In January 2002, Congress enacted and President Bush signed the Small Business Liability Relief and Brownfields Revitalization Act. This statute, which EPA refers to as the "Brownfields Law," changed the liability picture for parties who face the potential for suit under the Comprehensive Environmental Response, Liability, and Compensation Act, popularly known as CERCLA or Superfund (codified at 42 U.S.C. §§ 9601 eq. seq.).

These changes include the requirement for EPA to issue regulations which will establish standards for parties to meet in order to raise defenses as innocent landowners, contiguous landowners, or bona fide prospective purchasers of contaminated properties. The Brownfields Law provides liability protections for these landowners if they conduct a level of site assessment meeting its definition of "All Appropriate Inquiry" ("AAI") with regard to the subject property. Then, having conducted AAI, the party seeking liability protection must take "reasonable steps" or provide "appropriate care" (both as described in the Brownfields Law) to address threatened and actual contamination at those properties. (In addition, state, local, and tribal governments that apply for brownfields grants pursuant to CERCLA Section 104(k)(2)(B) must also conduct AAI site assessments at the properties where they intend to use the grant proceeds.)

This article aims to provide guidance both to parties who will need to utilize the services of an Environmental Professional ("EP") who satisfies the criteria under EPA’s regulations to conduct AAI on their behalf, and to EPs who wish to offer AAI services. I anticipate that much will be written by others about the substance of the new AAI requirements, and I will not attempt to analyze or parse those requirements in this article. Nor will I discuss the requirements for "reasonable steps" or "appropriate care" that follow after conducting AAI. Rather, this article contains practical advice on the considerations that go into selecting an EP to conduct AAI. I will also discuss standards of performance that a client should expect from an EP in the AAI process. I base this advice on more than 20 years’ experience in environmental due diligence activity and my participation as a member of the committee convened by the United States Environmental Protection Agency (EPA) to negotiate and draft its soon to be published AAI regulations.

Conducting AAI consists of a particularized due diligence inquiry into the historical uses of the subject property and must be conducted by an EP as that term will be defined by the yet to be issued regulations. Until EPA issues those regulations, parties may satisfy AAI obligations by conducting assessments that are consistent with the ASTM (American Society of Testing and Materials) E 1527-00 "Standard Practice for Environmental Site Assessments: Phase I Environmental Site Assessment Process." If a Phase I Site Assessment results in the finding of a "recognized environmental condition," i.e., the actual or threatened release of a hazardous material, then a party must go on to take reasonable steps or provide appropriate care to address the actual or threat-
Enacted release, which may include conducting a Phase II assessment.

Owners, Buyers/Developers, Borrowers, Lenders, and public entities, all of whom want to secure the defenses of the Brownfields Law against CERCLA liability should select EPs who (1) recognize the client’s need; (2) demonstrate a thorough understanding of the AAI process; (3) can implement the AAI process productively and efficiently; and (4) can do so for a reasonable and appropriate fee.

**MEETING CLIENT NEEDS**

The purchasers of EP services for the purpose of conducting AAI have varying needs that the conduct of an AAI examination may fulfill. For example, a current site-owner participating in AAI for the benefit of a prospective purchaser might also have an interest in obtaining information to meet reporting and disclosure requirements under state and federal statutes, or to meet its obligations under the terms of a purchase and sale agreement with the prospective purchaser. A prospective purchaser may also have obligations to disclose particular sorts of information to its lender or development partners. We could speculate about countless permutations of need, always dependent on the particular circumstances of the party engaging the services and the subject property. The party seeking the services of the EP for an AAI exercise should acquaint the prospective EP of its needs as far it understands those needs. The prospective EP should, in turn, demonstrate sensitivity to those needs throughout the AAI process, from design of the inquiry, through its implementation, and preparation of the final report. The EP should keep in mind that the client may wish to utilize the AAI process not only to secure defenses to CERCLA, but also to meet other purposes. Thus, the EP should ask its client if the client wants the EP to consider issues specific to the client’s anticipated use of the property.

The EP’s work should put the EP’s knowledge of the client’s need in context with the uses of and conditions at the property. Discovery of a particular activity or a particular chemical substance at a site which would not make out a “recognized environmental condition” might, nonetheless, disqualify the property for the client, depending on the articulated need. AAI conducted on behalf of public entities such as municipalities and not for profit industrial development corporations additionally require EP sensitivity to issues of environmental justice and other community activist concerns.

**ESTABLISHING THE EP’S QUALIFICATIONS**

An EP who seeks to perform AAI should be able to demonstrate its understanding of the AAI process to its potential client. These include setting out professional credentials, and providing examples of experience with similar properties and clients. I frequently request environmental consultants to provide copies of reports they have done in the past, asking them to exclude confidential information. I always require references and recommendations from their clients and the regulatory agencies familiar with their work.

The EP should be able to demonstrate an ability to implement the AAI process productively and efficiently. This includes evidence of appropriate staffing, technical and logistical support, and the commitment to provide me or my client with a central point of contact who has project management responsibility. The EP should also be able to demonstrate his or her familiarity with the local “terrain,” both physical and human. That means already having knowledge of (and preferably experience with) particular local geographical and climatic conditions as well as knowing local regulators and important policy makers. The AAI process will also benefit if the EP has a working knowledge of the historical development of the general area of the particular site, including local industries, land uses, and other pertinent demographic and economic conditions. In the alternative, the EP should have an established relationship with a local entity that does have these relationships and this knowledge. The EP should also have a good reputation in the local community or utilize the local services of someone who does.

Keeping open lines of communication helps assure that no surprises emerge at the end of the inquiry process. Thus, I ask references for examples of how the EP kept open lines of communication or failed to do so. For larger, more complex projects and those involving multiple sites, the EP should have a system available, such as a secure web-site for posting of information and e-conferencing among those with a need for real time or close-to-real time reports on developments.

My conversations with references also include whether the EP met the time constraints imposed by its clients and regulatory agencies. Failure to meet deadlines results in unhappy clients or government regulators or both, and in increased expense.

**GOOD JUDGMENT, CANDOR, AND CONFIDENTIALITY**

To avoid unexpected or otherwise unanticipated bad news at the conclusion of the process, a purchaser of AAI services should always demand the exercise of good judgment by and candor from the EP.

Good judgment includes the EP’s adherence to chains of authority established by the client. While open lines of communication require that the client receive all important information on a timely basis, the EP should contact the appropriate person within the client’s organization when doing so. This particularly includes the client’s lawyer in all cases where the
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EP has been hired by the lawyer and otherwise when the EP has received urgent and alarming communications from regulators, such as notices of violation or other such communications. The client should set up these lines of authority and, if the EP believes that the lines are not appropriate, the EP should tell the client about its misgivings. Nonetheless, the client makes the final decision as to who will receive communications from the EP and as to both when and how those communications should take place.

The obligation of the EP to adhere strictly to standards of candor includes the avoidance of cover-ups of information which the EP believes will be adverse to the client. Reports of sensitive information should be made to the client, but not to others unless the law clearly requires the EP to do otherwise. Thus, the EP must respect the confidentiality of the client’s information, even information that the EP believes the client should disclose to other parties. In cases where the EP believes that the failure to disclose would present an imminent danger to human health, safety, or the environment, the EP should so advise the client and, if the client refuses to make the disclosure, the EP should ask its own lawyer for advice as to what it should do in the specific circumstance. Outside of the very rare circumstance where the law compels disclosure, the environmental professional should hold the information that it both receives from the client and develops for the client in the strictest confidence.

Good judgment includes the EP’s recognition of its own limitations and its disclosure of those limitations to the client before such a limitation becomes an issue. A good EP will request support from others in areas calling for special expertise and with regard not only to technical, but also with regard to legal issues. Given the heavily technical orientation of environmental laws and regulations, the purchasers of environmental diligence services sometimes ask those service providers to cross a professional line into providing what amounts to legal advice: this is not only imprudent, but is also unlawful in many states as the unauthorized practice of law. The EP should be careful not to cross over that line, even if requested to do so by the client. A good rule of thumb is what I tell EPs whom I hire: “I don’t try to be an engineer and I expect that my engineers don’t try to practice law.”

The environmental professional must also recognize that it should not perform services different from or beyond those which the client has requested. Having said this, however, the environmental professional should inform the client when he or she believes its scope of services ought to change or expand; that the client ought to ask the EP for something other than what the client first had in mind. This circumstance arises frequently with regard to situations the environmental professional discovers in the course of the investigation.

DISCERNING WHAT TO STATE AS A CONCLUSION OF AN AAI REPORT

In preparing a final report on the AAI exercise, the EP should recognize that differences exist among reporting observations of fact, setting out scientific conclusions, issuing opinions, and making recommendations. Rendering opinions and making recommendations may carry legal implications that stating facts and scientific conclusions do not. These are all critical distinctions which the EP should keep in mind when drafting its written report to the client.

The AAI standard will call for the EP to issue an opinion as to whether the inquiry has identified conditions indicative of releases or threatened releases of hazardous substances which will entail the reporting of observations of fact and stating scientific conclusions. This distinction will carry substantial importance in the event that the AAI process has involved data gaps which might be filled by more invasive examination beyond the AAI process. As proposed by the advisory committee convened by EPA to draft the AAI regulation, the standards will not require the EP to make recommendations. Failure by the party that commissioned the AAI to follow an EP’s recommendation to undertake a follow-up assessment could result in a determination by a court that it did not satisfactorily complete the AAI process or that the party did not take reasonable steps or undertake appropriate care. An EP’s opinion as to the condition of a property, however, may not impose as onerous a burden with regard to follow-up activity. Thus, the EP should consult closely with his or her client as to what the EP should include in the final report. An AAI report prepared in contemplation of obtaining the protections of the Brownfields Law should receive the scrutiny of a qualified environmental lawyer before the EP finalizes the report. The lawyer will help guide the client and the EP in determining the appropriateness of the report’s conclusions.

FEES

Finally, a few thoughts on the pricing of AAI examinations: Site Assessments that will comply with the contemplated EPA AAI regulations are likely to cost more than current ASTM E 1527-00 Phase I studies. AAI quality reports may require more extensive investigation, a higher level of expertise from the EP, and the exercise of judgment and professional discretion by the EP that may expand the EP’s exposure to legal liability. EPs who qualify under the new regulations will not be able to churn out AAI reports as commodity items without incurring substantial risk in doing so, and less qualified / lower-priced
consultants will not be able to offer AAI services that meet the standard. One should therefore reasonably expect the fee for an AAI examination under the new regulations inevitably to exceed current ASTM E 1527-00 Phase I reports.

Phase I reports which do not meet the AAI standard imposed by the new regulations, but which otherwise comply with ASTM E 1527-00, should still fill a need in a large and vigorous market that does not require full AAI compliance. Such studies have ranged in price in the past several years from less than $1500 to about $3000, depending on the location, complexity, and time-sensitivity of the assignment. Sellers, buyers, and lenders may not find it necessary to conduct environmental assessments that fully comply with AAI standards under the new regulations on numerous rural, residential, retail, and commercial properties which appear to pose no future threat of CERCLA liability. For these properties a Phase I Assessment compliant with ASTM E 1527-00 should suffice for routine commercial needs. It can also serve as a screening mechanism to determine if further examination should be conducted to make it fully compliant with AAI standards to avoid CERCLA liability.

Some members of the environmental consulting and engineering community may take issue with this approach, arguing that consultants who do not qualify as EPs under the new regulations, but who otherwise hold themselves out as capable of performing ASTM E 1527-00 assessments, may provide less reliable assessments. Such an outcome would subject

the client to unnecessary risk when the client could obtain a more reliable product under the AAI process. Adequately vetting the qualifications and references of the consultant, however, should address this concern.

Another criticism of this approach consists of acknowledging that, at the outset of a project, neither the client nor the consultant has enough information about a site or its adjoining properties to draw a reasonable conclusion about whether a particular property will raise the specter of CERCLA liability. David E. Lourie, PE, a Consulting Engineer and fellow member of the committee on which I served to negotiate the AAI regulations, has informed me that, according to documents of his professional trade association (ASFE), "some of the biggest losses come from the smallest or most 'routine' projects, simply because their size suggests less attention is acceptable." Although Mr. Lourie would argue that smaller and more routine projects merit more attention, "if only to counteract casual attitudes," using the ASTM E 1527-00 procedure should enable the party undertaking the examination to discover impending problems that could result in expanding the assessment into full-blown AAI under the Brownfields Law.

Those properties that undergo full scale AAI will generate studies the cost of which reflects the increased burden on and exposure to liability of the EP. Purchasers of services should expect these price increases, but should also require their EPs to explain and justify such price increases. Reasonable cost should reflect

an optimum level of service: neither the minimum that will "get by" nor the maximum that constitutes "over-kill."

CONCLUSION

Although I have painted my statements and advice in this article with a very broad brush, they should nonetheless make out a road map both for parties who need to select an EP to conduct AAI and for the EPs who wish to provide those services. Road markers have included close scrutiny of the EP’s qualifications, the EP’s recognition of the client’s needs and tailoring services to address those needs, its staffing the project with appropriate personnel, meeting appropriate time constraints, keeping open lines of communication, adherence to strict standards of candor, and providing a report as required by the client and for the purposes stated by the client. Following this advice should result in a productive relationship between the client and the EP and one that should enable the client to meet the AAI standard of the Brownfields Law.

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