



# Working Together

## The Recent History of the Practice for Phase I Environmental Site Assessments

BY JULIE KILGORE

**T**he history of the development of ASTM E 1527, Practice for Phase I Environmental Site Assessments, in the early 1990s is an interesting narrative on the value of bringing voluntary consensus-based standards to industry when little guidance is available elsewhere. Fifteen years later, with the foundation of federal legislation and an existing industry standard, U.S. Environmental Protection Agency representatives and the ASTM E50.02.06 task group (part of ASTM International Committee E50 on Environmental Assessment, Risk Management, and Corrective Action) undertook a monumental coordinated effort to bring an EPA regulation and an ASTM standard together to implement requirements set out in federal legislation.

The story begins to unfold in 1980 when a unique piece of legislation emerged from the United States

Congress. The Comprehensive Emergency Response Compensation and Liability Act (CERCLA), combined with the subsequent Superfund Amendments and Reauthorization Act (SARA) in 1986, set forth the concept of an innocent landowner defense to liability for EPA cost recovery at “Superfund” sites. This innocent landowner defense required “acquisition without knowledge,” which required that the “defendant must have undertaken, at the time of acquisition, *all appropriate inquiry* into the previous ownership and uses of the property consistent with good commercial or customary practice.”

### **A CONSISTENT APPROACH TO ALL APPROPRIATE INQUIRY**

Legislative guidance for conducting all appropriate inquiry was minimal, providing only general factors for courts to consider. These factors included:

1. Specialized knowledge or experience on the part of the defendant;
2. Whether the purchase price was below market value;
3. Commonly known or reasonably ascertainable information;
4. Obviousness of the contamination; and
5. The ability to detect the contamination by investigation.

While most of these factors appeared to be simply common sense, the wild card was determining what would be considered commonly known and reasonably ascertainable information. There was no consistency within the environmental industry to guide the degree of due diligence required to meet this test. Developing a clear and consistent AAI process was critical because assignments of liability coming out of court decisions were frightening, particularly when the lending industry and other parties with pri-



marily secured interests were found to be “responsible parties” and held liable for cleanup costs.

Several professional and industry organizations had rallied to develop a consistent approach to conduct all appropriate inquiries. These various protocols, however, were typically developed from the perspective of a single stakeholder group and ranged from one-page checklists to in-depth technical manuals.

#### **SUBCOMMITTEE E50.02 ON COMMERCIAL REAL ESTATE ENTERS THE PICTURE**

In 1989 ASTM organized a new subcommittee, E50.02 on Commercial Real Estate, under the jurisdiction of Committee E50. The primary focus of this subcommittee was to develop a standard practice for conducting all appropriate inquiries, consistent with good commercial and customary practice, specifically

for CERCLA liability protection.

The newly formed Subcommittee E50.02 drew member participation from other ASTM technical committees, but many were representing stakeholder groups relatively new to the ASTM process. “The major membership growth of the E50 Committee was directly related to the AAI standards development,” says Gwen Eklund, one of the original E50 committee officers. “That first meeting was attended by over 100 ‘interested parties’ – real estate attorneys, environmental attorneys, corporate attorneys, regulators, home builders, mortgage bankers, environmental bankers, insurers, consultants – there was a furor around AAI. CERCLA and Superfund issues were important at the time because nobody wanted to own that kind of liability.”

Eklund went on to say, “No one was certain what might have to be done to really comply with the AAI test. The efforts to develop this standard took off so fast that there were meetings almost weekly for the first year. The subcommittee quickly formed task forces to address sub-issues. Each task force worked separately, then pulled back together.” EPA representatives were also on hand. Helen Keplinger, attorney and advisor for EPA enforcement, recalled, “I was primarily an observer during this period, attending the ASTM meetings and reporting back to EPA.”

In 1993, after four years of intense effort, the first ASTM E 1527, Practice for Phase I Environmental Site Assessment, was published and was widely accepted as a baseline process for conducting AAI. The rapid adoption of ASTM E 1527 was no doubt due in large part to the ASTM-required balanced stakeholder representation within the E50 committee. This adoption, however, did not occur at the federal level. “In about 1995 ASTM sent correspondence to EPA requesting the agency adopt ASTM’s standard, but nothing ever came of this request,” Keplinger recalled. “There were behind-the-scenes discussions at EPA but no formal ratification of the [ASTM E 1527] standard resulted.”

#### **2002 BROWNFIELDS LAW LEADS TO RE-EVALUATION OF E 1527**

While EPA was present in the early development stages of E 1527, the agency had little participation with Committee E50 in the interim years between the initial publication of E 1527 in 1993 and the most recent efforts. This renewed interest was sparked in large part by the Small Business Liability Relief and Brownfields Revitalization Act signed in January of 2002. The 2002 Brownfields Law created new landowner liability protections including a “contiguous property owner” and the “bona fide prospective purchaser.” The Brownfields Law also provided additional guidance regarding the criteria for conducting AAI, and cited the ASTM E 1527 standard as the interim standard for meeting these criteria. However, Congress went on to require that EPA develop its own standards and practices for conducting AAI.

At the time the Brownfields bill became law, there was much speculation as to why Congress created this mandate for EPA to essentially recreate what already existed in the marketplace. Perhaps it was Congressional intent to force EPA and industry to closely scrutinize and evaluate the appropriateness of an AAI process that was developed by a voluntary consensus standards developing organization outside the legislative or regulatory arena. That scrutiny and evaluation of ASTM E 1527 is, in fact, what occurred during an eight-month federal advisory regulatory negotiating process that took place throughout 2003.

Though Congress had required in the 2002 Brownfields Law that EPA develop standards and practices for conducting AAI, EPA was well aware that ASTM E 1527 was well established in the marketplace. After conducting a series of interviews with public and private sector stakeholders, EPA established a regulatory negotiating (reg-neg) federal advisory committee consisting of 25 negotiators representing specific stakeholder groups. The negotiators were tasked to come together in a cooper-

## Cooperative Effort Results in Sound Due Diligence Practice

By James R. Roewer

When the U.S. Congress passed the Brownfields Act in 2002 and instructed EPA to develop a permanent due diligence standard, many industries were concerned about the effect this would have on the ASTM E 1527 Phase I standard that had been widely accepted as the norm for property environmental site assessments. The electric utility industry, through the Utility Solid Waste Activities Group or “USWAG,” recognized that the new statute would require a few changes in E 1527, but that it would not require scrapping the entire standard and starting all over again. We did not want to lose the experience we had gained with the ASTM standard in the 10 years of its existence once EPA published its “all appropriate inquiry” or “AAI” rule.

When EPA announced its intention to develop its AAI rule through the rarely used regulatory negotiation or reg-neg process, USWAG made several recommendations to EPA:

- ▶ To facilitate coordination between EPA and the ASTM E 1527 Task Group, EPA should appoint Julie Kilgore, the task group chair, to the EPA Regulatory Negotiation Committee;
- ▶ EPA should commit to preserving as much of the ASTM E 1527 standard as is legally permissible under the Brownfields Amendments; and
- ▶ EPA should endorse the E 1527 standard as revised to comply with the Brownfields Amendments as a valid alternative to the AAI rule.

Given the availability of the E 1527 standard as a starting point and EPA’s invitation to Julie Kilgore to participate as one of 25 members of the reg-neg committee, we thought that this negotiation had a reasonable chance of success.

This feeling was confirmed each time the committee had to address thorny issues that needed to be resolved in the AAI rule and would turn to Julie and ask her “How did ASTM address that issue?” That is the point at which Julie’s participation became decisive. She could speak with the authority of someone who not only participated in the original drafting of ASTM E 1527, but also as someone who had a decade of experience using the standard to conduct site assessments. Because of her expertise and experience, she became a critical player on the reg-neg committee, winning over not only her committee colleagues, but gaining the confidence and respect of the EPA staff.

The utility industry is very happy with the outcome of the process. The reg-neg committee and the EPA staff, with much guidance and insight from Julie Kilgore, worked diligently to develop a reasonable AAI rule that built on the existing ASTM Phase I standard and also complied with the new Brownfields law. And the ASTM task group, led by Julie and with the constructive participation of EPA staff members, worked tirelessly to update the E 1527 standard to ensure EPA endorsement of the ASTM standard as a legally valid alternative to the AAI rule. The end product – E 1527-05 – is a sound due diligence practice that I expect many in the utility and other industries will continue to use. It is amazing what can be accomplished when the channels of communication are open and flowing. Our industry achieved its goal of minimal disruption as EPA and ASTM worked together to update the environmental site assessment standards for property transactions required by the 2002 Brownfields Amendments.

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ative effort to assist EPA in developing a proposed regulation for conducting all appropriate inquiries.

Several negotiators appointed to the EPA committee were representing organizations that were also members of the ASTM E50 committee, and were well versed in the development and application of E 1527. But as with any consensus process, not all the negotiators on the EPA committee were fully satisfied with E 1527. Early in the reg-neg process, there was considerable resistance to referencing E 1527 in a new EPA AAI regulation. The reg-neg was a grueling process for the negotiators, as each of the 10 AAI criteria set out in the 2002 Brownfields Law was debated exhaustively, and the applicability of the language in E 1527 was scrutinized down to the tiniest detail. If ever there was an ASTM standard that was severely tested, it was during this EPA negotiation process. Language that had been crafted in E 1527 15 years earlier consistently stood up as reasonable and balanced.

As the EPA negotiations wore on and the negotiators became more familiar with the consensus language found in E 1527, the idea of referencing the ASTM standard in the EPA regulation started to gain momentum. It was important to many involved in this reg-neg process, including EPA representatives, to address all of the legislatively required components of AAI, as well as the needs of all the stakeholder groups represented at the reg-neg, and to not significantly disrupt the marketplace. As the cooperative effort moved forward, this win-win outcome started to seem possible.

In the waning months of the negotiations, EPA announced its intent to work with ASTM International to update E 1527 so that it would be compliant with the AAI regulation so that the updated standard could be referenced in the regulation as compliant with the federal requirements for all appropriate inquiries. Patricia Overmeyer, with the EPA Office of Brownfields Cleanup and Redevelopment and the EPA designated official assigned to develop the AAI regulation, stated, “EPA would

reference the updated ASTM E 1527, if the ASTM committee could make the necessary modifications to the standard that would render it be in full compliance with the anticipated EPA AAI final regulation.”

Making the necessary changes to E 1527 was already in the works. On a parallel track during the 2003 EPA reg-neg process, E50.02.06, the ASTM task group responsible for E 1527 was also convening regular task group meetings to monitor EPA’s progress. The ASTM E 1527 task group chair was serving as one of the EPA negotiators and Overmeyer actively participated with the ASTM task group, providing a bridge between these two efforts. Some members of the EPA reg-neg who were not already members of ASTM also joined the task group to facilitate this bridge.

In November 2003, the EPA reg-neg committee reached final consensus on the proposed EPA AAI regulation. Afterwards, the ASTM task group made the final modifications to E 1527 and submitted the document to EPA for an informal pre-compliance review to help ensure that the objectives of both the federal legislation and the EPA regulation had been met. EPA completed its required public comment period, which gave ASTM members the final opportunity to provide input to EPA on the AAI regulation, while ASTM proceeded through its rigorous balloting process, which provided EPA the final opportunity to provide input to ASTM on E 1527. Symposia, training, and numerous conference presentations were held to maximize public participation and public education about the upcoming changes.

#### **NEWLY REVISED E 1527 NOW IN FULL COMPLIANCE WITH AAI REGULATION**

The final result of this truly amazing cooperative effort was the nearly simultaneous publication of both the EPA AAI final regulation and ASTM E 1527-05, wherein the EPA AAI regulation references E 1527-05 as being in full compliance with the AAI regulation. “The

#### **Timeline Overview**

1980s	1990s	2002	2005/2006
<b>CERCLA / SARA</b> Requiring All Appropriate Inquiry	<b>ASTM E 1527</b> Developed to define “good commercial and customary practice” for conducting AAI	<b>BROWNFIELDS Law</b> cites ASTM E 1527 as the interim standard for conducting AAI	<b>EPA AAI REGULATION</b> References to ASTM E 1527 for conducting AAI

fact that the revised ASTM standard is compliant with the final rule and is widely available prior to the effective date of the final rule (Nov. 1, 2006) will ease implementation and minimize disruptions to the commercial real estate market,” said Overmeyer.

Many articles have been and will be written regarding industry changes in the environmental site assessment process, shifts in the commercial real estate market, revitalization of underutilized properties, and the expansion of CERCLA liability protections due to the 2002 Brownfields Law, development of the 2005 EPA All Appropriate Inquiry regulation, and modifications that resulted in ASTM E 1527-05.

However, the focus of this article is to recognize and applaud first and foremost the efforts of those many industry professionals who came together in the early 1990s to form an ASTM task group that devoted four years to bringing consensus to a wildly unpredictable environmental site assessment process. Those early

efforts resulted in an ASTM standard practice that stood the test of time and held up to the severe scrutiny of an equally passionate and committed EPA negotiating team.

Secondly, it is important to recognize and applaud the dedication of the current ASTM committee members and EPA representatives who worked so tirelessly for another four years (2002-2005) to bring consensus and complementary processes to the marketplace. “From EPA’s perspective, things couldn’t have turned out better,” said David Lloyd, director of EPA’s Brownfields program. “We were fortunate to have talented, dedicated people all around the negotiating table. The close working relationship built between EPA’s Patricia Overmeyer, who coordinated development of the all appropriate inquiries rule, and [ASTM task group chair] Julie Kilgore was crucial to getting this to work. A lot of thanks and hard won appreciation goes to both of them, and to the rest of the rulemaking team.” //



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