

## ASTM E1527-13: Applying the New Phase I Site Assessment Standard

Navigating the Material Changes to Meet All Appropriate  
Inquiries Requirements and Limit CERCLA Liability

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THURSDAY, JANUARY 23, 2014

1pm Eastern | 12pm Central | 11am Mountain | 10am Pacific

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# ASTM E1527-13: Applying the New Phase I Site Assessment Standard

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# **Overview of CERCLA All Appropriate Inquiry Requirement (AAI)**



# Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), 42 U.S.C. §§ 9601, et seq.

- Strict, joint and several liability for four classes of persons (PRPs) including:
  - Current owners and operators
  - Owners and operators at the time of release
- Defenses to Liability v. Limitation on Liability



# 2002 Small Business Liability Relief and Brownfields Revitalization Act, Public Law 107-118 (“Brownfield Amendments”)

## CERCLA Limited Liability for:

- Bona Fide Prospective Purchasers (BFPPs)
- Contiguous Property Owners (CPOs)
- Clarified Requirements for Innocent Landowner Defense (ILOs)





# CERCLA Bona Fide Prospective Purchaser

- 42 U.S.C. § 9607(q)(1)(C)
- Knew or had reason to know of contamination at time of acquisition
- PRP must establish by a preponderance of the evidence:
  - “[M]ade all appropriate inquiries into the previous ownership and uses of the facility in accordance with generally accepted good commercial and customary standards and practices.”
  - Other requirements: Disposal/release prior to acquisition; Provides all legally required notices regarding release; Due Care; Cooperation; Compliance with institutional controls; No affiliation with PRP.



# CERCLA Contiguous Property Owner

- 42 U.S.C. § 9607(a)(1)(A)
- PRP owns property that is or may be contaminated by contiguous property owned by another person and
  - At time property acquired did not know or have reason to know of contamination from contiguous property
  - At time property acquired conducted AAI with respect to the property
  - Other requirements: Not cause or contribute to release; Not potentially liable or affiliated with PRP; Due Care; Cooperation; Compliance with institutional controls; Compliance with U.S. EPA information requests; Provides all legally required notices regarding release.



# CERCLA Innocent Landowner Defense

- 42 U.S.C. 9607(b)(3)
- Act or omission of third party other than employee or agent or one whose act or omission occurs in connection with a “contractual relationship”
  - Definition of “contractual relationship” - 42 U.S.C. § 9601(35)(A)
  - Party to establish by preponderance of evidence that did not know and had no “reason to know” of hazardous substance disposed on, in or at Site
  - To establish no “reason to know” must conduct all appropriate inquiry and exercise due care.
  - Other requirements: Due Care; Took precautions against foreseeable acts and omissions and consequences.




# What Is CERCLA All Appropriate Inquiries?

“All appropriate inquiries . . . into the previous ownership and uses of the facility in accordance with generally accepted good commercial and customer standards and practices.” (42 U.S.C. § 9601(35)(B))

# What Is CERCLA All Appropriate Inquiries?

- U.S. EPA AAI Regulations
  - Standards and Practices for All Appropriate Inquiries
    - Nov. 1, 2005, 70 FR 66070
    - 40 C.F.R. Part 312
    - Effective Nov. 1, 2006

“Persons seeking to establish one of the liability protections ... must conduct investigation as required in this [regulation] ... to identify conditions indicative of releases or threatened releases ... of hazardous substances defined in CERCLA.”



# Where Does ASTM Standard E1527 Fit Into AAI?

“The following industry standards may be used to comply with the requirements set forth in §§ 312.23 through 312.31: (a) The procedures of ASTM International Standard E1527-05 entitled “Standard Practice for Environmental Site Assessments: Phase I Environmental Site Assessment Process.” (40 CFR § 312.11)

# What Is ASTM Standard E1527?

- American Society for Testing and Materials
- Intended for use on voluntary basis to assess environmental conditions taking into account commonly known and reasonably ascertainable information.
- Practice to define good commercial/customary practices for conducting environmental site assessment of commercial property within range of contaminants within the scope of CERCLA and petroleum products.

# What Is ASTM Standard E1527?

“In defining a standard of good commercial and customary practice for conducting an environmental site assessment of a parcel of property, the goal of the process established by this practice is to identify recognized environmental conditions.”



# What Is ASTM Standard E1527?

- Four Components of Phase I ESA
  - Records Review
  - Site Reconnaissance
  - Interviews
  - Report
- Must be Performed by “Environmental Professional”
- Imposes Responsibilities on User
- No Sampling Required
- Not Include Evaluation of “Business Environmental Risk” or Other Non-Scope Considerations (e.g. mold, asbestos, lead, radon)





# 40 C.F.R. PART 312 IS THE STANDARD FOR COMPLYING WITH AAI

- ASTM E1527-05 Not A Federal Regulation Nor Incorporated Into One
- U.S. EPA merely recognized use of ASTM E1527 to comply with Part 312
  - ASTM Standard may be used to comply with 40 C.F.R. Parts 312.23 through 312.31
- What does this mean?
  - Phase I Reports must always comply with all requirements of 40 C.F.R. Part 312
  - Phase I Report must state that it complies with 40 C.F.R. Part 312
- You Are Not Required To Use ASTM E1527 To Satisfy AAI Requirements



# The New ASTM Standard: ASTM E1527-13



# ASTM E1527-13: Background

- 2013: ASTM finalizes ASTM E1527-13
- ASTM E1527-13 Similar to ASTM E1527-05 in Form, Process, and Areas of Coverage

# ASTM E1527-13: Background

- Aug. 15, 2013: U.S. EPA Direct Final Rule
  - Amend 40 C.F.R. Part 312 to Reference ASTM E1527-13
- Aug. 15, 2013: U.S. EPA Companion Rule
  - Public Comment on Direct Final Rule
  - If Adverse Comments Received Will Withdraw Direct Final Rule
- EPA Received Adverse Comments
- Oct. 29, 2013: Notice of Withdrawal

# ASTM E1527-13: Background

- Dec. 30, 2013: EPA Final Rule
  - Amending 40 C.F.R. Part 312 to Permit Use of ASTM E1527-13
  - Responding to Public Comment
- Does Not Withdraw ASTM E1527-05
  - U.S. EPA to Publish Separate Proposed Rule Seeking Public Comment on Removing Reference to ASTM E1527-05



*ASTM E1527-13 v. ASTM E1527-05:  
What's Different?*





# The Potential For Vapor Intrusion Must Now Be Evaluated



# The Potential For Vapor Intrusion Must Now Be Evaluated

Definition of “Migrate/Migration” – Includes Vapor

“Migrate/Migration” means “the movement of hazardous substances or petroleum in any form, including for example, solid and liquid at the surface or subsurface, and vapor in the subsurface.”



# The Potential For Vapor Intrusion Must Now Be Evaluated

Records Review component of Phase I requires evaluation of potential for migration of hazardous substances and petroleum products to the property and significance to analysis of Recognized Environmental Conditions.

# The Potential For Vapor Intrusion Must Now Be Evaluated

U.S. EPA Statement on Vapor Intrusion:

“Neither the All Appropriate Inquiries Rule nor the ASTM E1527-05 standard excludes the identification of vapor releases as a possible type of release . . . . EPA wishes to be clear that, in its view, vapor migration has always been a relevant potential source of release or threatened release that, depending on site-specific conditions, may warrant identification when conducting all appropriate inquiries.” (AAI Dec. 30, 2013 Final Rule, 78 FR 79322)



# The Records Review Requirements Are Broader And Stricter

# Records Review – Broader and Stricter

## ASTM E1527-05:

- Requires review of “Reasonably Ascertainable/Standard Sources”
  - Publicly available
  - Reasonable Time and Cost
  - Practically Reviewable
- No Affirmative Obligation to Conduct On-Site Physical Review of Agency Files
- Physical File Review Not “Standard Environmental Record Source” but “Additional Environmental Record Source” to Supplement Standard Review in Judgment of the EP



# Records Review – Broader and Stricter

ASTM E1527-13:

- “If the property or any of the adjoining properties is identified on one or more of the standard environmental record sources . . . pertinent regulatory files and/or records associated with the listing should be reviewed.”
- “If in the environmental professional’s opinion, such a review is not warranted, the environmental professional must explain within the report the justification for not conducting the regulatory file review.”
- Increased Time, Increased Cost, Less Confusion



# Revised Definition of “Recognized Environmental Condition”



# Revised Definition of REC

ASTM E1527-05:

“[T]he presence or likely presence of any hazardous substances or petroleum products on a property under conditions that indicate an existing release, a past release, or a material threat of a release of any hazardous substances or petroleum products into structures on the property or into the ground, ground water, or surface water of the property. The term includes hazardous substances or petroleum products even under conditions in compliance with laws. The term is not intended to include de minimis conditions that generally do not present a threat to human health or the environment and that generally would not be the subject of an enforcement action if brought to the attention of appropriate governmental agencies. Conditions determined to be de minimis are not recognized environmental conditions.”

# Revised Definition of REC

ASTM E1327-13:

“The presence or likely presence of any hazardous substance or petroleum products in, on, or at a property: (1) due to release to the environment; (2) under conditions indicative of a release to the environment; or (3) under conditions that pose a material threat of a future release to the environment. De minimis conditions are not recognized environmental conditions.”

- Definition of “Release” incorporates CERCLA definition by reference so Definition of REC now aligns better with CERCLA



# Definition of “Historic Recognized Environmental Condition” Clarified

# Clarified Definition of HREC

## ASTM E1527-05:

“[A]n environmental condition which in the past would have been considered a recognized environmental condition, but which may or may not be considered a recognized environmental condition currently. The final decision rests with the environmental professional and will be influenced by the current impact of the historic recognized environmental condition on the property. If a past release of any hazardous substances or petroleum products has occurred in connection with the property and has been remediated, with such remediation accepted by the responsible regulatory agency (for example, as evidenced by the issuance of a no further action letter or equivalent), this condition shall be considered an historic recognized environmental condition and included in the findings section of the Phase I Environmental Site Assessment report. The environmental professional shall provide an opinion of the current impact on the property of this historic recognized environmental condition in the opinion section of the report. If this historic recognized environmental condition is determined to be a recognized environmental condition at the time the Phase I Environmental Site Assessment is conducted, the condition shall be identified as such and listed in the conclusions section of the report.”

# Clarified Definition of HREC

ASTM E1527-13:

“[A] past release of any hazardous substances or petroleum products that has occurred in connection with the property and has been addressed to the satisfaction of the applicable regulatory authority or meeting unrestricted use criteria established by a regulatory authority, without subjecting the property to any required controls (for example, property use restrictions, activity and use limitations, institutional controls, or engineering controls). Before calling the past release a historical environmental condition, the environmental professional must determine whether the past release is a recognized environmental condition at the time the Phase I Environmental Site Assessment is conducted (for example, if there has been a change in the regulatory criteria). If the EP considers the past release to be a recognized environmental condition at the time the Phase I ESA is conducted, the condition shall be included in the conclusions section of the report as a recognized environmental condition.”



# Clarified Definition of HREC

- Only applies to past release remediated to unrestricted use criteria
- EP must determine if past release would be REC at time of Phase I
  - Change in regulatory cleanup criteria



# Definition of “Controlled Recognized Environmental Condition” Added

# CREC Added

## ASTM E1527-13:

“[A] recognized environmental condition resulting from a past release of hazardous substances or petroleum products that has been addressed to the satisfaction of the applicable regulatory authority (for example, as evidenced by the issuance of a no further action letter or equivalent, or meeting risk-based criteria established by regulatory authority), with hazardous substances or petroleum products allowed to remain in place subject to the implementation of required controls (for example, property use restrictions, activity and use limitations, institutional controls, or engineering controls). A condition considered by the environmental professional to be a controlled recognized environmental condition shall be listed in the findings section of the Phase I Environmental Site Assessment report, and as a recognized environmental condition in the conclusions section of the Phase I Environmental Site Assessment report.”



# CREC Added

- Past release that has been addressed to agency satisfaction
- Hazardous substances/petroleum remains in place with controls (e.g. use restriction, engineering and institutional controls)
- Does not require EP evaluation of adequacy, implementation, or continued effectiveness of control
- Potential Impact of Change:
  - User will not know if remedy is protective or whether future action will be required
  - Require EP to evaluate adequacy and effectiveness of control?



# Definitions Of “Release” And “Environment” Revised



# Revised Definition of “Release” and “Environment”

- Mirrors CERCLA Definitions
- Increased Consistency Between ASTM Standard and AAI



# Definition of “De Minimis Condition” Clarified

# Clarified Definition of “De Minimis Condition”

ASTM E1527-05:

- Not separately defined
- Included in Definition of REC
- REC “ is not intended to include de minimis conditions that generally do not present a threat to human health or the environment and that generally would not be the subject of an enforcement action if brought to the attention of appropriate governmental agencies. Conditions determined to be de minimis are not recognized environmental conditions.”



# Clarified Definition of “De Minimis Condition”

ASTM E1527-13:

“[A] condition that generally does not present a threat to human health or the environment and that generally would not be the subject of an enforcement action if brought to the attention of appropriate governmental agencies. Conditions determined to be de minimis conditions are not recognized environmental conditions nor controlled recognized environmental conditions.”



# Clarified Definition of “De Minimis Condition”

- Clarifies “de minimis condition” not subject to enforcement action if reported to agency
- Clarifies “de minimis condition” cannot be REC or CREC
- Potential Impact of Change:
  - Reduces prior confusion by consultants, counsel, and users on scope of “de minimis condition”



# “User Responsibilities” Revised





# Revised “User Responsibilities”

- Clarified to Align with AAI Regulations
- User must perform certain tasks, but is not required to provide information to EP
- EP must request information, but if not provided should consider significant as a data gap on the ability to identify RECs
- User Responsibilities
  - Review title and judicial records for environmental liens and activity and use limitations
  - Specialized knowledge or experience
  - Actual knowledge
  - Reason for significantly lower purchase price
  - Commonly known or reasonably ascertainable information
  - Degree of obviousness of release or potential release



# Environmental Lien and Activity And Use Limitation Search Required

# Environmental Lien and AUL Search Required

- User's Responsibility
- In addition to EP's search in institutional and engineering control registries
- ASTM 1527-05: Reasonably ascertainable land title and lien records should be reviewed to identify environmental liens or AULs
- ASTM 1527-13: "To meet the requirements of 40 C.F.R. 312.20 and 312.25, a search for the existence of environmental liens that are filed or recorded against the property must be conducted."
- Not required to be provided to EP, but if not EP must consider significance on ability to identify RECS.



Flexibility Added to  
“Conclusion Statement”  
Requirement



# “Conclusion Statement” Flexibility

ASTM E1527-05:

- Phase I report must include:
  - Conclusions section summarizing all RECs connected with the property
  - One of two statements as specified by standard



# “Conclusion Statement” Flexibility

ASTM E1527-13:

- Phase I report must include:
  - Conclusions section summarizing all RECs (including CRECs) connected with the property
  - Statement “substantially similar” to one of the two statements specified in standard
- Statements Not Changed
- Provides flexibility to environmental professional
- May cause confusion if environmental professional utilizes a “substantially similar” statement



# Recommendations Not Required

# Recommendations Not Required

- Users Often Want/Require EP Recommendations But Prior Confusion Regarding Whether Required
  - Possible failure to comply with “Due Care” if not implement EP Recommendations
- ASTM E1527-13:
  - “Recommendations are not required by this standard. A user should consider whether recommendations for additional inquiries or other services are desired. Recommendations are an additional service that may be useful in the user’s analysis of LLPs or business environmental risk.”
- Include as non-scope item in Phase I or require EP to address in separate letter to counsel?






# Updates to Nonmandatory Appendixes

# Nonmandatory Appendixes Updated

## List of Appendixes:


- X1. Legal Background on CERCLA and the Application of “All Appropriate Inquiries” to the Practice on Environmental Assessments in Commercial Real Estate Transaction.
- X2. Definition of Environmental Professional and Relevant Experience Thereto, Pursuant to 40 CFR § 312.10
- X3. User Questionnaire
- X4. Recommended Table of Contents and Report Format
- X5. Summary of Common Non-Scope Issues (Common Non-Scope Consideration)



The Big Question:  
ASTM E1527-05 Or ASTM  
E1527-13?

# ASTM E1527-05 Or ASTM E1527-13?

- Both Currently Permitted Under AAI Regulations, but ...
  - ASTM has designated ASTM 1525-05 as historical standard
  - EPA recommends use of ASTM E1527-13




# Survey of Case Law Involving Environmental Due Diligence and AAI



# Why is a case law survey beneficial?

- Demonstrates judicial use of AAI standard.
- Provides context by highlighting disputes that demonstrate why the AAI standard is important.
- Provides historical and temporal context so you can see how the rule evolved over time.
- Gives factual context by providing scenarios where AAI standard is relevant.



***BCW Assoc., LTD and Knoll Int'l, Inc. v. Occidental Chem. Corp. & Firestone Tire and Rubber Co., 1988 U.S. Dist. LEXIS 11275 (E.D. Pa. 1988)***

- BCW leased a warehouse to Knoll to store furniture.
- BCW performed two independent ESAs before they purchased the property from Occidental Chemical Company, and Knoll had an independent ESA performed before they entered into a lease with BCW.
- Knoll, upon using the space, hired a cleaning company to clean the furniture in storage.
- Without Knoll's knowledge, the cleaning company had dust that had accumulated on the furniture analyzed for the presence of contaminants, which revealed the presence of lead.
- BCW and Knoll sued Occidental for the recovery of the testing and cleanup costs.
- The court declined to extend the innocent landowner defense to BCW and Knoll, and held them responsible for two-thirds of the cost of cleanup.
- The court did not say specifically that the Phase I assessments performed by Knoll and BCW were inadequate, *per se*, but seemed to be saying that if the cleaning company had the wherewithal to test the dust, BCW and Knoll would have reason to know the hazardous quality of dust, perhaps from the history of the property developed through their consultants.
- In short, the court found that the innocent landowner defense was not available because due care was not exercised by BCW and Knoll in taking precautions against foreseeable acts of third parties, and there was likely knowledge by BCW and Knoll of the hazardous nature of the dust prior to the purchasing of the property.



*United States of America v. Louis Serafini,*  
**706 F. Supp. 346 (M.D. Pa. 1988)**

- Property was purchased by Serafini.
- The property was strewn with more than 1,000 55-gallon drums.
- The drums were easily visible to the naked eye.
- Serafini did not conduct an AAI analysis or otherwise inspect the site.
- On summary judgment, the court denied the government's motion, finding that the innocent landowner defense was not negated by Serafini's failure to conduct AAI.
- The court held that the government failed to show that Serafini had any specialized knowledge or reason to know of the hazardous waste.
- That the drums were plainly visible to the naked eye was not enough to show that Serafini did not make an AAI into the status of the property.
- The court further held that there was insufficient evidence to show that Serafini's failure to inspect was inconsistent with commercial or customary standards.



# Take Aways

- These two cases show the various approaches courts have historically taken when assessing the adequacy of AAI.
- In *BCW*, the court seems to be saying that even the completion of multiple inquiries by an environmental consulting firm did not ensure that the innocent landowners defense could be established.
- In *Serafini*, the court seems to say that a person may indeed qualify for the innocent landowners defense even where no AAI took place, if there is no affirmative evidence showing that defendant's actions were inappropriate by commercial or industrial standards.



*State of New York v. Delmont*, 2000 U.S. Dist.  
LEXIS 5149 (W.D.N.Y. 2000)

- Defendant purchased property that was later found by the state to be contaminated with lead.
- On summary judgment, the court used an approach similar to *Serafini*, stating, without explaining, that an AAI must be conducted in a manner “consistent with good commercial or customary practice.”
- The court concluded that although the government did not adduce evidence of any inconsistency between Defendant’s inspection of the property and “good commercial or customary practice,” the court nevertheless declined to apply the innocent landowners defense, finding there was “considerable evidence that Delmonte should have known that the site was contaminated.”



*United States v. Pacific Hide and Fur Depot, Inc.*, 716 F. Supp. 1341 (D. Idaho 1989)

- This case involved property that was obtained from an inheritance, not a commercial transaction.
- The contamination (PCBs) was not obvious.
- The court applied a less strict standard and looked at several equitable factors.
- The court found that the PCBs were released by their father, who owned a scrap yard on the property.
- “The court rejects the government's argument that § 101(35)(A)'s requirement for ‘all appropriate inquiry’ mandates that some level of inquiry always be made. Congress’ choice of terms such as ‘appropriate’ and ‘reasonable’ indicates that the level of inquiry must be made on a case-by-case, fact-specific basis.”


# Take Aways

- Prior to the promulgation of standards and guidance explaining just what AAI is, courts did not adopt a consistent rule as to what procedures will protect purchasers under CERCLA defenses.
- Nor did the court clarify as to just what constitutes an “appropriate” inquiry.
- Such cases were handled strictly on a case-by-case basis, creating considerable confusion.




*Ashley II of Charleston v. PCS Nitrogen, Inc.  
et al.*, 791 F. Supp. 2d 431 (D.S.C. 2011)

- In 2008, Ashley II purchased a three-acre parcel of a former fertilizer plant from Allwaste Tank Cleaning, Inc., which Allwaste operated as a container cleaning and storage facility from 1988 to 2008.
- Prior to the purchase, Ashley II conducted various environmental assessments, including a Phase I assessment, which identified several recognized environmental conditions (RECs).
- The court addressed each of the eight elements of a BFPP defense to determine if Ashley II was entitled to that defense.



*Ashley II of Charleston v. PCS Nitrogen, Inc.  
et al.*, 791 F. Supp. 2d 431 (D.S.C. 2011)  
(Cont.)

- In determining that Ashley II had satisfied the AAI standard, the court noted that the 2005 ASTM standard was utilized, and further noted that this standard was consistent with the AAI final rule.
- The court noted that Ashley II hired environmental consultants and that the consultants certified that its report was in compliance with the 2005 ASTM standard.
- The court briefly noted that there were some inconsistencies between the report and the 2005 ASTM standard, but found those to be insignificant.
- The court found that Ashley II's actions, namely hiring a consultant, and then relying on a consultant's report that was certified as satisfying the ASTM standard was reasonable, and thus Ashley II properly conducted AAI.



*Ashley II of Charleston v. PCS Nitrogen, Inc.  
et al.*, 791 F. Supp. 2d 431 (D.S.C. 2011)  
(Cont.)

- However, the court found that Ashley II failed to establish the BFPP defense because it failed other elements of the defense:
  - It could not show that no disposal had occurred on the property following its acquisition.
    - The court found that a “disposal” had taken place when Ashley II subsequently demolished structures on the property resulting in contaminated runoff.
  - It had not taken reasonable steps to address the environmental conditions impacting the property.
    - Although the Phase I determined there were several RECs, Ashley II failed to adequately correct those actions.
  - It could not demonstrate that it was not affiliated with another PRP.

# Take Aways

- The promulgation of the regulations defining the requirements for conducting AAI, and the incorporation of the ASTM standard simplified the court's analysis as to whether a sufficient AAI was undertaken.
- However, a sufficient Phase I assessment is only the first step to obtaining BFPP status, and further inquiry may be appropriate.
- A Phase I assessment that identifies RECs is only the starting point for fulfilling the statutory requirements for BFPP status.
- Simply hiring a consultant and conducting a study may not be enough; “reasonable steps” must be undertaken to prevent ongoing or future releases.



# Professional Negligence and Negligent Misrepresentation

- First question: To what standard of care are environmental professionals held?
  - Normal standard of a “reasonably prudent person”, or heightened professional standard.
- Answer: heightened professional standard, *i.e.* that of a “reasonable consultant” performing AAI under similar circumstances.
- *Bonnieview Homeowners Ass’n LLC v. Woodmont Builders, LLC*, 2006 U.S. Dist. LEXIS 47414 (D.N.J. 2006) (recognizing that “an environmental consultant must conform to standard of care possessed by members of the profession in good standing.”); *Grand Street Artists v. Gen. Elec. Co.*, 19 F. Supp. 2d 242 (D.N.J. 1998) (same).
- *Watco v. Pickering Env’tl. Consultants, Inc.*, 2007 Tenn. App. LEXIS 364 (Tenn. Ct. App. 2007) (considering a geologist and engineer who performed a Phase I environmental assessment to be environmental professionals and holding them to a professional standard of care.)
- *Brown Field Aviation Park, LLC v. PB Aviation, Inc.*, 2005 Cal. App. LEXIS 6358 (Cal. Ct. App. 2005) (referencing the general rule that engineers are obligated to exercise a reasonable degree of care, skill, and ability ordinarily employed by their respective professions and noting that “this professional duty of care has been applied to numerous types of professionals, including environmental consultants.”)



## *Chiacchia v. Lycott Environmental Research, Inc., 1995 Mass. Super. LEXIS 195 (Mass. Super. 1995)*

- Environmental consulting firm was hired to perform an environmental assessment of a 25-acre parcel with an industrial history.
- The environmental engineer's report concluded "there is no remaining evidence of discharge of hazardous waste or materials on this site which would threaten the community or the environment."
- The court found that this statement was a grossly negligent misrepresentation because the site was obviously contaminated and awarded the property owner \$1.5 million to compensate for the decrease in value of the property and the costs of cleanup.
- In finding the engineers assessment was "slipshod and woefully inadequate," the court found negligence stemming from the engineer's:
  - Failure to identify the correct boundaries of the property, which limited his investigation to the portion of the property that did not include a dump site.
  - Failure to obtain common knowledge about the site where, due to the site's inclusion on the National Register of Historical Places, resources could have been identified discussing the prior use of chemicals at the site.
  - Failure to interview the Board of Health or any adjacent property owners.
  - Failure to collect soil and groundwater samples at the dumpsite.

# Take Aways

- This case demonstrates the dangers of investigating the bare minimum of sources recommended.
- Note, the court's finding of the engineer's various shortcomings are not requirements specifically stated under the AAI regulatory standard, but such information was reasonably ascertainable and publicly available.
- A "reasonable engineer" would have at least properly delineated the property and performed the necessary work on the entire property.
- The engineer's professional judgment to limit the sources researched and failure to confirm the boundary lines at the site ultimately proved very costly.
- Environmental professionals should take it upon themselves to confirm the property boundaries, the scope of work, and any other ambiguities prior to issuing a report.



***Watco v. Pickering Env'tl. Consultants, Inc.,***  
**2007 Tenn. App. LEXIS 364 (Tenn. Ct. App.**  
**2007)**

- A buyer conditionally agreed to purchase real estate from a trustee bank if the bank first obtained a satisfactory Phase I ESA of the property.
- The consultant performed the assessment and prepared a written report stating that it had conformed with the applicable professional standard in its assessment, that it had not detected any hazardous materials or environmental concerns at the subject property due to current or past uses of the property, that it had not identified any significant environmental concerns in the surrounding area of the subject property, and that it did not recommend further environmental review.
- The buyer purchased the property in 1995. During residential development of the property in 2004, the buyer discovered the remains of a municipal garbage dump on the adjacent property that extended under a portion of the subject property and sued the consultant for negligent misrepresentation and professional malpractice.
- The consultant's letter agreement stated that the scope of work was in conformance with the scope of ASTM E1527 .



*Watco v. Pickering Env'tl. Consultants, Inc.,*  
**2007 Tenn. App. LEXIS 364 (Tenn. Ct. App.  
2007) (cont.)**

- The court, however, noted that the ASTM standard and the professional standard of care are not equivalent in a negligence claim.
- The court found that an environmental professional's compliance with an ASTM standard was evidence that the professional engaged in good practice, but it was just one factor to be weighed.
- Nevertheless, the Tennessee Court of Appeals upheld the trial court finding that, based on the facts of that case, the environmental professional had not committed malpractice.

# Take Aways

- Although compliance with the ASTM standard is relevant to a court's analysis in negligence claims, the court will look to other factors to ensure that the heightened standard of professional care is satisfied.
- Compliance with the ASTM standard is persuasive, but not determinative to the court's analysis.
- *See also Bonnieview Homeowners Ass'n LLC v. Woodmont Builders, LLC*, 2006 U.S. Dist. LEXIS 47414 (D.N.J. 2006) (Court concluded that consultant provided substantial evidence that it was not negligent by providing evidence that it complied with ASTM Standard E1527 and environmental standards established by the New Jersey Department of Environmental Protection's Technical Requirements for Site Remediation); *Tyree Org., Ltd. v. Cashin Assoc.*, 2007 N.Y. Misc. LEXIS 124 (N.Y. App. Div. 2007) (holding that "compliance with administrative regulations ... does not establish as a matter of law" that the professional did not act negligently toward his client.)

# Other Examples

- *XDP, Inc. v. Watumull Props. Corp.*, 2004 U.S. Dist. LEXIS 12057 (D. Or. 2004)
  - Court found that an owner of property contaminated with chlorinated solvents failed to sufficiently perform AAI because he failed to investigate DEQ files that were reasonably obtainable and revealed the high probability of contamination on the subject property.
  - This case serves as a reminder that even though a physical review of government files is not necessarily required under EPA's regulations, there are certain circumstances where such reviews are required to meet the performance-based standards.
- *United States v. A&N Cleaners & Launderers, Inc.*, 854 F. Supp. 229 (S.D.N.Y. 1994)
  - Court found that the purchaser of a property containing dry cleaning facility failed to satisfy AAI because he failed to investigate several local newspaper articles that reported chlorinated solvent contamination in the vicinity that suggested the contamination was emanating from the property.
  - This case suggests that although AAI does not specifically require newspaper articles be reviewed, when circumstances suggest that these sources may yield information needed to meet AAI's performance based goals, the environmental professional has a duty to investigate.
- Take away: Courts tend to look at the totality of the circumstances to determine whether AAI was satisfied, and have consistently found that where those circumstances raised suspicion about the environmental condition of the property, further investigation was required.

# Case Law Conclusions

- The promulgation of the AAI regulations and the incorporation of the ASTM standard helped to reduce judicial inconsistency and confusion in determining whether AAI was satisfied for the purpose of asserting a CERCLA defense.
- In the context of environmental professional liability, adherence to the ASTM standard is good evidence that the standard of professional care was observed.
- However, it is not conclusive or determinative evidence.
- Courts will likely continue to look to the totality of circumstances in determining whether the performance-based AAI standard was satisfied.



# Remember:

- The ASTM standard is an “option”, not a “requirement”.
- EPA’s Rule is the controlling authoritative standard.
- The ASTM standard “may” be used by parties to conduct AAI.
- EPA has made the determination that the new ASTM standard is compliant with its AAI requirement.

# What does the AAI do?

- Provides parties with a standard or steps to comply with part of EPA’s rule applicable to ILOs, BFPPs, and CPOs.
- Provides parties with a “minimum level” of information relevant to an assessment of environmental conditions, and identifies additional inquiries to be addressed to minimize environmental risks in transactions.
- If conducted properly, AAI provides parties a partial defense in court because the judiciary has demonstrated its willingness to impose liability on parties that have not complied with AAI in accordance with EPA’s rule or the ASTM standard or that have a level of obvious sophistication.



# What doesn't the AAI do?

- It does not provide a complete defense to liability for environmental conditions.
- It does not provide parties with all relevant information required to assess the totality of the environmental conditions that may be required in a transaction or business decision.
- It does not provide parties with protection against environmental professionals who do not perform a due diligence investigation using a heightened standard of professional care.
- It does not provide parties with a defense to environmental liability or toxic tort claims.



## What are the most significant revisions to the ASTM standard for parties and transactions?

- Review of environmental records maintained by agencies.
- Confirmation of vapor migration as an issue to be considered by parties and environmental professionals.
- More flexibility for conclusions and recommendations by environmental professionals.
- Clarifies the importance of pre-existing environmental conditions: HRECs and CRECs.
- Requires that searches for activity and use limitations and environmental liens be conducted.



## Environmental Professionals: What's a lawyer to do?

- Ensure the contract for services specifies compliance with the revised ASTM standard and EPA's rule.
- Be sure that the terms of the contract are fair to your client and that sufficient insurance is available in case of an issue.
- Require a conference call after the site review to discuss the results and to determine what additional steps or actions may be required in conjunction with the environmental professional and their initial conclusions.
- Require a “draft” of the report prior to its being finalized to determine if any revisions are required:
  - Are there any data gaps or missing information?
  - Are the conclusions well-founded and supported by the findings?
  - Are any recommendations supported by the findings and environmental records?
- True Stories (without names).



# Thank you!

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