

## All Appropriate Inquiry: The New Standard for Environmental Due Diligence

### Introduction

Weaver Boos Consultants (Weaver Boos) prepared this environmental brief to highlight key changes to environmental due diligence standards and practices and points to consider in preparing for those changes.

On November 1, 2005, the USEPA published its final All Appropriate Inquiries (AAI) Rule (70 Fed. Reg. 66070) titled "40 CFR Part 312, Standards and Practices for All Appropriate Inquiries" (AAI regulation). At the same time, the USEPA announced that the American Society for Testing and Materials (ASTM) E1527 2005 Phase I Environmental Site Assessment Standard (Phase I ESA) is consistent with the new AAI regulation. ASTM published its standard practice ASTM E1527-05 on November 21, 2005 (the ASTM Phase I Standard). The new AAI regulation becomes effective on November 1, 2006, but the ASTM Phase I Standard can be used now, if desired. The AAI regulation and ASTM Phase I Standard apply to property owners seeking CERCLA landowner liability protections and property owners applying for federal Brownfield grants.

Generally, AAI and the ASTM Phase I Standard are more prescriptive than prior standards, require more information to be provided by the user of the Phase I ESA report, and provide more comprehensive assessment requirements by the Environmental Professional performing that Phase I ESA.

### Background

Under CERCLA, persons may be held strictly liable for releases or threatened release of hazardous substances at properties they owned or operated at the time of release. This rule means that a potentially responsible party may be liable for contamination based solely on property ownership without regard to fault. AAI, which is an outgrowth of the 2002 Small Business Liability Relief and Revitalization Act (also known as the Brownfields Amendments), provides the following expanded CERCLA landowner liability protections:

- 1) **Bona Fide Prospective Purchaser** – for the first time, a purchaser may knowingly acquire contaminated property while limiting future CERCLA liability.
- 2) **Contiguous Property Owner** – also a new defense category which provides protection from CERCLA liability for contamination caused by a neighbor's actions.
- 3) **Innocent Landowner** – this pre-existing defense provides CERCLA protection to those who, after performance of appropriate due diligence, find at a later date that they have unknowingly acquired contaminated property.

A property owner can meet one of the requirements for the aforementioned CERCLA landowner liability protections by performing AAI prior to the purchase of a property.

### Phase I ESA User's Responsibilities

In addition to information traditionally provided by the user, AAI requires the user to provide the following information to the Environmental Professional that is material in identifying recognized environmental conditions:

- Information concerning environmental liens or activity use limitations recorded against the property obtained either from the review of judicial and title records, or from actual knowledge.
- Specialized knowledge or experience the user may have.
- Relationship of purchase price to fair-market value of the property if it were not contaminated.
- Commonly known or reasonably ascertainable information within the local community.
- Any obvious indicators that suggest the presence or likely presence of contamination at the property.

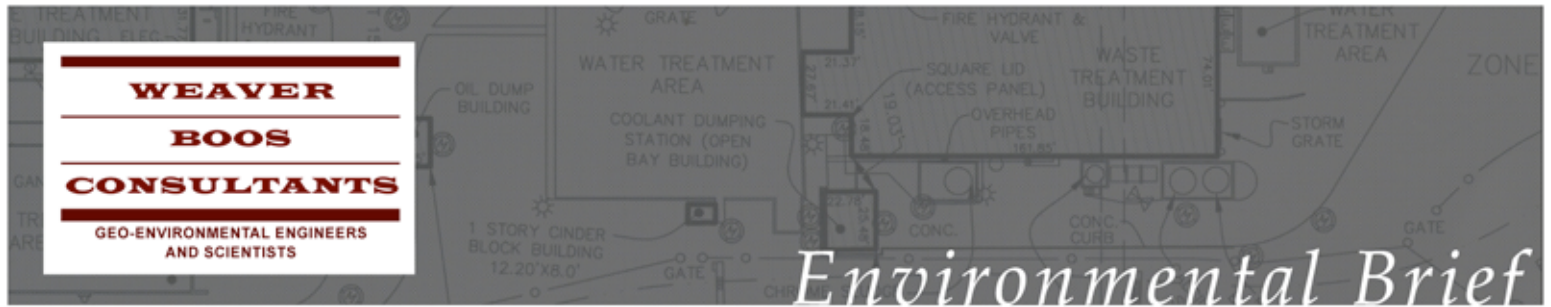
Failure to provide this information could result in a data gap.

### Property Owner's Continuing Obligations

AAI requires the property owner to comply with continuing obligations that vary depending on desired CERCLA landowner liability protections, but are generally as follows:

- Acquired the property after all disposal of hazardous substances has ceased and not liable for or did not contribute to such releases.
- Provide all legally required notices with respect to the discovery or release of any hazardous substances.
- Comply with and do not impede the effectiveness of land use restrictions or institutional controls.
- Exercise appropriate care and reasonable steps to stop continuing or prevent future releases.
- Provide full cooperation, assistance, and access to authorized personnel conducting response actions or natural resource restoration.
- Comply with CERCLA information requests and administrative subpoenas.

Failure to identify a release, land use restrictions, or institutional controls does not release a property owner from continuing obligations.



## Key AAI Requirements/Changes from Past Practices

An AAI compliant Phase I ESA will still have the same four basic components: records review, site reconnaissance, interviews, and report, but the following key changes to those components include:

- **Qualifications** - Specific licensing, educational, and experience qualifications for “**Environmental Professionals**” performing Phase I ESAs.
- **Identification and Discussion of Data Gaps** - Generally, a data gap is the inability to obtain required information despite good faith efforts. The Environmental Professional must identify data gaps and discuss their significance or the uncertainties they pose and their affect on the Environmental Professional’s ability to form a conclusion. Data gaps may require further investigation to satisfactorily resolve, but does not necessarily mean that AAI is not met.
- **Need for Additional Investigation** – The Environmental Professional is required to provide an opinion, not necessarily a recommendation, regarding appropriate additional investigation, if necessary, in circumstances when greater certainty is required regarding a recognized environmental condition.
- **Records reviews** – The records review provisions have been modified to include additional government databases.
- **Additional Compounds of Concern** – Includes controlled substances (only the AAI regulation, not ASTM) in addition to hazardous substances, pollutants, contaminants, petroleum, and petroleum products.
- **Specific Declarations** - The Environmental Professional is required to make specific declarations about their qualifications and conclusions of the Phase I ESA.

## Key AAI Similarities to Past Practices

An AAI Phase I ESA standard practice has provisions similar to past standards, but with some changes.

- **Interviews** - More **mandatory** interviews of current and past property owner operators and adjoining property owners and operators if the subject property is abandoned.
- **Adjoining Property Inspections** - Visual inspection and identification of uses of adjoining properties from accessible vantage points and rights of way.
- **Historical Uses** - Identification of obvious uses of the property from the present to the first developed use or 1940, whichever is earlier. The first developed use includes agricultural uses and the placement of fill material among other obvious improvements/uses.
- **Shelf Life** – AAI requires completion of the AAI investigation within **one year** prior to the date of the property acquisition. Furthermore, at a minimum, the interview, recorded environmental cleanup lien search, government records review, inspection, and Environmental Professional declaration components of an AAI compliant Phase I ESA must be updated within **180 days** prior to the date of property acquisition.

## Points to Consider in Preparing For AAI during Property Transactions

Do you need an AAI compliant Phase I ESA? A reduced scope will likely reduce time and cost to complete your environmental due diligence, but may not afford you the protections of an AAI compliant Phase I ESA.

If a property transaction will be completed after the November 1, 2006 AAI deadline, you may want to complete an AAI compliant Phase I ESA scope.

Allow for sufficient time to complete the AAI Phase I scope to minimize potential data gaps due to necessary additional research.

Other business risks, such as asbestos-containing building material, lead-based paint, wetlands, etc., are not addressed by AAI.

Be aware of the user’s obligations for an AAI compliant Phase I ESA and prepare as necessary.

Be aware that your lender’s Phase I ESA scope may differ from an AAI Phase I ESA scope.

Individual states may also have specific AAI requirements. For example, the Illinois Environmental Protection Act references the AAI regulations.

Data gaps may require investigation beyond a Phase I ESA if the user desires CERCLA landowner liability protections.

*Weaver Boos currently employs qualified Environmental Professionals with the background and experience to assist you with your environmental due diligence needs. For additional information, please contact Keith R. Fetzner at 630-717-4848 or Doug Dorgan at 312-922-1030.*

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