



# Environmental Consulting

## INSIGHTS

### *Phase I ESAs and the USEPA's All Appropriate Inquiry Final Rule*

#### *What Do the New Requirements Mean for Real Property Transactions?*

*(printer friendly version uses Acrobat Reader)*

An Electronic Newsletter  
of EEA's Environmental  
Consulting Activities  
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EEA services include  
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There has been, and continues to be, a lot of discussion of the USEPA's All Appropriate Inquiry (AAI) Final Rule, published on November 1, 2005 in the Federal Register, and now in effect as of November 1, 2006, as regulations in 40 CFR Part 312. These new regulations are an important development in the environmental industry, directly affecting potential property purchasers, prospective commercial tenants and the environmental consultants servicing these persons. Persons indirectly affected by these new regulations include prior landowners, lenders, financial advisors, attorneys, property managers, and others.

A Phase I ESA is a preliminary investigation where the investigator visits and inspects the site, interviews owners or occupants, reviews historical and public documents, and reviews owner-supplied information, and then issues a report. This report will contain an opinion by the investigator as to whether the evidence for environmental contamination exists, or is likely to exist on the subject property. Typically, if such evidence exists, additional studies are initiated to characterize environmental contamination through a Phase II ESA involving some degree of on-site testing. With the results from the Phase II ESA in hand, intelligent decisions can be made relating to appropriate response actions necessary to address the environmental issues prior to moving forward with the transaction.



***This recently converted sales office was once an active print shop.***

Up until recently, no federal environmental regulations controlled the standards

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for a Phase I ESA, with the performance standards dictated either by industry standards, or by procedures set by the client's internal risk management policies. Since 1986 and through the 1990s the industry standard used and widely recognized was developed by the American Society for Testing and Materials (ASTM) in its "Standard Practice for Environmental Site Assessments: Phase I Environmental Site Assessment Process" (ASTM E1527). The ASTM practice was revised several times through the 1990s, with the most recent versions including ASTM E 1527-00, and the newest version, ASTM E 1527-05. The environmental due diligence process under the ASTM ESA Phase I ESA practice addresses hazardous substances and petroleum products (Recognized Environmental Conditions), along with other hazardous materials and toxic materials such as asbestos, lead, radon and molds (Business Environmental Risks).

The newly enacted AAI Final Rule is a long anticipated set of regulations promulgated to address CERCLA liability, and also to be used for federal Brownfields cleanup programs. Now according to the Final Rule, completing a Phase I ESA according to the newly issued ASTM E 1527-05 standard is determined to be compliant with the AAI regulations. The key to understanding these regulations, and how they apply lies with the purpose for the investigation. Prospective owners of properties can use this standard to fulfill regulatory requirements as part of maintaining CERCLA liability defenses. In the cases where others to which the CERCLA liability protections do not apply, such as lenders, financial advisors, attorneys, property managers, and others, it is those users' own risk management policies which may control the amount of effort in following the new ASTM standard, or whether or not to follow the standard at all. However, EEA has found that performing Phase I ESAs according to the new ASTM standard affects pricing significantly only for certain properties, and only moderately for other properties.

EEA has now completed a large number of these Phase I ESAs according to this new standard, and the AAI regulations.

Based on our experiences, we have outlined the general differences between these new rules and the old standard below.



**Fuel Oil Tank in Typical Urban Apartment Bldg**

### **How Does The Final Rule & ASTM E 1527-05 Differ From The Earlier ASTM E 1527-00?**

A Phase I ESA completed according to the Final AAI Rule and ASTM E 1527-05 involves additional requirements over the former version of the standard, ASTM E 1527-00. These additional requirements include:

#### **1. Environmental Professional Qualifications**

**ASTM E 1527-00:** The qualifications for the "Environmental Professional" performing the Phase I ESA investigation was left up to the user's discretion.

**ASTM 1527-05 and the AAI Final Rule:** The minimum Environmental Professional qualifications requires at least 10 years of relevant experience; must at least supervise the ESA process; must sign the report; and include a statement regarding his or her qualifications.

## 2. Interviews of Current Owners and Occupants and past Owners

**ASTM E 1527-00:** This standard required only a "reasonable attempt" to interview owners and occupants.

**ASTM 1527-05 and the AAI Final Rule:** Requires interviews with current and past owners, and interviews with owners or occupants of neighboring properties where the subject property is an abandoned property.

## 3. Site Inspection

**ASTM E 1527-00:** This standard required a physical and visual inspection of the subject property and any structures.

**ASTM 1527-05 and the AAI Final Rule:** The requirements are similar to the earlier ASTM standard, but also requires the reporting of uses of adjoining properties to the extent visually or physically observed during the site visit.

## 4. Government Records Review

**ASTM E 1527-00:** This standard required the review of physical setting information, along with federal and state environmental regulatory agency records. The standard set approximate minimum search distances for a particular record.

**ASTM 1527-05 and the AAI Final Rule:** The ASTM E 1527-05 standard requirements is generally similar to the ASTM E 1527-00 standard, but is expanded to include additional record types.

## 5. Historical Information Review

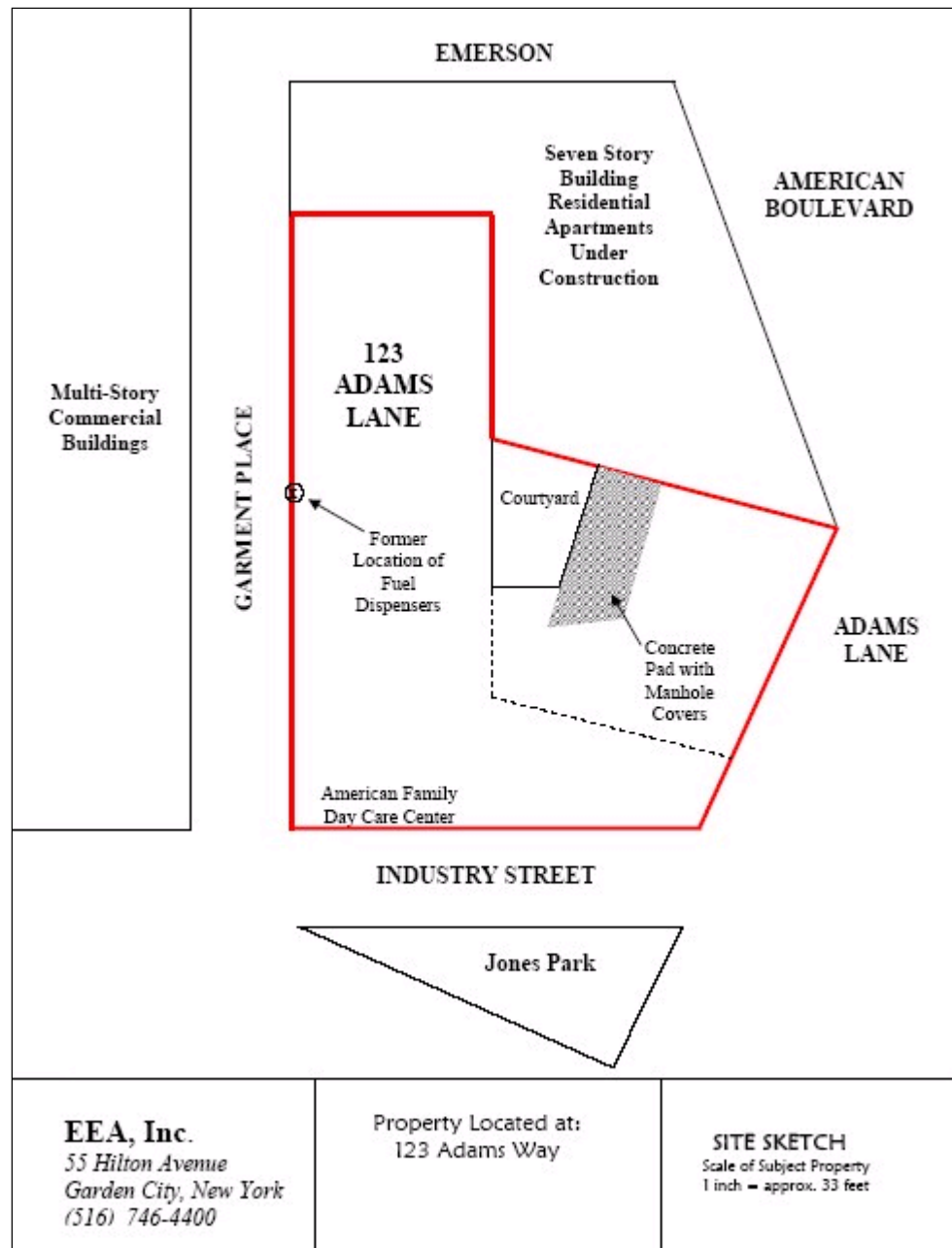
**ASTM E 1527-00:** This standard required the review of historical information, to evaluate all obvious uses from the present back to the property's first obvious developed use or 1940, whichever is earlier.

**ASTM 1527-05:** This standard also requires the review of historical information, back to the property's first obvious developed use or 1940, whichever is earlier.

**The AAI Final Rule:** The Final Rule requires the review back to the when the property first contained structures or was used for residential, agricultural, commercial, industrial, or governmental purposes.

### *New Additional Requirements under the AAI Rule*

- ◇ Environmental Professional Qualifications
- ◇ Interview Current Owners and Occupants, and past Owners
- ◇ Site Inspection
- ◇ Government Records Review
- ◇ Historical Information Review
- ◇ User Supplied Information
- ◇ Data Gaps
- ◇ Certification Statements
- ◇ Shelf Life of a Phase I ESA Report
- ◇ Prospective Purchaser's Continuing Obligations
- ◇ The Transaction Screen



**Hypothetical Case:** This building, constructed in 1918, was identified on a 1930 historical atlas as being occupied as a clothing manufacturer and dye facility. It was redeveloped in 1975 for residential apartments, and is presently being redeveloped as a residential condominium complex.

## 6. User Supplied Information

**ASTM E 1527-00:** This standard required that the User (i.e., client) communicate to the environmental professional any information, based on specialized knowledge or experience, which is material to Recognized Environmental Conditions.

**ASTM 1527-05:** This standard expands the requirements for User-supplied information, such as a title search and evaluating the purchase price of the subject property to determine whether the purchase price is significantly lower than the prices of comparable properties, due to hazardous substances or petroleum products. The standard requires the

User to draft a written explanation of this diminution in value as part of the Phase I ESA process.

**The AAI Final Rule:** The AAI Final Rule does not require the User to provide certain information, such as title search results, and the results of the diminution in value analysis, to the Environmental Professional. But, the Final Rule requires the Environmental Professional to identify and evaluate the significance for not being provided with certain information as Data Gaps (see below).

## 7. Data Gaps

**ASTM E 1527-00:** This standard did not define a Data Gap.

**ASTM E 1527-05 and the AAI Final Rule:** Both the standard and the Final Rule, requires a discussion of Data Gaps, defined as a lack of, or inability to, obtain information despite good faith efforts. The ASTM standard requires the Environmental Professional to identify *significant* Data Gaps, while *Insignificant* Data Gaps do not have to be included in this evaluation. For both the ASTM standard and the AAI Final Rule, the Environmental Professional must identify what was done to address the Data Gaps. A Phase I ESA which includes Data Gaps is still considered as compliant with the standard and the Final Rule. The Environmental Professional should provide an opinion regarding appropriate further investigations, if any, necessary to address Data Gaps.



*Typical Mixed Use Urban Neighborhood*

## 8. Certification Statements

**ASTM E 1527-00:** This standard required: an environmental professional statement to be placed in the conclusions section of the report; a statement of his or her qualifications; and the professional's signature.

**ASTM E 1527-05 and the AAI Final Rule:** ASTM E 1527-05 and the Final Rule require that the report include a separate certification statement declaring that the Environmental Professional meets the qualifications requirements, and that the all appropriate inquiry was performed in

conformance with 40 CFR Part 312.

## 9. Shelf Life of a Phase I ESA Report

**ASTM E 1527-00:** This standard required that reports older than 180 days prior to the date of acquisition of the property include certain updates, such as additional site reconnaissance, updated interviews and updated environmental regulatory data base reviews.

**ASTM E 1527-05 and the AAI Final Rule:** The ASTM standard and the AAI Final Rule allows the use of reports completed within one year with an expanded list of required updates including: site reconnaissance; updated interviews; updated environmental lien search; updated environmental regulatory data base reviews; and updated declarations by the Environmental Professional.

## 10. Prospective Purchaser's Continuing Obligations

**ASTM E 1527-00 and ASTM E 1527-05 Standard Practices:** Both versions of the ASTM standard only address the requirements for completing a Phase I ESA, as part of a due diligent "first look" environmental investigation.

**The AAI Final Rule:** In the AAI Final Rule, the USEPA states that the AAI investigation is only one component of regulatory compliance, making it clear that the Phase I ESA is not the only requirement for claiming a CERCLA liability defense.

## 11. The Transaction Screen

**ASTM E 1528:** ASTM developed this abbreviated ESA standard for certain properties. This practice essentially involves a site visit and a review of environmental regulatory database information. This practice was considered, under certain circumstances, to be sufficient to qualify for the Innocent Landowner defense against CERCLA liability.

**The AAI Final Rule:** The AAI Final Rule does not consider this ASTM standard practice as compliant with the regulations.



*Improper Chemical Storage and Use Practices Can Affect Property Conditions for Many Years Afterwards.*

### ***So What Does This Mean?***

ASTM E 1527-05 is an important new Phase I ESA standard. Prospective owners of properties can use this standard to fulfill the AAI Final Rule regulatory requirements as part of maintaining CERCLA liability defenses, and for Federal Brownfields site investigations. In the cases where users of the ASTM standard include others to which the CERCLA liability protections do not apply, such as lenders, financial advisors, attorneys, property managers, and others, it is those users' own risk management policies which may control the amount of effort desired in following the ASTM standard. For example, EEA has found that some lenders do not require that newer Phase I ESAs follow the new ASTM standard, electing to use the earlier ASTM E 1527-00 or the Transaction Screen practices, or even to not require Phase I ESAs altogether, requiring borrowers to purchase environmental insurance policies to cover environmental liabilities. However, EEA has found that performing Phase I ESAs according to the new ASTM E 1527-05 standard affects pricing significantly only for certain properties, and only moderately for other properties.

As with any new set of regulations, there is uncertainty as to the degree at which these regulations will ultimately impact the industry. EEA finds that any increased efforts and costs affected by these new rules can be controlled within reason through minor changes to the risk management programs already established within our clients' organizations. It is our experience that the application of the principles behind ASTM E 1527-05 and the AAI Final Rule involves only a refinement of methodologies already existing under the earlier standards. By approaching these regulations in a level-headed manner, professional good faith efforts will continue to guide users through the appropriate levels of environmental due diligence needed for the property transactions.

Additional Internet Links of Interest:



[EPA: All Appropriate Inquiries Fact Sheet](#)

[Federal Register Final Ruling](#)

[What are Bownfields](#)

[Cleanup of Contaminated Industrial Properties.](#) Environmental Consulting Insights. Fall 2003.

[Contaminated Site and Brownfield Cleanups.](#) Environmental Consulting Insights. Fall 2004.

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