The Bottom Line

The transition over to EPA's AAI rule has environmental consultants as well as lenders and property purchasers concerned about their own liability. Environmental consultants across the country are now turning a critical eye to the language in their service contracts and reports in preparation for clients who are—or soon will be—demanding AAI-compliant Phase Is.

Preparing Phase I reports that are complete and accurate has always been critical for preventing exposure to litigation.

This is now even more important. Signing off on a Phase I ESA report that is missing documentation or contains careless errors can come back to haunt an environmental consultant and a property owner down the road.

It is understandable that given the higher level of research and documentation, added exposure to liability and the prospect of higher insurance rates, Phase I pricing will likely increase. The price impact estimates range from EPA's low-ball estimate of \$52-\$58 per Phase I to as much as \$2,000-\$4,000 more on every transaction. The majority of consultants, however, based on EDR's own research, put the incremental price impact in the \$400-\$500 range. Consultants are educating clients now about any expected increase in Phase I prices, coupled with the added benefits of maintaining CERCLA liability protection.

One impact the AAI rule may have on the Phase I market is that there will be fewer places for clients to shop for qualified consultants, given that low-quality providers are less appealing. Many analysts and stakeholders are already predicting that the AAI rule will make it difficult for the "fly-by-night firms" to compete effectively, giving high-quality firms a competitive edge.

Although an AAI-compliant Phase I may not be appropriate for every commercial real estate transaction, lenders and property purchasers must make educated decisions about whether and when to adopt the new Phase I ESA protocol. For users of Phase Is who have not yet crafted an AAI response strategy, now is the time to start thinking about it. Questions to be asked are:

- How old is our environmental due diligence policy? Does it warrant updating?
- What level of environmental due diligence will satisfy our risk tolerance on different types of transactions?
- How important is it to qualify for CERCLA liability protection?
- Do our pre-approved consultants meet the new federal EP definition?
- Will we adopt AAI universally? And, if not AAI, then what?
- If we require AAI, will it be required on all Phase Is? Or only in certain cases?
- If our environmental due diligence policy references the 2000 version of the Phase I standard (E 1527-00), do we wish to adopt the updated 2005 version?

The only certainty about AAI in the market right now is uncertainty. Each bank and property purchaser has its own unique risk tolerance against which to measure the new requirements. Confusion about who must do what when is now widespread, and clearly much remains to be clarified in the coming months as the market gets more comfortable with the rule and how it is interpreted and applied in the marketplace. ■

For More Information on AAI & ASTM E 1527-05. .



www.edrnet.com/aai for:

- Links to final AAI rule, including preamble
- Links to ASTM's page on E 1527-05 for information on purchasing the standard

www.epa.gov/brownfields/regneg.htm for:

- fact sheets on the rule
- Comparison of the AAI rule to E 1527-00

