

# All Appropriate Inquiry and Brownfields Redevelopment

by Julie Kilgore

By now, most professionals involved in environmental consulting, commercial property transactions, and redevelopment activities are familiar with the 2002 Small Business Liability Relief and Brownfields Revitalization Act (the Brownfields Bill)<sup>1</sup> and the Congressional mandate that the U.S. Environmental Protection Agency (EPA) promulgate a regulation for conducting all appropriate inquiry (AAI) for the expanded federal landowner liability protections. Many have speculated about the far-reaching effects that the EPA regulation may have on industry,

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particularly with respect to brownfields redevelopment.

In considering the potential impact that the AAI regulation<sup>2</sup> may have on brownfields redevelopment, it is important to first recall that "all appropriate inquiry" is neither a new term nor a new concept. In 1980, the Comprehensive Emergency Response, Compensation, and Liability Act (CERCLA) emerged from Congress. It was this piece of legislation that initially outlined a liability defense to cost

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recovery if, at the time of acquisition, a defendant "did not know and had no reason to know that any hazardous substance was released." In 1986, the Superfund Amendments and Reauthorization Act (SARA) further clarified the concept of "acquisition without knowledge" by stating that a "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." SARA provided further guidance for courts to consider in determining whether a defendant had conducted AAI consistent with good commercial and customary practice. These factors included

- specialized knowledge or experience on the part of a defendant;
- whether the purchase price was below market value;
- commonly known or reasonably ascertainable information;
- obviousness of the contamination; and
- the ability to detect the contamination by inspection.

Of the 10 criteria set out in the 2002 Brownfields Bill for conducting AAI (see sidebar), several were originally established by legislation almost 20 years ago.

Congress provided little guidance in earlier legislation as to how a defendant was to demonstrate there was "no reason to know" that contamination was present at the time of acquisition. There was no consistency within the environmental industry to guide the degree of due diligence required to meet this test and court decisions varied widely. In 1989, an ASTM committee consisting of several hundred industry professionals, including lenders, developers, regulators, and environmental professionals, was established to define good commercial or customary practice for conducting AAI for commercial property transactions. In 1993, the first ASTM

E1527 Standard Practice for Conducting Phase I Environmental Site Assessments (ESAs)<sup>3</sup> was published and was widely accepted as the process for conducting AAI.

However, over the past 20 years, the ESA process has not been particularly applicable to

brownfields sites, at least not for liability protection. For all practical purposes, liability protection was only available for "innocent landowners" (i.e., those who did not know and had no reason to know that any hazardous substance was released). Once an inquiry provided reason to know there may be contamination, if any inquiry was conducted at all, a CERCLA liability defense through AAI was no longer available. Given the very broad liability scheme under CERCLA, this often meant that many sites like those depicted in Figure 1 remained vacant or underutilized.

The 2002 Brownfields Bill broadened CERCLA liability protection to include innocent landowners, contiguous property owners, and bona fide prospective purchasers. The most intriguing of these liability protections is the bona fide prospective purchaser, which allows a buyer to purchase commercial

## The 10 Criteria

The 2002 Brownfields Bill outlines the below 10 criteria for conducting AAI.

- I The results of an inquiry by an environmental professional.
- II 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.
- III 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.
- IV Searches for recorded environmental cleanup liens against the facility that are filed under federal, state, or local law.
- V 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.
- VI Visual inspections of the facility and of adjoining properties.
- VII Specialized knowledge or experience on the part of the defendant.
- VIII The relationship of the purchase price to the value of the property, if the property was not contaminated.
- IX Commonly known or reasonably ascertainable information about the property.
- X 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.

property with knowledge of the contamination, so long as certain conditions are met and maintained. This concept of "acquisition with knowledge" has resulted in an industry mind-shift that has already had a positive effect on brownfields redevelopment. Regulatory agencies are facing increasingly limited resources, and enforcement actions are

often not the driving force behind cleanups. However, contamination issues can often be quantified and factored into development projects like those depicted in Figures 2 and 3. Consequently, cleanups are occurring across the country because it makes good economic sense

## REFERENCES

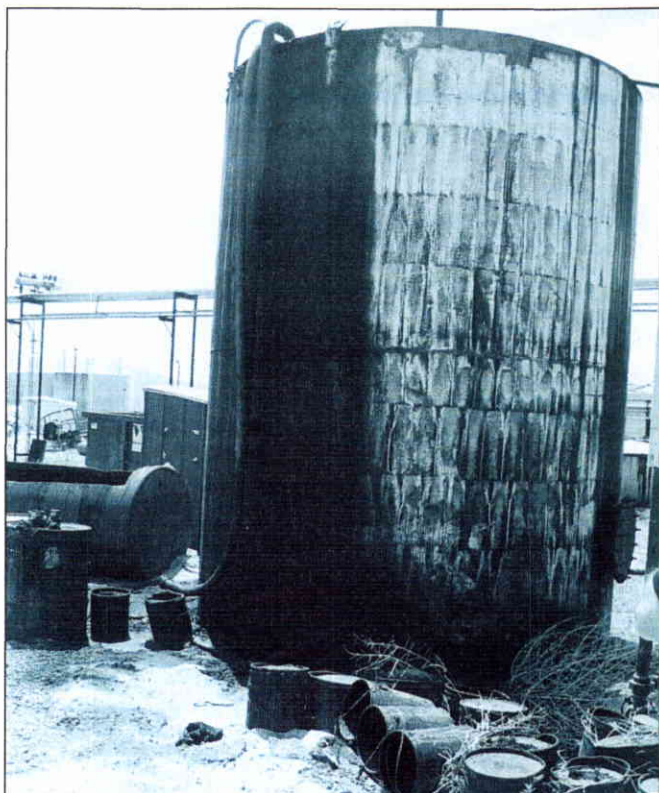
1. Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended by Superfund Amendments and Reauthorization Act of 1986 and Small Business Liability Relief and Brownfields Revitalization Act of 2002. 42 U.S.C. §§9601 et seq.
2. All Appropriate Inquiry; Final Rule. Codified at 40 C.F.R. Part 312.
3. E1527 Standard Practice for Environmental Site Assessments: Phase I Environmental Site Assessment Process; ASTM, 1993.
4. "Interim Guidance Regarding Criteria Landowners Must Meet in Order to Qualify for Bona Fide Prospective Purchaser, Contiguous Property Owner, or Innocent Landowner Limitations on CERCLA Liability ("Common Elements)"; Memorandum; U.S. Environmental Protection Agency, 2003.
5. Common Elements Guidelines; U.S. Environmental Protection Agency; available at [www.epa.gov/compliance/resources/policies/cleanup/superfund/common-elm-guide.pdf](http://www.epa.gov/compliance/resources/policies/cleanup/superfund/common-elm-guide.pdf).

**Table 1.** AAI timeline.

1980s	1990s	2002	2005/2006
<b>CERCLA/SARA</b> Requiring AAI	----->	----->	----->
	<b>ASTM E1527</b> Developed to define "good commercial and customary practice" for conducting AAI	----->	----->
		<b>BROWNFIELDS BILL</b> Cites ASTM E1527 as the interim standard for conducting AAI	----->
			<b>EPA AAI REGULATION</b> References ASTM E1527 for conducting AAI

and, at least conceptually, the fear of unlimited CERCLA liability has been reduced.

AAI plays a central role in these activities. Among other requirements, a prospective purchaser must conduct AAI prior to purchase. The 2002 Brownfields Bill also requires that AAI be conducted by those conducting an ESA as part of a Brownfields Assessment and Characterization Grant awarded under CERCLA. These legislative changes have resulted in significantly broadening the applicability of AAI. These days, it is not uncommon for clients to request Phase I ESAs because they are specifically interested in bona fide prospective purchaser liability protection.



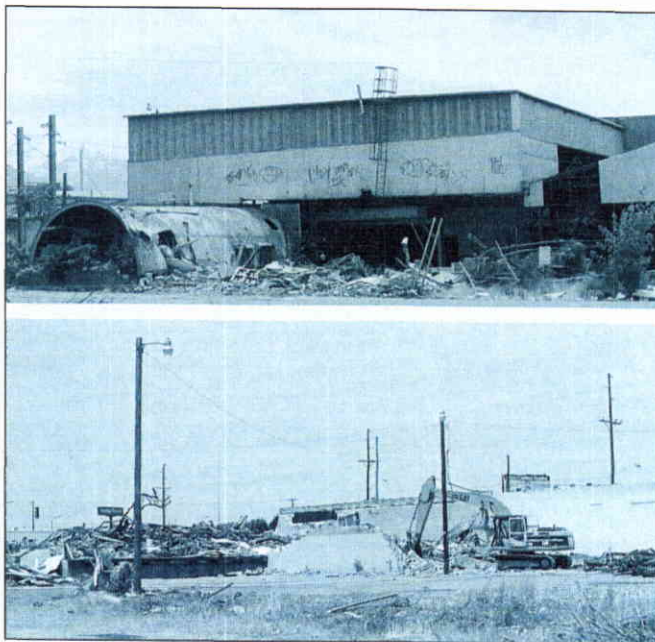
**Figure 1.** Prior to 2002, sites with known or presumed contamination would remain dormant due to concerns about unlimited liability.

Conducting AAI on brownfields sites requires environmental professionals to revisit some of the underlying principles of Phase I ESAs. The ASTM E1527 standard practice has been the primary mechanism for conducting AAI since 1993 and was never intended to be a one-size-fits-all process. ASTM E1527 was developed as a baseline study to establish a minimum level of inquiry that could be implemented nationwide and enhanced by the professional judgment of the environmental professional(s) conducting the inquiry. In addition to the responsibilities of environmental professionals, those commissioning the inquiry have specific responsibilities as well, which are often entirely overlooked

in the AAI process.

As stipulated in the 2002 Brownfields Bill, conducting AAI is an initial step in establishing a bona fide prospective purchaser liability protection. A well prepared AAI also lays the groundwork for the subsequent continuing obligations (i.e., the requirements necessary for maintaining that liability protection;<sup>4</sup> guidance regarding continuing obligations is presented in EPA's Common Elements Guidelines<sup>5</sup>). Additionally, a Phase I ESA is a foundation piece for many brownfields redevelopment projects entering into state voluntary cleanup programs.

As far as the practical application of AAI, very little is likely to change for many of the estimated 250,000 Phase I ESAs conducted annually (see Table 1). Congress cited the ASTM E1527 standard practice for conducting Phase I ESAs as the interim standard for conducting AAI. In addition, the 10 criteria the 2002 Brownfields Bill requires EPA to consider in establishing the AAI regulation are consistent with the ATSM E1527



**Figures 2 and 3.** Cleanups or containment requirements can be quantified and incorporated into redevelopment activities.

**Table 2.** Changes to the E1527 standard practice.

	<b>ASTM E1527-00</b>	<b>ASTM E1527-05 Modifications to Reflect EPA AAI Regulation Requirements</b>
Environmental Professional (EP)	Generally defined	More stringent definition requiring specific combinations of education and experience
EP Duties	EP required to conduct site visit and interviews	EP in "responsible charge." Previous ASTM EP definition required as minimum qualifications for conducting site visits and interviews
Updates	Presumed to be valid up to 180 days (subject to actual knowledge)	Certain components must be conducted within 180 days
Interviews	Key site manager, certain occupants required. Others to the extent necessary to identify environmental concerns	In addition, interviews with at least one neighbor if the property is abandoned with evidence of uncontrolled access
Government Records Review	Standard federal and state databases. Others to the extent available and useful	Standard databases expanded to include institutional control registries and tribal and local records
Reports	Present findings, opinions, and conclusions	Specifically those data gaps that affect the ability of the EP to form opinions regarding environmental conditions
Declaration		New declaration of experience and compliance with AAI regulation required by the EP

standard practice. The ASTM E50.02 task group and EPA representatives worked in a cooperative effort to revise the E1527 standard practice to be in full compliance with the EPA AAI regulation, and is referenced as such by EPA in the final regulation. Both the EPA AAI regulation and the ASTM E1527-05 were published in November 2005. Table 2 presents a direct comparison of some of the changes to E1527.

What is changing? Phase I ESAs are now being conducted on a regular basis for complex brownfields sites with the full intention of identifying environmental concerns. This is a significant mind-shift in the marketplace, in part, because the concept of being a bona fide prospective purchaser or recipient of a brownfields grant is much more tangible than that of the elusive innocent landowner. **em**