

## Legal AAI Primer: Protecting Yourself from Liability Exposure

*If the transition over to EPA's "All Appropriate Inquiries" rule has you concerned about your own exposure to liability, you are not alone. Environmental consultants across the country are 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 I ESAs. In terms of liability exposure, the current transition period over to the new Phase I ESA protocol is a most dangerous time for environmental professionals. Attorneys are already in line to scrutinize Phase I ESA reports for true conformance to the requirements of the AAI rule.*



*The purpose of this portion of EDR's AAI business development tool is to provide environmental consultants with information on potential new areas of risk exposure under AAI, and more importantly, steps consultants can and should be taking now to cover their bases and avoid professional liability exposure. The written summary below reflects input from more than a dozen attorneys nationwide who specialize in environmental due diligence.*

There are several areas of the AAI rule that may expose consultants to more liability. For instance, the AAI rule is commonly referred to as a "performance-based" regulation, meaning that the environmental professional conducting the investigation has the flexibility to make judgment calls along the way, provided that the rule's objective and performance factors are met. This inherent flexibility, however, also presents a source of professional liability for environmental consultants, and caution is in order. In addition, in several key areas of the research, consultants must rely on information from other parties and assess the truthfulness or reliability of particular sources on which to base their professional opinions. This can also present an area of potential added liability. Fortunately, there are steps consultants can take to protect themselves from liability in four key areas: client communication, performing the Phase I, report writing and contract language.

### **1. Client Communication**

Bringing clients up the learning curve on changes to environmental due diligence practices brought about by the AAI rule and E 1527-05 is arguably the biggest challenge facing the industry. In fact, EDR's Annual State of the Phase I ESA Industry Survey (August 2006) revealed that educating clients about the requirements of the AAI rule is the leading business concern facing the industry today, ranking above the state of the commercial real estate market, pricing and the overall health of the economy.

Much of the uncertainty about AAI, and its potential to expose consultants to more liability, can be managed by paying closer attention to how and what is communicated to clients, both verbally and in writing. Now that the market essentially has two new protocols to follow for a Phase I ESA (the AAI rule and E 1527-05), it is important that your clients are clear about expectations for the work that your firm will be providing.

For starters, make sure that the purpose of the Phase I ESA report is clearly defined in the scope of work prior to starting on the project. For example:

- If your client is the property purchaser, will the Phase I ESA be used to qualify the client for liability protection under CERCLA? Or is the client interested in assessing business environmental risk?
- Is the work being done to satisfy a lender in order for a loan to be approved?
- Is your client receiving money from a Brownfields grant?
- Does your client also want the scope of work to include certain non-scope issues?
- What protocol is being used (e.g., AAI, E 1527-05, E 1527-00, customized scope, etc.)?
- If it is an AAI scope, is your client taking responsibility for the environmental cleanup liens search or is your firm assuming that responsibility?
- Is your client placing constraints on your work (i.e., time, cost, confidentiality)?

These questions should all be clearly answered within the scope of work. Tight time constraints often put pressure on consultants to cut back efforts in preparing a written scope of work for a specific project. Attorneys feel that this is a huge mistake. By investing the time to customize each scope of work, consultants can make huge strides toward avoiding breach of contract charges. Another common pitfall that consultants run into is starting work before a formal contract is agreed upon. This is a definite mistake to avoid, especially with the increased confusion in the market place.

Documenting a thorough scope of work at the onset of every project will achieve several critical objectives. It will ensure that your client obtains the level of detail in the report that they need. It will help you protect yourself from charges that the clients' expectations were not met, and hopefully avoid misunderstandings later in the project when the report is delivered.

## **2. Phase I Process**

After clearly defining the scope of work that will be followed for a particular project, outlining the client's expectations and identifying any client-imposed constraints, there are certain steps consultants should take during the Phase I process to minimize liability exposure under AAI.

### *EP Qualifications*

The AAI rule clearly spells out that only environmental professionals who meet the rule's qualifications can oversee Phase I work and declare a report as "AAI-compliant." One of steps consulting firms can take to minimize liability is to mitigate any internal confusion over "who does what" under AAI. For instance, EPA strongly recommends in the rule's preamble that only a qualified EP should be conducting site visits. However, at a minimum, EPA states that a qualified EP should be involved in planning for the site visit with a junior staff person. Given this ambiguity, it is up to each individual firm to consider this language in the context of their own risk tolerance. If a Phase I ESA report undergoes scrutiny by a court, one of the first things a court will review are the qualifications of the consultant who performed the work, including the site visit. If an unqualified EP was involved, the risk is that the findings of the investigation will be

thrown into question. If a firm decides to use junior staff for site visits, it requires careful consideration of whether their firm is willing to incur this risk.

So far, consulting firms have had different reactions to this issue. In a survey conducted by EDR during the spring of 2006, roughly one-third of firms planned to allow only qualified EPs to conduct site visits on Phase Is with an AAI scope of work, while another 24% plan to require EPs to walk the site only for properties that are perceived to be high risk. Still another one-quarter of respondents said that their firm has not yet made a decision on how to proceed.

No matter what your firm decides, attorneys recommend writing a formal policy on the matter. It is also important to document the qualifications of all of your firm's Phase I staff and keep it updated over time. This will help avoid confusion and liability. It can also be used to give your firm a competitive edge, as it will demonstrate to a prospective client that your firm is staffed with the individuals qualified to perform a Phase I in accordance with *40 CFR Part 312*.

### *User Responsibilities*

Congress defines AAI in terms of ten components, and certain key elements are the responsibility of a qualified environmental professional while others may be conducted by the individual seeking CERCLA liability protection (i.e., the "user"). This represents a potential area of confusion for the consultant and the client, particularly if either party is unclear about what tasks the other is assuming responsibility for completing. Lawyers agree that explaining the new user responsibilities to clients upfront is a crucial step. This is particularly important given that the EP is the one responsible for writing a report and declaring that the investigation was conducted in accordance with the federal rule. It is critical that any transfer of the user responsibilities to the EP is documented not only in contract language, but also in the report (see "Contract Language section" below). One user responsibility that is already commonly being transferred over to the EP at this early stage of AAI implementation is the search for environmental cleanup liens. The EP's contract should clearly state the distribution of responsibilities for each of the ten elements of AAI. The revised ASTM E 1527-05 standard has an updated User's Questionnaire to help facilitate these types of discussions with clients, and avoid confusion later in the project.

### *Records Review*

The AAI rule now requires additional databases be searched for government records, including institutional and engineering controls (AULs), and local and tribal databases. After the review of government records is complete, the environmental professional should evaluate and document the thoroughness of the search, as well as what was and was not found. For instance, if tribal environmental records were not searched because the property is not located on or near tribal lands, the report should state this. The danger is that a failure to document this could be construed as oversight on the part of the EP to conduct one element of AAI. This attention to detail will help make a tight case for any consultant whose work may be brought under scrutiny in court.

### *Interviews*

Documentation is the key to conducting interviews that yield usable and defensible information. All too often, lawyers see that consultants do not properly detail the who, what, where, when and how of interviews conducted for a Phase I. This can be avoided by taking time to create internal templates for interviews with current and past owners, operators and occupants (as well as neighboring property owners and government officials to the extent required to meet the AAI rule's objectives).

Having standardized interview questions to be used by all Phase I staff companywide can contribute significantly to higher levels of quality control and consistency, a factor that becomes particularly important if junior staff will be conducting the interviews. Later, if a report is brought under scrutiny in court, the opposing attorney will likely look for any inconsistency and sloppiness in the consultant's recordkeeping and methodology. By creating and adhering to a strict technique for conducting interviews, the consulting firm will have an easier time demonstrating to a court that they have covered all of their bases. It is also important to document the types of interviews that could not be conducted and why. For example, if the EP makes several "good faith" attempts to contact a past owner but is not successful, the steps taken to reach that person should be specifically documented in the report.

### *Historical Research*

With historical records, as with many other elements of AAI, liability can often be attributed to poor documentation. More so than other elements of a Phase I, the historical research component is an area that is often scrutinized in court. To minimize liability, attorneys recommend that each source that was searched be documented within the report, even if it did not provide any valuable information. In commodity-style reports, this portion is often overlooked or done with very little effort. The rule also puts much more emphasis on "commonly known information" in the local community. As such, every firm should ensure that it is appropriately tied into sources like historical societies, local newspapers, local government offices and other types of sources to avoid overlooking critical information that may be material to the environmental investigation.

### *Site Visit*

A common mistake that environmental professionals make in conducting site visits is performing only a partial physical site investigation. Under the AAI rule and E 1527-05, there is also now a greater onus on the EP to pay attention not just to the target property but also to conditions on surrounding properties "to the extent observable." In the report, any factors that prevented the EP from examining the entire property or surrounding property/-ies should be expressly documented. One example is snow cover, which may prevent an EP from identifying stained soil that may be indicative of a release at the site. While this type of hurdle may not lead to a "significant" data gap, the report should at a minimum detail any obstacle faced by the EP during the site visit. In other "unusual circumstances", the consultant conducting the site visit may not be able to gain any access to the property or piece of the property where a release is suspected. In this case, the data gap should be documented along with the steps that were taken in attempt to compensate for this shortcoming in the site visit.

## *Opinions*

While most lawyers would tell a consultant that “professional opinions = liability claims,” the AAI rule makes it impossible for an EP to avoid giving an opinion in the report about whether the investigation identified releases or threatened releases of hazardous substances at the property. To help mitigate this risk, lawyers recommend that firms establish a procedure for reaching decisions to be followed during *all* AAI-compliant Phase Is. In addition to opining on the presence or likely presence of hazardous substances, the EP may also need to provide an opinion regarding additional investigation, when necessary. From a legal standpoint, this blurs the line of where AAI ends and there is a great deal of confusion in the market about when and how an EP should address this element of AAI. Decisions about whether to provide an opinion regarding additional investigation may not be welcomed by the client, particularly if the opinion affects the client’s ability to obtain a loan, and may also result in a court’s decision that AAI was not met. Given that each situation is unique, EPs should consult with counsel to obtain clear guidance in order to minimize any liability associated with providing opinions regarding additional investigation.

## *Data Gap Reporting and Analysis*

An important fact to remember about the requirement to report and analyze data gaps is that EPA’s language in the AAI rule allows for a property owner to qualify for CERCLA liability protection even with a data gap in the Phase I report, provided the gap is documented and its significance to the overall findings of the investigation are clearly evaluated. When reporting a data gap, the EP should note what attempts were made to access the missing information, in addition to listing any alternative sources that were used to help fill the data gap. In addition, EPs should ensure that clients are aware that AAI requires any gaps in the investigation to be included as one of three mandatory components of an AAI-compliant Phase I (in addition to EP qualifications and declaration that AAI was met, and the EP’s opinion regarding the target property).

As a safeguard, firms may consider including language in the contract that inhibits liability if a data gap is present. For example:

“In the event that data gaps are identified, the EP will endeavor to comment on the significance of those data gaps. However, the EP cannot, and does not warrant or guarantee that no significant events, releases, or conditions arose, during periods such as data gaps.”

Common data gaps that may be easily overlooked by EPs in writing the report is a failure on the part of the “user” to provide certain information (e.g., specialized knowledge, commonly known information, relationship of the purchase price to fair market value, etc.). If the client does not provide the necessary information, the EP may consider noting the absence of data from the client as a data gap. The danger of not doing so is that the courts could rule that all elements of AAI were not met. It is important to note that the user is *not required* by the language in the AAI rule to share information with the EP. However, it is the EP who must document the report as AAI-compliant. At a minimum, educate the client of the responsibilities, document in the scope of work what the user is taking responsibility for and use this documentation to demonstrate that the user was made aware of his/her responsibilities.

## *Report Preparation*

As a strategy for meeting clients' demand for ever-faster turnaround times, the Phase I industry has increasingly turned to report writing templates. A word of caution is in order for EPs at firms that rely on these types of systems. Under AAI, EPs are being held to a higher standard of care. As a result, it is critical that if the requisite statement that the federal rule was adhered to will appear in the report, EPs should ensure that the report is error-free. Common complaints from attorneys who perform compliance reviews of Phase Is include: misinformation (e.g., a wrong address), inclusion of photos for the wrong property, ambiguous fill-in-the-blank statements declaring that "a REC was/was not present," and instances where the executive summary's conclusions do not match the supporting documentation provided. These types of errors have been a plague of the industry for many years, and become even more important to address as the AAI rule takes effect. The good news is that inaccuracies in reports can be easily avoided with a little extra care in the review process.

For instance, some firms have already staffed an individual with quality assurance and quality control of all AAI-compliant reports, at least in the early stage of transition over to the new protocol. Firms may also consider having at least one higher level staff person review each Phase I, in addition to having a person from another "team," or one who is unfamiliar with the property, thoroughly assess each report's content. Even the most basic assessments should be put through thorough review. In fact, the most standard projects often include the most errors, as EPs often opt to use templates to format their findings.

## *Limitations*

It is important for any limitation of the Phase I, even if it does not constitute a data gap, be presented in the writing of the report. Limitations may include missing files from records review, confidentiality agreements by the client that constrain the EP's ability to conduct interviews, an inability to observe a certain portion of the property, and myriad other obstacles that a consultant might run into while completing a report.

## **3. Contract Language**

In response to AAI, every consulting firm should review their contract language to be sure that it is up to speed with new criteria and liabilities put forth by the rule. Attorneys recommend tightening language like warranty provisions and reliance language, in particular. At a minimum, every contract should include:

- Property location;
- Agreed-upon scope of work;
- Agreement that the client will provide certain information which may be relied upon by the consultant;
- Price of the investigations;
- Deadlines;
- Warranties;
- Reliance language; and

- Limitations on liability.

It is also critical that EPs seek the advice of a qualified attorney to review any revised contract language in the context of the AAI rule.

### *Limitations on Liability*

Certain liabilities can be avoided by including the proper language in contract provisions. However, attorneys recommend that consultants tread lightly around limitations on liability. If the contract is not written with care, more limitations can equate to more liability. This is another reason to make sure your contract is reviewed by a trusted attorney. Limitations language that should be included in the report include that regarding data gaps, user truthfulness, and additional inquiries that were recommended in the report since a consultant can never truly verify the bearing of these pieces of information on their ability to reach an opinion on the release or threatened release of hazardous substances. Another tip given by attorneys familiar with the market is that this portion of the report be made clear to the user. Often, clients will request that their consultant increase their maximum liability for a fee; this should all be clearly stated within the report. In other cases, a consultant may completely waive liability claims, besides those of direct damages within the contract itself. Ultimately, the limitation on liability is a provision that should be discussed thoroughly by the consultant, the client, and legal counsel.

### *Disclaimers*

When it comes to disclaimer language, attorneys often advise EPs that any information that cannot be verified should be disclaimed. As previously stated, the report should always disclaim any perceived untruthfulness of a user, interviewees or other data sources identified during the investigation. In addition, the accuracy of information obtained by others or its compliance with the new rule should also be disclaimed. Some lawyers also feel it is important to disclaim use of the report by third parties, while other believe that the rule itself protects consultants from this liability. Discussion with your attorney can help you make this distinction.

### AAI and E 1527-05: Areas of Potential New Liability Exposure

<i>Requirement of AAI Rule</i>	<i>Potential Liability Posed</i>	<i>Steps for Mitigating Liability</i>
Reliance on qualified “environmental professional”	<p>“Relevant experience” can be somewhat subjective.</p> <p>Experience on certain property types may not transfer to experience across the board.</p>	Document your EP qualifications clearly, especially years of relevant experience and the type of experience on similar projects.
Data gaps analysis	If a data gap exists and conclusion is made despite the gap, further information may lead to the discovery of a REC.	Disclaimers can be useful in this case. Consultants should verify that their contract does include language that protects them from such liability.
Declaration by environmental professional	If the EP is signing off on a project that he or she is in “responsible charge” of, but did not complete all of the work, they may still be considered liable for any inaccuracies within the report.	If junior level staff is participating in report preparation or research, be certain to communicate clearly about what is being done and how. Also, implement appropriate QA/QC measures in your office.
Professional opinion	Your opinion may be proven wrong in the future.	Document exactly how opinion was reached. Have a company policy that designates how an opinion is formulated.
Interviews	The truthfulness of interviewees is never certain.	Limitations on liability should document that although the EP relied on information from interviews to reach their opinion, the truthfulness of those opinions are not guaranteed by the consultant.
Visual inspection of the facility and of adjoining properties	If a Phase I is brought under scrutiny of a court, the qualifications of the individual who conducted the site visit will likely be questioned.	Consider whether it is within your firm’s risk tolerance to have non-EPs conduct site visits. If non-EP is conducting site visit, make sure that instructions given to the individual are well documented. According to the rule, a qualified EP must interpret the findings of the site visit.
User-provided Information	EPs cannot avoid relying on other’s work or truthfulness.	Again, use the Limitations on Liability section of the contract to disclaim information that cannot be verified by the EP.

## Summary of Steps to Minimize Liability Under AAI

Has your firm...

- ...revisited contract language to ensure that clients' expectations regarding scope of work are clearly communicated?
- ...evaluated the qualifications of Phase I staff and made determinations about who can sign off on reports as "AAI-compliant?"
- ...created an internal QA/QC procedure?
- ...made changes to your interview questions to ensure consistency and thoroughness?
- ...evaluated its documentation practice for current and historical research to ensure that the AAI rule's new requirements are addressed (even if information is not found during the investigation)?
- ...reviewed the way that site visits are conducted, given special attention to the AAI rule's emphasis on the target and adjoining properties?
- ...clearly communicated the company's internal AAI compliance strategy companywide to ensure consistency and compliance?
- ...contacted your insurance provider to verify coverage under the new rule?

**NOTE TO READERS:** *This article is intended for general educational purposes, and is not to be considered legal or professional advice. Any assessment of a consultant's potential risk and liability exposure will be heavily dependent on the underlying facts. As such, appropriate consultation with competent legal and technical professionals aware of such facts is always recommended.*