

# ALL APPROPRIATE



## Standards

by Julie Kilgore

In 1989 a new ASTM committee was established to define good commercial or customary practice for conducting “all appropriate inquiry” pursuant to the innocent landowner defense to CERCLA liability. Congress had given little guidance as to how to demonstrate there was “no reason to know” that contamination had occurred on a property prior to acquisition. No precedent existed within the environmental industry to guide the degree of due diligence required to meet this test and court decisions varied widely.

Two primary objectives of the ASTM committee were to establish a standard of inquiry that was practical and reasonable, and to improve the quality and consistency of environmental site assessments. The committee included hundreds of people representing the financial, real estate, insurance and legal industries, environmental professionals, and regulatory agencies. This balanced representation is an important requirement of the ASTM consensus process, ensuring that no single interest dominates the development of industry standards. After four years of tough negotiations, the first version of the E1527 was published in 1993 and it quickly became the industry standard for conducting Phase I environmental site assessments.


Fast forward 10 years. In January 2002, Congress passed the Small Business Liability

Relief and Brownfield Revitalization Act (brownfield bill). The brownfield bill broadened CERCLA liability protection to include innocent landowners, contiguous property owners, and bona fide prospective purchasers if, among other requirements, the buyers conducted “all appropriate inquiry” (AAI) prior to purchasing the property. The brownfield bill outlines 10 general criteria (see sidebar) to meet AAI. Each of the 10 criteria is addressed in detail in the ASTM E1527 standard and the E1527-97 revision was cited in the legislation as the interim standard to satisfy all appropriate inquiry (a subsequent administrative ruling allowed the E1527-00 version to be used as well) until the EPA promulgated its own standard regulation for conducting all appropriate inquiry. However, the National Technology Transfer and Advancement Act of 1996 requires federal agencies, whenever possible, to adopt existing voluntary consensus industry standards to reduce unnecessary government standards that duplicate existing private sector standards. The ASTM committee believed that the EPA could, and in fact should, use the E1527 in its final regulation.

In May 2003 an EPA AAI regulatory negotiation committee convened for the first of seven monthly meetings. ASTM, by strict definition of balanced committee representation, includes all of the regulatory negotiation groups selected by the EPA. Therefore the EPA designated ASTM as a “resource”

member of the negotiating committee rather than a stakeholder.

From the outset, many stakeholder representatives were resistant to a blanket adoption of ASTM E1527. Some committee members felt the standard was too prescriptive, others felt it was not prescriptive enough. Still others were completely unfamiliar with E1527. However, it was important to the EPA committee members that the marketplace not be significantly disrupted with a regulation that deviated considerably from current industry practice.

Throughout 2003 the ASTM task group also conducted monthly meetings to monitor the activities of the EPA regulatory negotiating committee and to continue drafting updates to the E1527 that would reflect both the legislation and anticipated regulatory language. In October, the EPA announced that the AAI regulation would refer to, in whole or in part, ASTM E1527 and any other industry standards that comply with the final regulation. Additionally, the EPA representatives have been working with the ASTM task group in the efforts to update the standard. Ten years ago E1527 established an industry standard for conducting all appropriate inquiry. The 2002 brownfield bill outlined 10 criteria for all appropriate inquiry that were consistent with E1527. The 2004 EPA regulation will likely refer to E1527, and the E1527 will be updated for consistency with the brownfield bill and the EPA regulation. 

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### The 2002 brownfield bill outlines the following 10 criteria for conducting All Appropriate Inquiry.

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| I. The results of an inquiry by an environmental professional.   | disposal, and spill records, concerning contamination at or near the facility.  |
| 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.  | VI. Visual inspections of the facility and of adjoining properties.   |
| 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. | VII. Specialized knowledge or experience on the part of the defendant.  |
| IV. Searches for recorded environmental cleanup liens against the facility that are filed under federal, state, or local law.  | VIII. The relationship of the purchase price to the value of the property, if the property was not contaminated.  |
| V. Reviews of federal, state, and local government records, waste disposal records, underground storage tank records, and hazardous waste handling, generation, treatment,   | 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. |