

**Due Diligence and Contamination: AAI,
Landowner Liability Protections, ASTM E 1527-05 and
Impact of *Cooper Industries v. Aviall***

By Amy L. Edwards
Holland & Knight LLP[©]

A. Landowner Liability Protections

1. The 1980 CERCLA/Superfund law created a scheme of joint, strict and several liability for owners/operators of real property and others
2. The Small Business Revitalization Act of 2002 (the “Brownfields Amendments”), 115 Stat. 2356, offered purchasers potential relief from federal CERCLA (*i.e.* Superfund) liability
3. Brownfields Amendments created three types of defenses to CERCLA liability. These three defenses are known collectively as the **Landowner Liability Protections (LLPs)**:
 - *Bona fide* prospective purchaser (“BFPP”) (knowingly purchases contaminated property)
 - Contiguous property owner (“CPO”) (groundwater or soil impacted by releases from other properties)
 - “Innocent” landowner (no knowledge of contamination after ASTM Phase I)
4. In order to qualify for any of the LLPs, a purchaser must:
 - Conduct All Appropriate Inquiry (“AAI”)
 - Provide full cooperation to environmental agencies
 - Comply with land use restrictions and institutional controls
 - Comply with all information requests
 - Not be contractually affiliated with a potentially responsible party
 - Take “**reasonable steps**” and exercise “**appropriate care**” to prevent continuing releases or threatened releases, preserve the integrity and effectiveness of institutional and engineering controls, and comply with legally required release reporting obligations

- BFPP is likely to have greater obligations because it purchases with knowledge of the contamination
- Range of Purchasers’ potential obligations:
 - ♦ Report release to regulatory agency
 - ♦ Do further intrusive testing
 - ♦ Operate pump and treat system
 - ♦ Test for/remediate vapor intrusion concerns

B. EPA’s Final “All Appropriate Inquiries” (“AAI”) Rule

1. The proposed AAI rule was published in August 2004, and the final rule was published on November 1, 2005 (69 *Fed. Reg.* 66, 070). The final rule will go into effect on November 1, 2006 (to be codified at 40 CFR pt. 312).
2. At the same time, ASTM updated its Standard Practice on Phase I ESAs in order to satisfy the final AAI Rule. The updated version is known as **ASTM E 1527-05**.

C. Principal Changes Made by the Final AAI Rule and E 1527-05

1. The assessment must be conducted by an Environmental Professional (EP) who has certain minimum qualifications
2. The report must include **declarations** by the EP:
 - That he/she meets the definition of an EP
 - That he/she has conducted the assessment in accordance with the final AAI rule
 - The report must be signed by the EP
3. EP must identify any “**data gaps**” and evaluate whether those gaps affect his/her ability to provide an **opinion** about releases or threatened releases
4. Phase I ESAs must be conducted within one year prior to closing. Certain information must be updated within *6 months* prior to closing:
 - Interviews
 - Site visit
 - Regulatory database review

- Search for recorded environmental liens
- EP declaration
- 5. Clear objectives and performance factors
 - **Objectives:** To identify
 - ♦ Past and current property uses and occupancies
 - ♦ Past and current use of hazardous substances
 - ♦ Waste management and disposal practices that could have caused releases
 - ♦ Current and past remediation activities
 - ♦ Engineering and institutional controls
 - ♦ Adjoining properties that may have had releases that impacted the property
 - **Performance factors:** To
 - ♦ Gather information that is publicly available, obtainable within a reasonable time and cost, and practicably reviewable
 - ♦ Review thoroughness and reliability of information gathered
 - ♦ Comment on any material data gaps that may impact EP's ability to draw a conclusion about releases or threatened releases
 - ♦ Identify conditions indicative of releases or threatened releases

D. Impact of *Cooper Industries v. Aviall*

1. Purchaser may not bring a CERCLA §113 contribution action against other Responsible Parties unless it has been sued or entered into a judicial settlement
2. Purchaser has stronger motive to qualify as a BFPP so that it may bring a CERCLA §107 cost recovery action

3992643_v1