

EPA's AAI: A New Phase in ESAs?

Special
Feature

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

1. The AAI rule applies to all commercial property types, not just brownfields, and can even apply to residential properties in certain cases.
2. Environmental professionals must meet specific education, experience and certification requirements under the AAI rule.
3. The standard review of federal and state government records under ASTM E 1527-00 is expanded under AAI to encompass records from local government agencies as well as records maintained by Indian tribes.
4. Searches for engineering and institutional controls within one-half mile of the subject property must be conducted by environmental professionals under the draft AAI rule.
5. The draft AAI rule's provisions for historical research are very general, leaving decisions about the research time frame, data sources, and search intervals up to the environmental professional's judgment.
6. Environmental professionals will have extensive requirements for documenting data gaps under the draft AAI rule.
7. Interviews with owners or occupants of neighboring properties will be mandatory for ESAs at brownfield sites.
8. If the environmental professional cannot conduct a site visit, the draft AAI rule contains a specific set of requirements that must be met.
9. Environmental inquiries under the AAI rule are good for one year. Phase I ESAs older than one year will need to be redone.
10. EPA is expected to issue the draft AAI rule in mid-May. After the draft is issued, it will be open for public comment for 60 days.

Environmental due diligence is on the brink of change. Some subtle. Others more substantive. The changes stem from EPA's mandate pursuant to the January 2002 Small Business Liability Relief and Revitalization Act (the Federal Brownfields Law) to write the nation's first federal standards for conducting "all appropriate inquiries," the process by which a property's potential for environmental contamination is investigated prior to purchase. Congress laid out a 10-step framework for what constitutes AAI (see Table 1 on p. 2), and gave EPA two years to write the regulation (by January 11, 2004).

In April 2003, EPA tasked a broad-based 25-member stakeholder committee to write the rule using a regulatory-negotiation (reg-neg) process under the Federal Advisory Committee Act (FACA). On November 14, 2003, after more than 100 hours of discussion and debate, the reg-neg committee reached consensus on a draft rule for the first federal standards and processes for conducting AAI. The final consensus draft rule—to be eventually codified in federal regulation, "*Part 312 - Standards for Conducting All Appropriate Inquiries*"—follows the ASTM E 1527-00 standard in many areas, but it does add certain new levels of investigation (see Table 2 on p. 3). This article covers 10 key facts about the draft AAI rule (see sidebar), including its applicability, requirements for Phase I professionals, and its most notable differences with current industry practice.

1. AAI's Broad Applicability

The federal standards will outline the steps property owners must take to protect themselves from CERCLA cleanup

liability down the road. Since 1986, CERCLA has provided property owners with the "innocent landowner" defense, which can protect an owner from cleanup liability for pre-existing contamination if the owner conducted AAI "into the previous ownership and uses of the property" prior to purchase, and if the results did not reveal the presence of contamination. The conduct of a Phase I environmental site assessment (ESA) is now institutionalized in commercial real estate transactions using ASTM Standard Practice E 1527 for Phase I Environmental Site Assessments (the most recent revision is ASTM E 1527-00). The standard was developed to

permit a property owner to qualify for the "innocent landowner" defense to CERCLA liability.

Along came the Federal Brownfields Law, which not only amended the "innocent landowner" defense but, in an attempt by Congress to mitigate

obstacles to brownfields redevelopment, added two new landowner liability protections as follows:

- *bona fide prospective purchaser defense*: creates, for the first time, liability protection for a property owner who knowingly purchases a contaminated property, provided the owner can demonstrate that contamination on-site occurred prior to purchase.
- *contiguous property owner defense*: provides liability protection for the owner from contamination caused by the migration of hazardous substances from an adjacent property, provided the owner demonstrates that he/she did not know of contamination on his/her property at the time of purchase.

The first key point applicable to the AAI rule is that, although its mandate

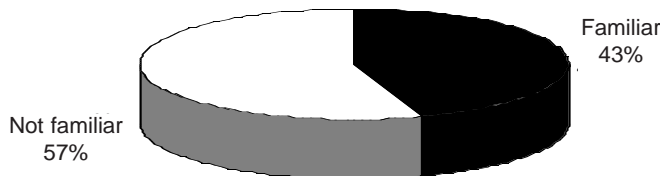


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stems from the Federal Brownfields Law, the process will apply to all types of properties, not just brownfield sites. To qualify for any of these three CERCLA liability protections, regardless of whether the transaction involves a brownfield, a property owner must meet certain conditions outlined in the Federal Brownfields Law, not the least of which is conducting AAI in accordance with the upcoming federal rule before purchase.

The draft AAI rule applies to a wider universe of properties than the ASTM E 1527-00 standard. The ASTM E 1527-00 standard is limited solely to commercial properties and the innocent landowner defense (although the ASTM standard is currently in the process of being revised and expanded). In contrast, the draft AAI rule extends beyond commercial properties to include residential properties in certain cases. Under the Federal

Percentage of consultants who are familiar with AAI



Source: EDR's TrendTrack Survey at www.edrnet.com

Brownfields Law, owners of any residential property used for commercial purposes (irrespective of the number of units), as well as residential properties under government ownership, will now be required to conduct a Phase I under the AAI rule in order to be protected from CERCLA liability. Moreover, AAI will be mandatory for all grantees whose environmental inquiries are funded under EPA's brownfields program.

the three liability defenses, the purpose is similar to that of ASTM 1527: "to identify conditions indicative of releases or threatened releases...of hazardous substances, as defined in CERCLA §101(14)." If the inquiry is being funded by an EPA grant, however, the environmental professional must look for a broader range of contaminants which includes releases of "petroleum or petroleum products" and "controlled substances" (a term that essentially includes the presence of drugs at the property within the scope of the assessment to reflect the reality that EPA makes grants to clean up sites formerly used as drug laboratories or methamphetamine factories.)

2. Who Can Conduct Environmental Inquiries?

Section 312.10 of the draft AAI rule includes a hotly debated and controversial definition of "environmental professional" (EP) that seeks to discourage those who lack sufficient education, federal or state licensing or relevant experience from conducting environmental inquiries. In writing the regulation, the reg-neg committee's debate essentially centered around two competing interests: ensuring quality by attempting to limit the conduct of environmental inquiries to those with specific qualifications versus allowing the market to function without disruption. The final consensus definition favors those with a back-

Table 1. 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 clean-up 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, Section 223 - Innocent Landowners, signed into law January 11, 2002.

The applicability of the draft AAI rule goes beyond ASTM E 1527-00 when the contaminants of concern under the two sets of requirements are compared; however, the differences are quite subtle. The environmental professional under the ASTM standard is seeking to identify "recognized environmental conditions," meaning the "presence or likely presence of any hazardous substances or petroleum products on a property under conditions that indicate an existing release, a past release, or a material threat of a release of any hazardous substances or petroleum products..." Under §312.1(c)(1) of the draft AAI rule, if the environmental inquiry is being conducted to qualify a property owner for one of

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**Table 2. Comparison Between
ASTM E 1527-00 Standard and Draft AAI Rule**

ASTM E 1527-00 Standard		Draft AAI Rule
Innocent landowner defense	Which CERCLA Defense(s)?	Innocent landowner defense Bona fide prospective purchaser defense Contiguous property owner defense
Limited to commercial real estate, excluding those for residential use with no more than four units.	Applicability to what types of properties?	Commercial real estate Residential properties used for commercial purposes (any number of units) Residential properties under government ownership
Identify recognized environmental conditions (RECs)	Objective of the assessment or inquiry?	Identify conditions indicative of releases or threatened releases
CERCLA hazardous substances and petroleum products	What are the contaminants of concern?	- 3 CERCLA defenses: CERCLA hazardous substances only - EPA grantees: CERCLA hazardous substances, petroleum/petroleum products, and controlled substances.
Broad definition	Who is qualified to perform assessments/inquiries?	Specific requirements for: Education Relevant experience License/registration/certification
User	Responsibility for searching records of engineering and institutional controls?	Environmental professional (if sources are "reasonably ascertainable")
Federal and state records	What sources of government records must be searched?	Federal, tribal, state and local government records
Prescriptive	How extensive are historical research requirements?	Left to discretion of environmental professional
1940 or first developed use, whichever is earlier	What is the time frame for historical research?	First developed use
Limited documentation requirements	What if there are data gaps?	More extensive documentation requirements
Left up to environmental professional's discretion	Is it necessary to interview neighboring property owners?	Mandatory at abandoned properties
Must be documented as limitation in environmental professional's report	What if site visit cannot be performed?	EP must meet specific set of requirements
Permits updates of old reports	How long is a Phase I report considered valid?	Reports older than one year are invalid

ground in science or engineering, but also includes provisions for professionals with non-scientific backgrounds. The end result of the negotiations is shown in Table 3 (on p. 4), criteria based on a combination of "relevant experience" and licensing, certification or education.

In terms of how "relevant experience" would be defined, some members argued that a strict focus on Phase I experience would be insufficient. The AAI rule will require environmental professionals to render opinions about the release or threatened release of hazardous materials on a property (or the potential for migration from adjoining properties)—expertise that can only be obtained from the type of subsurface sampling and analysis typically done in a Phase II.

In the draft rule (see footnote 2 in Table 3), "relevant experience" is based on past "participation in the performance of ESAs that may include environmental analyses, investigations and remediation which involves the understanding of surface and subsurface environmental conditions and the processes used to evaluate these conditions..."

The final hurdle in this area was whether to add a grandfather clause that would allow current Phase I professionals without a P.E. or P.G. license, a degree in a science/engineering/environmental field or a state certification to continue practicing, provided they meet some other criterion. One option was to grandfather those who conducted some minimum number of Phase Is at the time of the

rule's promulgation. The compromise reached is shown in the fourth criteria (see d. in Table 3). Essentially, an individual with a baccalaureate degree in a field other than a science, engineering or environmental discipline needs to have at least 10 years of relevant experience. An environmental professional also must "remain current in his or her field through participation in continuing education or other activities and should be able to demonstrate such efforts."

What is important to remember is that the reg-neg committee agreed to allow individuals who do not meet the criteria in Table 3 to perform AAI tasks, provided the work is conducted "under the supervision or responsible charge" of someone who does. In effect, an EP would need to oversee the work, but not necessarily be the one conducting historical research, site visits, interviews or other components of the inquiry. Clearly, experience in the field in terms of making accurate observations and asking the right questions will still be critical, regardless of who reviews the final report, but it will not be necessary for all individuals working on a Phase I to qualify as EPs. However, if a less experienced individual overlooks something critical during the site visit, unfortunately there is little that the more experienced EP can do when reviewing the report.

In finalizing any rule, EPA must consider its potential for adverse market impact and as such, the agency is interested in feedback on the EP definition during the public comment period following the rule's proposal. "The agency itself does not want to be in a situation where we end up leaving people who are doing quality ESAs, and have been doing so for years, out of the definition," said Patricia Overmeyer, designated federal official for the AAI rule. Anyone interested in commenting on the draft EP definition

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**Table 3. Definition of "Environmental Professional":
ASTM E 1527-00 Standard vs. Draft AAI Rule**

ASTM E 1527-00 Standard <i>Section 3.3.12 Definitions</i>	Draft AAI Rule <i>§312.10 – Definitions</i>		
<p><i>A person possessing sufficient training and experience necessary to conduct a site reconnaissance, interviews, and other activities in accordance with this practice, and from the information generated by such activities, having the ability to develop opinions and conclusions regarding recognized environmental conditions in connection with the property in question. An individual's status as an environmental professional may be limited to the type of assessment to be performed or to specific segments of the assessment for which the professional is responsible.¹</i></p>	<p>All appropriate inquiry must be undertaken by "an environmental professional, or conducted under the supervision or responsible charge of an environmental professional" defined as:</p> <p><i>(a) a person who possesses sufficient specific education, training, and experience necessary to exercise professional judgment to develop opinions and conclusions regarding the presence of releases or threatened releases to the surface or subsurface of a property sufficient to meet the objectives and performance factors in §§312.20(d) and (e).</i></p>		
<p><i>(b) In addition, such a person must:</i></p>			
Professional/Educational Qualifications			Years of Full-Time Relevant Experience ²
(1) hold a current professional engineer's or professional geologist's license or registration from a state, tribe, or U.S. territory;	and		Three (3) years
OR			
(2) be licensed or certified by the federal government, a state, tribe or U.S. territory to perform environmental inquiries;	and		Three (3) years
OR			
(3) have a baccalaureate or higher degree from an accredited institution of higher education in a relevant discipline of engineering, environmental science, or earth science;	and		Five (5) years
OR			
(4) as of the date of the promulgation of this rule, have a baccalaureate or higher degree from an accredited institution of higher education;	and		Ten (10) years
<p><i>(c) an environmental professional should remain current in his or her field through participation in continuing education or other activities and should be able to demonstrate such efforts.</i></p>			
<p><i>(d) the definition of "environmental professional" provided above does not preempt state professional licensing or registration requirements such as those for a professional geologist, engineer, or site remediation professional. Before commencing work, a person should determine the applicability of state professional licensing or registration laws to the activities to be undertaken as part of the inquiry identified in §312.21(b).</i></p>			
<p><i>(e) a person who does not qualify as an environmental professional under the foregoing definition may assist in the conduct of all appropriate inquiries in accordance with this part if such person is under the supervision or responsible charge of a person meeting the definition of an environmental professional provided above.</i></p>			

¹The ASTM E 1527-00 standard also includes *Appendix X3 - Guidance to Assist Users in the Preparation for, and Selection of, an Environmental Professional to Conduct a Phase I Environmental Site Assessment.*

²Relevant experience, as used in the definition of environmental professional above, means "participation in the performance of environmental site assessments that may include environmental analyses, investigations, and remediation which involve the understanding of surface and subsurface environmental conditions and the processes used to evaluate these conditions and for which professional judgment was used to develop opinions regarding conditions indicative of releases or threatened releases (per §312.1(c)) to the subject property."

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Table 4a. Summary of Minimum Search Distances for Federal Records: ASTM E 1527-00 Standard vs. Draft AAI Rule

Database	Target Property	Nearby				References and Notes
		Adjoining (1/8 mile)	1/4 mile	1/2 mile	1 mile	
FEDERAL RECORDS						
NPL Site List						
	ASTM	x	x	x	x	Section 7.2.1.1 Standard Environmental Record Source
	AAI	x	x	x	x	Section 312.26(b)(2) and (c)(1)(i) (also includes tribal- or state-equivalent NPL sites)
CERCLIS List						
	ASTM	x	x	x	x	Section 7.2.1.1 Standard Environmental Record Source
	AAI	x	x	x	x	Section 312.26(b)(3)
CERCLIS NFRAP Site List						
	ASTM	x	x			Section 7.2.1.1 Standard Environmental Record Source
	AAI	x	x	x	x	Section 312.26(c)(2)(iv)
RCRA CORRACTS Facilities List						
	ASTM	x	x	x	x	Section 7.2.1.1 Standard Environmental Record Source
	AAI	x	x	x	x	Section 312.26(c)(1)(ii) RCRA facilities subject to corrective action
RCRA non-CORRACTS TSD Facilities List						
	ASTM	x	x	x	x	Section 7.2.1.1 Standard Environmental Record Source
	AAI	x	x			Section 312.26(b)(2)
RCRA Generators List (Small and Large Quantity)						
	ASTM	x	x			Section 7.2.1.1 Standard Environmental Record Source
	AAI	x	x			Section 312.26(b)(2) and (c)(3)(i)
Delisted NPL						
	ASTM	x				Not expressly required; such sites would be considered "historical RECs" on a target property and included in the report as such. Such sites may also be identified through other sources, such as state hazardous waste site lists or in state-equivalent NPL databases.
	AAI	x	x	x	x	Section 312.26(c)(2)(i)
Emergency Response Notification System (ERNS) Records						
	ASTM	x				Section 7.2.1.1 Standard Environmental Record Source
	AAI	x				Section 312.26(b)(5)

should bear in mind that while EPA will recognize government license and certification programs, it will not recognize private ones, mainly because the agency does not want to put itself in the position of reviewing and approving private certification programs. This means that if the draft rule is finalized with the definitions shown in Table 3, possession of certifications commonly held by Phase I professionals such as Certified Hazardous Materials Manager (CHMM), Qualified Environmental Professional (QEP), or Certified Industrial Hygienist (CIH), among others, will not automatically qualify individuals to conduct AAIs.

Review of Government Records

In writing the rule's requirements for "reviews of federal, state, and local government records," much of the

debate boiled down to one fundamental question: Would the committee adopt the "status quo" represented by the minimum search distances in ASTM E 1527-00 or go beyond current practices in the name of protecting public health and the environment? The debates of the reg-neg committee were reminiscent of those that took place when ASTM developed the first Phase I ESA standard back in the early 1990s. The committee's compromise defines three categories of facilities. The underlying logic behind grouping records/databases in one of three categories was to assign a particular minimum search distance to all types of records that fall within each category (e.g., 1 mile for category 1, 1/2 mile for category 2 and adjoining for category 3). This quickly became unworkable, however, because the committee could not reach agreement. For instance,

records of NPL sites and leaking underground storage tank (LUST) sites would both be classified as facilities with reported releases under category 1. Under ASTM, NPL sites are searched to one mile, but LUST sites are searched only to one-half mile. In terms of listing particular types of databases, the committee decided to include several examples under each of the three categories, specify search distances, and then leave it up to the Phase I consultant to modify the distances as necessary and supplement the standard sources with other state and local sources. It was interesting to note that after close scrutiny of ASTM E 1527-00's minimum search distances, the committee, in the end, agreed to search distances that are more or less consistent with the commercial real estate industry's current practice, with two key differences (see tables 4a and 4b).

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Table 4b. Summary of Minimum Search Distances for State, Local and Tribal Records: ASTM E 1527-00 Standard vs. Draft AAI Rule

Database	Target Property	Nearby				References and Notes	
		Adjoining (1/8 mile)	1/4 mile	1/2 mile	1 mile		
STATE RECORDS							
State-equivalent NPL	ASTM	x	x	x	x	x	Section 7.2.1.1 Standard Environmental Record Source Section 312.26(b)(2) and (c)(1)(i)
	AAI	x	x	x	x	x	
State Hazardous Waste Sites/State-equivalent CERCLIS	ASTM	x	x	x	x		Section 7.2.1.1 Standard Environmental Record Source Section 312.26(b)(2) and (c)(1)(i)
	AAI	x	x	x	x		
State Voluntary Control Programs (VCPs)	ASTM	x	x	x	x		Considered "state lists of hazardous waste sites" under Section 7.2.1.1 Standard Environmental Record Source Section 312.26(c)(1)(iii)
	AAI	x	x	x	x		
Landfill and/or Solid Waste Disposal Site Lists	ASTM	x	x	x	x		Section 7.2.1.1 Standard Environmental Record Source Section 312.26(b)(2) and (c)(3)(iii)
	AAI	x	x	x	x		
Leaking UST Lists	ASTM	x	x	x	x		Section 7.2.1.1 Standard Environmental Record Source Section 312.26(c)(1)(iv)
	AAI	x	x	x	x		
Registered UST Lists	ASTM	x	x				Section 7.2.1.1 Standard Environmental Record Source Section 312.26(b)(2) and (c)(3)(iii) refer to records of registered storage tanks with no distinction between above- and underground storage tanks
	AAI	x	x				
Spill Records	ASTM						Not expressly required Section 312.26(b)(2)
	AAI	x					
Engineering Control Registries	ASTM						Section 5.2: User's responsibility to check reasonably ascertainable recorded land title records for environmental liens or activity and use limitations, including engineering controls. Section 312.26(b)(6) and (c)(2)(ii) Registries or publicly available lists of engineering controls
	AAI	x	x	x	x		
Institutional Controls Registries	ASTM						Section 5.2: User's responsibility to check reasonably ascertainable recorded land title records for environmental liens or activity and use limitations, including engineering controls. Section 312.26(b)(7) and (c)(2)(iii) Registries or publicly available lists of institutional controls, including environmental land use restrictions, applicable to the subject property.
	AAI	x	x	x	x		
State Brownfields Lists	ASTM						Under Section 7.2.2 - Additional Environmental Record Sources. To be checked at EP's discretion if "reasonably ascertainable," "sufficiently useful, accurate and complete," and "generally obtained pursuant to good commercial or customary practice." Section 312.26(c)(1)(iii)
	AAI	x	x	x	x		
Public Health Records	ASTM						Section 7.2.2 lists "Department of Health/Environmental Division" as an additional environmental record source to be included at EP's discretion. Section 312.26(b)(4)
	AAI	x					
LOCAL RECORDS							
	ASTM	n/a					Under Section 7.2.2 - Additional Environmental Record Sources. To be checked at EP's discretion if "reasonably ascertainable," "sufficiently useful, accurate and complete," and "generally obtained pursuant to good commercial or customary practice." Section 312.26(a): "Federal, tribal, state and local government records and databases of government records of the subject property and adjoining properties must be reviewed..." (also required under Section 312.26(b) and (c)) subject to being "reasonably ascertainable."
	AAI	x	*	*	*	*	
Examples of the types of environmental records that may be available from local sources include: LUST site lists, brownfield site inventories, lists of landfill/solid waste disposal sites, lists of hazardous waste/contaminated sites, local land records (for activity and use limitations), records of emergency release reports, and records of contaminated public wells.							
TRIBAL RECORDS							
	ASTM						Tribal records not expressly required. Section 312.26(a): "Federal, tribal, state and local government records and databases of government records of the subject property and adjoining properties must be reviewed..." (also required under Section 312.26(b) and (c)) subject to being "reasonably ascertainable."
	AAI	x	*	*	*	*	
Examples of the types of environmental records maintained by tribes include: brownfield site lists, enforcement actions on contaminated properties under tribal ownership, records of USTs on tribal lands and landfill records. State databases may also contain environmental information on properties under tribal ownership.							
* = Applicable search distance for local or tribal sources depends on the type of record.							

1. Engineering and Institutional Controls

The first difference relates to the AAI rule's emphasis on engineering and institutional controls. Both types of controls are "activity and use limitations," a term used to describe any legal or physical limitations on the use of a property, such as deed restrictions and restrictive zoning. The inclusion of institutional and engineering controls in the draft AAI rule is rooted in the Federal Brownfields Law, which requires property owners to comply with any land use restrictions established or relied on in connection with the response action at the facility; and not impede the effectiveness or integrity of any institutional control imposed on a property.

This is a significant departure from current industry practice using ASTM E 1527-00. Under Section 5.2 of the Phase I standard, the "user" bears responsibility for identifying such records and reporting them to the environmental professional. Such records are often contained in land title records or deeds, and to a lesser extent, in state government records. However, records of engineering and institutional controls are not available in every state, and there is no consistency in the types of records kept from state to state. Registries of engineering controls and institutional controls are not necessarily separate lists in a given state, either. Nonetheless, a growing number of states have efforts underway to track institutional controls, thus it was important to the committee that the new rule account for the future availability of such databases and direct the EP to search them. As a result, the committee agreed, after some debate, to require a search of engineering controls and institutional controls to a radius of one-half mile. Records of engineering controls and institutional controls will need to be searched only if they are contained in publicly available lists/registries.

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**Table 5. Reviews of Historical Sources of Information:
ASTM E 1527-00 Standard vs. Draft AAI Rule**

	ASTM E 1527-00 Standard Section 7.3 <i>Historical Use Information</i>	Draft AAI Rule Section 312.24 <i>Reviews of Historical Sources of Information</i>
How far back must research go?	Uses shall be identified back to "...first developed use or back to 1940, whichever is earlier."	Review must go back as far as "it can be shown that the property contained structures or from the time the property was first used for residential, agricultural, commercial, industrial, or governmental purposes."
Which historical sources must be used?	Specifically identifies eight "standard historical sources" to be reviewed: <ul style="list-style-type: none"> • Aerial Photographs • Fire Insurance Maps • Property Tax Files • Recorded Land Title Records • USGS 7.5 Minute Topographic Maps • Local Street Directories • Building Department Records • Zoning/Land Use Records 	EP's professional judgment determines which specific historical sources are reviewed.
Does a research interval apply?	Review of standard historical sources at less than approximately five-year intervals is not required.	N/A
What if there are still data gaps?	EP to explain the reason for any gaps in the history of the property's use.	EP must: <ol style="list-style-type: none"> (1) identify data gaps; (2) document all sources of information consulted to address such data gaps; and (3) comment upon the significance of such data gaps¹.

¹The draft consensus rule's language regarding data gaps is included under Section 312.21, Results of Inquiry by an Environmental Professional, and applies to all information developed during the environmental inquiry, not solely to reviews of historical sources of information.

2. Tribal and Local Government Records

A second significant expansion in the draft AAI rule's requirements is the mandatory review of "reasonably ascertainable" records maintained by Indian tribes and local government agencies. Section 312.26(a) of the draft AAI rule is not ambiguous in assigning the same weight to tribal and local records as federal and state records: "Federal, tribal, state, and local government records or databases of government records of the subject property and adjoining properties must be reviewed for the purposes of achieving the objectives and performance factors..." This language is much stronger than that of ASTM E 1527-00, which lists mandatory federal and state sources in Section 7.2.1, but leaves the review of other state and local sources up to the environmental professional's judgment.

Although the AAI rule does not reference specific tribal and local databases, this does not diminish the requirement that such sources "must be reviewed." Rather, it reflects the committee's concerns that the rule could become obsolete over time if new databases surface that are not mentioned in the rule. The committee opted to list only general types of tribal and local records in the rule (e.g., records of NPL sites, RCRA facilities subject to corrective action, records of leaking underground storage tanks, etc.), and direct environmental professionals to search whatever records are reasonably available at the time of the inquiry. Certain regions, such as the western U.S., are more likely than others to have tribal or local records, but, to the extent that such data are available, environmental profession-

als will now be required to tap into the data during an inquiry.

Historical Research Requirements

In writing the rule's requirements for conducting historical research into a subject property's past uses, the reg-neg committee was bound by the language that Congress included in the Federal Brownfields Law (see 3. in Table 1). The broad language from Congress left the reg-neg committee to grapple with how prescriptive the rule should be in terms of researching a property's history. The negotiations generally centered on several key issues: What historical sources should be used? How far back must the environmental professional go to reconstruct the property's past use(s)? What amount of historical research would be sufficient? Although the final consensus draft bears some similarities to the ASTM E 1527-00 standard, there are several significant differences as well.

First, the ASTM E 1527-00 standard provides more guidance on the types of historical sources that may be used (see Table 5). Under the draft AAI rule, it is left up to the environmental professional's discretion to determine which historical sources are to be used.

Second, the draft AAI rule does not require the environmental professional to search historical sources back to a particular year, but rather, back to the property's first developed use. The environmental professional may then "exercise professional judgment in context of the facts available at the time of the inquiry as to how far back in time it is necessary to search historical records..." provided that he/she "gathers the information...that is publicly available, obtainable from its source within reasonable time and cost constraints, and which can practicably be reviewed (§312.20(e)1)."

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**Table 6. Interviews:
ASTM E 1527-00 Standard vs. Draft AAI Rule**

	ASTM E 1527-00 Standard <i>Section 9 Interviews with Owners and Occupants</i>	Draft AAI Rule <i>Section 312.23 Interviews with Past and Present Owners, Operators and Occupants</i>
What if site is abandoned and no owner, operator or occupant is available?	No specific requirements for abandoned properties.	Interview(s) with one or more owners/occupants of neighboring properties from which it appears possible to have observed such abandoned properties are mandatory. ¹
Is it necessary to interview past owners, occupants and operators of the subject property?	No specific requirements for interviewing past owners/occupants/operators. Environmental professional must ask questions during interview process regarding current and past uses of the property and adjoining properties (Section 8.4).	Environmental professional should interview one or more of the following persons: (1) current and past facility managers; (2) past owners, occupants, or operators of the subject property; or (3) employees of current and past occupants of the subject property.

¹Abandoned property is defined as "property that can be presumed to be deserted, or an intent to relinquish possession or control can be inferred from the general disrepair or lack of activity thereon such that a reasonable person could believe that there was an intent on the part of the current owner to surrender rights to the property" and where there is evidence of potential unauthorized uses of the property or evidence of uncontrolled access to the property.

The ASTM E 1527-00 standard's guidance is more specific, stating that "all obvious uses of the property shall be identified from the present, back to the property's obvious first developed use, or back to 1940, whichever is earlier." Here, the environmental professional has the flexibility to review as many historical sources as are "necessary and both reasonably ascertainable, and likely to be useful."

What this means is that if the subject property was, for example, undeveloped prior to 1970, the environmental professional under ASTM E 1527-00 would still be required to research the property's past uses back to 1940. Under the draft AAI rule, however, the research would need only go back to 1970. If dumping or waste disposal took place prior to 1970, this would not be detected under the AAI draft rule. Under ASTM's E 1527-00 standard practice, however, if such dumping or disposal took place after 1940, it would likely become evident in historical aerial photographs or topographic maps or some other ASTM historical source required to be researched back to 1940 prior to the property's development.

Another key difference between the draft AAI rule and the ASTM E 1527-00 standard involves search intervals. The ASTM E 1527-00 standard is more prescriptive, stating that "review of standard historical sources at less than approximately five year intervals is not required." The industry has for the most part translated this into five year intervals, except under specific situations (also defined in the ASTM standard). For example, if the property had one use in 1970 and another use in 1975, it would not be necessary to check for a third use in the intervening period. Not so for the draft AAI rule; no such guidance is provided. Instead, the rule relies entirely on the environmental professional to determine how much historical data is sufficient.

Typically, the investigation conducted to write a property's history is the most important—and certainly the most time consuming—step in the Phase I process. Environmental professionals have always faced problems of data availability. Each historical source represents a different piece of the puzzle, and Phase I consultants typically use a variety of sources to determine a property's past uses. If, for example,

historical fire insurance maps and city directories do not exist for an older year in a property's history, it is not unusual to find that historical aerial photography and historical topographic maps are available; these sources may provide insight into whether there may have been dumping or land filling on a property. Historical city directories can also be used to identify the former uses of a property, and often provide information that is not available from any other source. An environmental professional's reliance on an incomplete historical record search has always carried with it the potential for risk. For example, if a consultant reviewed only locally available fire insurance maps, aerial photographs from a local library, and zoning/building records at the local town hall during the historical use investigation, and overlooked the presence of a gas station that was later revealed in a more complete collection of fire insurance maps or historical aerial photographs, the consultant could bear some liability, and the property owner's ability to claim CERCLA liability protection could be jeopardized. An allegation of inadequate historical research is one of the most common causes of litigation against Phase I consultants, so it is extremely important to stay abreast of how the requirements under the draft rule may change current market practice.

Documentation of Data Gaps

What if, after conducting the review of historical sources, the environmental professional is unable to populate gaps in a property's history back to its first use? What if there are other steps in the environmental inquiry (e.g., site visit, interviews, etc.) that cannot be conducted? Should the property owner still be able to qualify for CERCLA liability protection if the historical research or any other area of the environmental inquiry is incomplete?

EPA's AAI CONT'D

Could the rule address the reality that data gaps are inevitable without creating a significant loophole that would allow property owners to avoid sufficient investigation?

It was during this discussion that the reg-neg process nearly broke down. After much debate, the compromise that was eventually reached by the committee states that if the environmental professional examines all available and practicably reviewable sources, and data gaps still remain, then the environmental professional is required to identify them and explain the reason for such gaps. Under §312.20(f), the report must also expressly "identify the sources consulted to address such data gaps and comment upon the significance of such data gaps with regard to the ability to identify conditions indicative of releases and threatened releases of hazardous substances on, at, in, or to the subject property." If the data gaps make it impossible for the EP to reach an opinion on the subject property, such information must also be noted in the written report. This is a subtle difference from ASTM E 1527-00, which requires the environmental professional to include all supporting documentation in the report, including "sources that revealed no findings" (Section 11.2).

Interviews with Neighbors

Under the Federal Brownfields Law, "interviews with past and present owners, operators, and occupants of the facility" are a necessary component of the AAI rule (see 2. in Table 1). It was up to the reg-neg committee to reach consensus on how many interviews the environmental professional must conduct during the environmental inquiry, and with whom. In terms of interviewing current owners and occupants of the subject property, there are only subtle differences between the draft AAI rule and ASTM E 1527-00.

**Table 7. Visual Inspections:
ASTM E 1527-00 Standard vs. Draft AAI Rule**

	ASTM E 1527-00 Standard <i>Section 8 Site Reconnaissance</i>	Draft AAI Rule <i>Section 312.27 Visual Inspections of the Facility and Adjoining Properties</i>
What if on-site reconnaissance cannot be performed?	No specific requirements. Environmental professional must still conduct observation from property line to observe likelihood of identifying RECs. Lack of on-site visit must also be noted as a limitation of the assessment (Section 8.2.4)	Environmental professional must ¹ : <ul style="list-style-type: none"> • conduct inspection via another method; • document efforts to obtain access; and • document other sources of information consulted.

¹ Applies at "abandoned properties" where there is "evidence of potential unauthorized uses of the subject property or evidence of uncontrolled access to the subject property."

Under both scenarios, the environmental professional must interview the current owner and occupant of the subject property, with specific requirements for multi-tenant properties. The AAI rule begins to extend beyond ASTM E 1527-00 in the provisions for interviewing owners/occupants of neighboring properties, and past owners, operators and occupants of the subject property (see Table 6 on p. 8).

Many members of the committee argued strongly in favor of heavy public involvement in AAI, including interviews with neighboring property owners, to gather valuable information about the property that would not be found from any other source (e.g., "midnight dumping" on the property). Opponents argued that a requirement for conducting interviews with neighbors would add significantly to the time and cost involved in completing an environmental site assessment, not to mention violating the commercial real estate market's need to keep property transactions confidential during negotiations. The resolution reached by the committee requires interviews with "one or more (as necessary) owners or occupants of neighboring properties" only in cases of abandoned properties where there is evidence of unauthorized uses or uncontrolled access. The draft AAI rule leaves it up to the environmental professional's judgment to determine whether interviews with neighboring

property owners (in the case of properties that are not abandoned) are necessary to meet the rule's objective to collect information on properties "adjoining or located nearby the subject property that have environmental conditions that could result in conditions indicative of releases or threatened releases of hazardous substances to the subject property."

The draft AAI rule also includes provisions for interviewing "past owners, operators and occupants of the facility," but grants the environmental professional flexibility to determine whether such interviews are necessary. If there was a "past facility manager with relevant knowledge of uses and physical characteristics of the property," and it was practicable under the criteria in the rule's first performance factor (section 312.20 (e) 1) to interview this individual, the environmental professional would need to do so. This is only a subtle difference from ASTM E 1527-00, which requires the environmental professional to include questions about a property's past uses during the interviews stage.

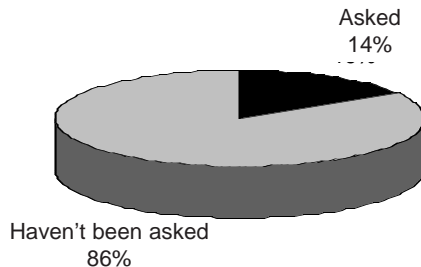
On-site Visit

Under the Federal Brownfields Law, Congress ordered EPA to include "inspections of the facility and adjoining properties" within the scope of the AAI rule. The key differences between the resolution reached in the draft

EPA's AAI CONT'D

consensus rule and the ASTM E 1527-00 standard related to a special provision in the AAI rule that applies if the environmental professional is denied access to the subject property (see Table 7 on p. 9). This situation may be encountered, particularly when a municipality is attempting to purchase a property from a private entity. Although the committee did not want to create a loophole, it was important to address the possibility that a site visit may not be possible in every situation. The committee agreed, after much debate, to include an exemption for such "unusual circumstances," and establish a new set of requirements to be met by the environmental professional (i.e., documenting the failed attempts to obtain site access, and conducting the inspection using another method). Under the ASTM E 1527-00 standard, site reconnaissance includes four principal areas of inspection: the structure(s)/interiors, exterior property, adjoining properties and surrounding area. If there are any limiting conditions, including inaccessibility to the property, the subject property would be observed in the same way as the adjoining properties and surrounding area; most likely from the property line. The lack of an on-site visit would also need to be noted in the environmental professional's report.

Percentage of consultants who have been asked about AAI



Source: EDR's TrendTrack Survey at www.edrnet.com

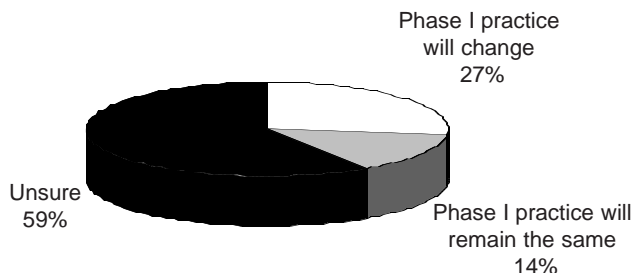
Although several committee members favored having environmental professionals conduct inspections on any and all adjacent properties, the committee was cautious about including any language in the regulation that would require the environmental professional to gain access to adjoining properties, mainly because EPA cannot legally require this. Instead, the consensus draft requires the environmental professional to visually inspect adjoining properties, essentially from any possible vantage point, most likely the property line. By contrast, the ASTM E 1527-00 standard does not expressly require the observation of adjoining properties, but rather the environmental professional should document any indications of

past uses of adjoining properties or the surrounding area observed during site reconnaissance that may indicate a REC.

Shelf Life

The EPA reg-neg committee also wrote language in the draft rule to address an inquiry's shelf life, and the extent to which a property owner can rely on an environmental inquiry prepared for another party. Under Section 312.20(b)(2), the draft AAI rule allows for an inquiry to be transferred from one party to another, allows a previously-completed inquiry to be used and defines the inquiry's shelf life. Both the ASTM E 1527-00 standard and draft AAI rule are consistent in giving Phase Is a six month shelf life. The difference between the two occurs when a Phase I is more than six months old. An AAI inquiry is only valid for up to one year prior to the purchase date of the subject property, and the interviews, searches for environmental cleanup liens, reviews of government records and visual inspections may not be more than 180 days old. Under ASTM E 1527-00, a Phase I completed more than 180 days previously may be used under Section 4.6 if, at a minimum, a new site visit, interviews, and an update of the records review are

Percentage of Phase I firms planning to change their practice in response to the AAI rule



Source: EDR's TrendTrack Survey at www.edrnet.com

EPA's AAI CONT'D

performed, and there have been no material changes to the property since the prior ESA was conducted. However, in one important respect, the draft AAI rule is more stringent than ASTM E 1527-00. A five-year old Phase I ESA report could still be used under ASTM E 1527-00 if the necessary updates are made, but under the draft AAI rule, if the assessment is more than one year old, a new assessment must be performed.

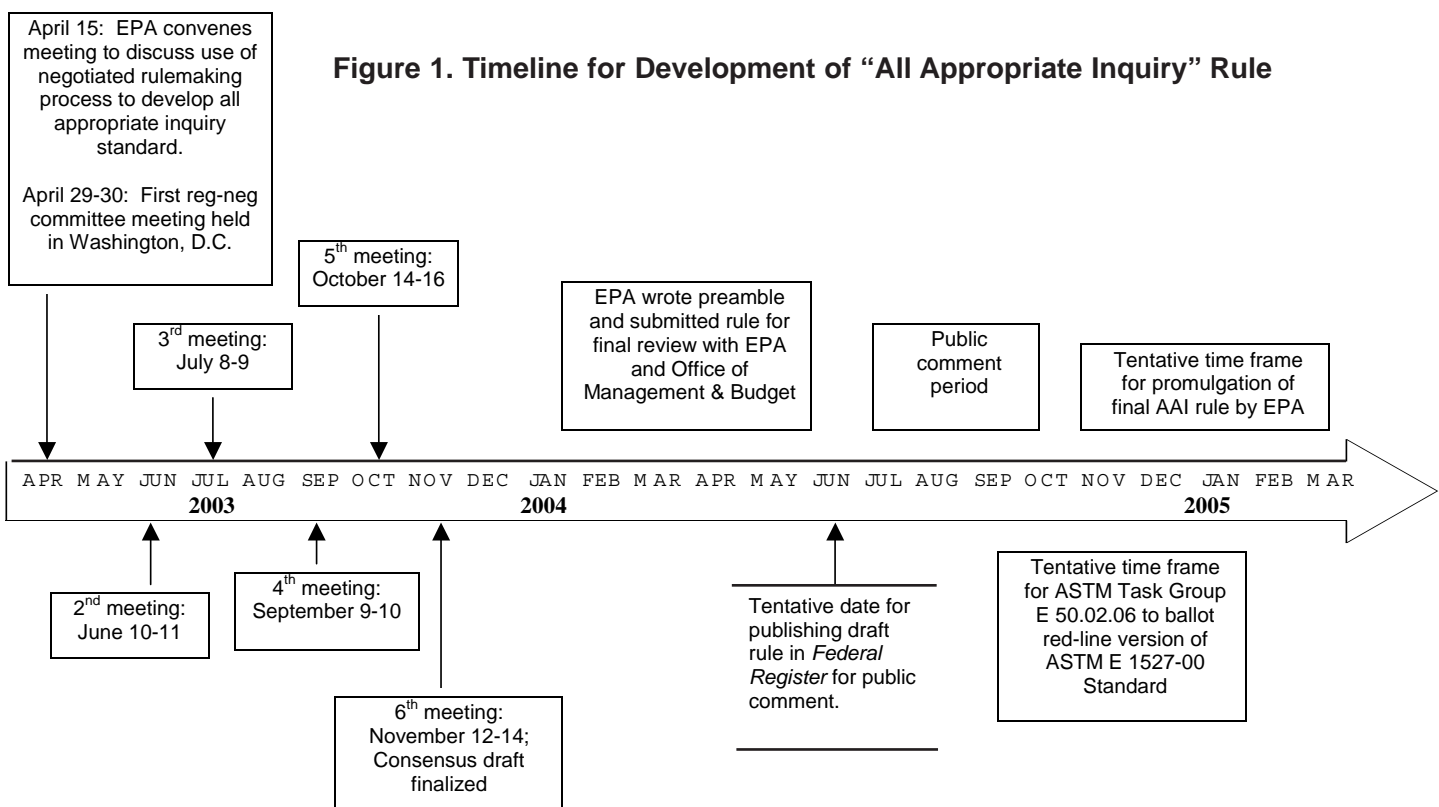
Nothing prevents a property owner seeking CERCLA liability protection from using information prepared for another party provided it is in compliance with the AAI rule and provided there have been no material changes to the condition of the property. It was important for the committee to address transferability because it is quite common in the government sector for one party to rely on another party's ESA. For instance, under

EPA's brownfields program, grants are typically made to communities for conducting ESAs on behalf of the buyer. The community then finds a private developer who becomes the prospective purchaser for the blighted property and may seek to use a report prepared by the local government agency for CERCLA liability protection. Several environmental professionals on the committee objected strongly to allowing one party to rely on another's inquiry, arguing that such language would expose consultants to the risk of being sued by a third party. In reality, however, it is quite common today for Phase I reports to be passed on to multiple prospective buyers and potential lenders. The language in the rule reflects this practice. This is what makes the reliance statement in Phase I reports so important: a consultant's liability may depend on it.

Release of Draft Rule

With the consensus draft in hand, EPA is now finalizing the draft rule that will include a preamble explaining the agency's mandate and purpose in establishing federal environmental due diligence standards, and interpretation and guidance on how the rule applies to CERCLA's landowner liability defenses. EPA is also required to submit a Regulatory Impact Analysis of the regulation to the Office of Management and Budget for review, in addition to meeting other obligations. EPA will publish the proposed rule in the Federal Register in June 2004, officially opening a 60-day public comment period. EPA will then develop a final regulation after giving full consideration to all public comments received. After any necessary changes are made, EPA will promulgate the final regulation, most likely in late 2004 (see Figure 1).

Figure 1. Timeline for Development of "All Appropriate Inquiry" Rule



EPA's AAI CONT'D

Until the first federal AAI rule takes effect, the interim standard set by Congress and clarified by EPA in a final rule (68 Fed. Reg. 3430-3435, May 9, 2003) remains in effect: the ASTM E 1527-00 standard (or E 1527-97). To ensure that the standard will continue to be used after promulgation, the E 50.02 Task Group, chaired by Julie Kilgore, is working on revisions to the 2000 standard for consistency with the AAI rule. The draft changes include adding the AAI rule's local and tribal records/database search requirements, incorporating new language on the need to search for institutional controls and engineering controls, and reflecting additional interview requirements, among other changes. The red-line version, once final, will be put out to ballot by the committee, most likely in mid-2004. If, once the revisions are final (expected to be E 1527-04), EPA determines that the revised ASTM E 1527 standard is at least as stringent as the final federal rule, according to Patricia Overmeyer of the U.S. EPA, "then the final Part 312 - Standards for Conducting All Appropriate Inquiries, will include, in the references section, recognition of the 1527 standard (after revision) as appropriate for complying with the federal requirements." This will enable the ASTM standard to remain the industry's benchmark for property environmental due diligence in terms of CERCLA liability protection. The ASTM standard will also continue to have applicability to the conduct of Phase Is to assess business environmental risk, in addition to those conducted solely out of concerns related to CERCLA liability.

Once final, the rule will codify the steps property owners will need to take to qualify for CERCLA liability protection. The impact on the market-

place remains to be seen, and will depend on how many transactions are driven solely by clients' interest in CERCLA liability protection versus business-related concerns, as well as by any changes EPA makes to the draft regulation before promulgation. In the meantime, the ASTM E 1527-00 standard will continue to provide clients with CERCLA liability protection. The rule is complex and will require more investigation, more interviews and more documentation. Under the new liability protections, particularly the contiguous property owner defense, there will also be much more emphasis on assessing the potential for contamination on adjoining properties in order for clients to claim CERCLA liability exemption down the road. The AAI rule clearly has the potential to affect virtually all commercial real estate transactions. It is therefore critical for anyone involved in these transactions to stay abreast of the rule as it is finalized as well as any upcoming changes to the ASTM standard to prepare for conducting due diligence in the future. ■

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FOR MORE INFORMATION

- Final Consensus Draft Regulation "Part 312 - Standards for Conducting All Appropriate Inquiries" (November 14, 2003) is available at
<http://www.epa.gov/brownfields/aai/draftreglangfinal.htm>
- All background information on the rulemaking process, including the text of the Federal Brownfields Law and all reg-neg meeting summaries, are posted at
<http://www.epa.gov/swerosps/bf/regneg.htm>

