

**March 15, 2005**

**Implementation of the Standard for All Appropriate Inquiry**

Moderated by: Andy Shivas, TN

**MAIN TOPICS:**

1. Background and requirements under the proposed new Rule for All Appropriate Inquiry (AAI)
2. Influence of the proposed Rule on property due diligence and differences between the proposed Rule and ASTM standards
3. The need for public notification and involvement

**Overview and Update on the Proposed Rule for AAI**

Patricia Overmeyer of EPA's Office of Brownfields Cleanup and Redevelopment provided a background summary and definitions of AAI, highlighting the requirements and detailing the continuing obligations part of the proposed Rule. Ms. Overmeyer explained the main parts of the Rule: Objectives, Report of Findings, Definition of Environmental Professional, Shelf Life, Interviews, On-Site Visual Inspection, Purchase Price versus Value of Property, Commonly Known or Reasonably Ascertainable Knowledge, Specialized Knowledge, and Sampling and Analysis.

Ms. Overmeyer discussed the significant comments received by EPA concerning the proposed Rule. The majority of comments were related to the definition of "Environmental Professional" and concerns regarding the role of the Environmental Professional. Some commenters wanted a performance-based approach, others a checklist, and others were concerned about the degree of discretion afforded the Environmental Professional. EPA also received comments about comparing the purchase price versus value of property part of the Rule. Some concerns about data gaps were expressed by some commenters, and some people indicated that sampling and analysis should be required.

EPA will provide a written response to all comments when the final Rule is promulgated, which should be within the year. EPA and ASTM are coordinating efforts in developing the final Rule and in updating the ASTM Phase I Site Assessment Standard.

**State Perspective on AAI**

Karl Kalbacher of KCI Technologies, Inc. presented the States' perspective as a former ASTSWMO representative on the AAI Negotiated Rulemaking Committee. Mr. Kalbacher's presentation focused on the influence of the proposed Rule on the property due diligence landscape. He began by identifying some of the differences between the proposed Rule and the ASTM standard (E1527-00). For example, AAI includes 10 required criteria, whereas ASTM provides for a tiered investigation approach (i.e., Screen, Phase I, Phase II). Mr. Kalbacher suggested that a much more stringent ASTM Phase I standard would be necessary to meet the AAI criteria. He also pointed out that there will be an increase in cost for consultants to conduct

an investigation in compliance with AAI as opposed to conducting an investigation using current ASTM standards.

The following requirements of the draft AAI Rule exceed the ASTM standard:

- AAI requires performance by an Environmental Professional;
- Interviews with past and present owners, operators and occupants are required;
- A review of federal, State, and local records is required;
- A visual inspection of the subject property and adjoining property must take place;
- AAI requires the Environmental Professional to consider commonly known or reasonably ascertainable information; and
- Conclusions must consider the degree of obviousness or presence of contamination and the ability to detect contamination by appropriate investigation.

Mr. Kalbacher also presented information on site investigation requirements referenced by the mid-Atlantic states per Memorandum of Agreement with EPA for those States' Voluntary Cleanup Programs. The following information was provided:

*Pennsylvania*

- 2004 EPA/PA DEP VCP MOA
- No reference to AAI
- "Notice of Intent" is trigger to federal protection

*Maryland*

- 1997 VCP MOA
- 2003 Contiguous Property Owner Defense
- 2004 Phase I ASTM in VCP law

*Delaware*

- 1997 VCP MOA
- Hazardous Substance Cleanup Law linked to ASTM E1527-00
- Separate HSCA/VCP Investigation Process to AAI

*Virginia*

- 2002 VRP MOA
- 2002 Contiguous Property Owner, Innocent Landowner
- 2002 Person may submit a Phase I ESA and receive a comfort letter that it complies with AAI

Mr. Kalbacher concluded his presentation with mention of several additional uncertainties associated with the proposed Rule. These uncertainties include: media sampling, due care, and the lack of guidance documents for AAI.

## **Community Perspective on AAI**

Lenny Siegel of the Center for Public Environmental Oversight described the negotiated rule process as related to “Six Blind Men and the Elephant”. In Mr. Siegel’s view, community perspective was limited. Public concerns with the proposed Rule include absence of requirements to perform public notice and include the public in the process. He indicated AAI is becoming the “Gold Standard” of Due Diligence and there should be a public involvement component.

Mr. Siegel also indicated AAI should use performance-based standards. The public considers this the heart of the Rule. He stated sampling should be performed regardless of whether it is required. In conclusion, Mr. Siegel suggested writing a Citizens’ Guide to AAI.

### **QUESTIONS:**

**Q:** Why were there no DoD representatives on the Rule making committee?

**A:** There was only one federal seat out of 25 on the committee. As the federal representative, Steve Luftig met with DOI, the Department of Agriculture and DoD to get input from all federal entities.

**Q:** Does AAI apply to Brownfields revolving loan grantees?

**A:** Yes.

**Q:** What’s the follow-up to TBAs for military transfer of properties?

**A:** GSA is still the main group doing federal property transfers.

**Q:** Will it be clear who will be the entity to deal with for a base closure?

**A:** Start with the Base/DoD facility for information for closing or transferring military property.

**Q:** Which States have adopted ASTM standards and how are the standards being used?

**A:** California: Liability Release Law referenced ASTM until AAI is final;  
Kentucky: Tax incentives: ASTM included;  
Ohio: Phase I regulation is similar to ASTM;  
Idaho: Using ASTM Standard.

**Q:** Do you have to perform sampling when you take possession of property?

**A:** If there is a chance of contamination or contamination is found at a later date, then the landowner must meet continuing obligations, so sampling will likely be a good idea.

**Q:** Is Federal Bar Total?

**A:** No, there are the “reopeners”, to include imminent and substantial endangerment; over-filing of State actions is very rare. No 128 program over-files. The only over-file was requested by State.

**Q:** Is AAI required in a property taking under Eminent Domain?

**A:** That is protected under CERCLA.