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# Currents

a quarterly publication of zephyr environmental corporation

## Newly Duly Diligent – EPA's New "All Appropriate Inquiry" Rule

**E**PA's new "All Appropriate Inquiry" (AAI) rule substantially changes the way Phase I Environmental Site Assessments (ESAs) will be conducted. Enacted on November 1, 2005 as part of a broad federal initiative to encourage the cleanup and redevelopment of brownfield sites, there has been, nonetheless, much speculation about how the new AAI rule will affect the business community, environmental practitioners performing ESAs, and even the brownfields redevelopment process itself.

In 1980, the Comprehensive Emergency Response, Compensation, and Liability Act (CERCLA) first outlined a liability defense to cost recovery for a contaminated site if a defendant "did not know and had no reason to know that any hazardous substance was released." In 1986, the Superfund Amendments and Reauthorization Act (SARA) further clarified the concept of "acquisition without knowledge" and specified that "a defendant must have undertaken, at the time of acquisition, all appropriate inquiry into the previous ownership and uses of the property, consistent with good commercial or customary practice."

In 2002, Congress enacted the Small Business Liability Relief and Brownfields Revitalization Act, which, among other things, broadened CERCLA liability protection to include innocent landowners, contiguous property owners, and bona fide prospective purchasers. Prospective purchasers may now buy commercial properties with knowledge of contamination so long as certain conditions are met. As specified in the 2002 Brownfields Act, an AAI is an initial step in establishing prospective purchaser liability protection. Unlike earlier legislation, the 2002 Act is more specific about how an AAI



should be performed, stipulating that an AAI must include the following:

1. An inquiry by an environmental professional
2. 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
3. Reviews of historical sources to determine previous uses and occupancies of the real property since the property was first developed
4. Searches for recorded environmental cleanup liens against the facility that are filed under federal, state, or local law
5. Reviews of federal, state, and local government records concerning contamination at or near the facility
6. Visual inspections of the facility and adjoining properties
7. Specialized knowledge or experience on the part of the defendant
8. The relationship of the purchase price to the value of the property

*inquiry rule >>> continued on page 8*

# FROM THE TRENCHES

## The Challenges of a Salty Rita



**T**he coast of Southeast Texas and Southwest Louisiana are great places to operate oil and gas production facilities. They contain productive onshore and offshore oil and gas fields, and the vast pipeline infrastructure provides for the easy transport of produced oil and gas. The flat terrain and relatively calm seas make it relatively straightforward to build, operate and maintain these facilities. Additionally, the ambient temperature in the area is optimum for operating an oil and gas production facility for 11+ months out of the year, and the weather is basically very mild . . . most of the time.

Unfortunately, this region is also conducive to periodic tropical storm formation. Knowing the damage potential of these storms, oil and gas facilities in this area have hurricane preparedness plans in place, which include several stages of required action, depending upon the danger posed. The first stage usually concerns cleanup of loose debris and equipment that could float away or become airborne, and the last stage involves shutdown and abandonment of the facility at the imminent approach of a storm. On the morning of September 24, 2005, the last stages of these plans were implemented at facilities located in the path of Hurricane Rita.

As shown in these pictures of an affected natural gas processing plant, Hurricane Rita's Category III winds and storm surge were devastating and the resulting environmental issues were extremely challenging. However, because these facilities accounted for much of the nation's petroleum production and refining capacity, getting them back up and running as quickly as possible was critical to the nation's economy.

The storm's aftermath created a host of challenges for responders, including poor communications, limited access to facilities, and lack of power and fuel for lighting and response equipment. Perhaps the most immediate challenge, however, was feeding and housing crews and maintaining their safety and that of everyone else in the area.

Initially, helicopters provided the only access to these damaged facilities. Days after Rita's landfall, when local law enforcement agencies finally allowed limited vehicle access to the area, Zephyr Environmental Corporation, among other responders, sent personnel to the site shown in the pictures to support the response effort. Activities ranged from cleaning up small oil spills to collecting hazardous waste items, such as used batteries, computer monitors, and oil filters, from the debris spread across the facility. Crews even had to deal with storage tanks and other equipment that were picked up from other facilities and deposited at the site by the storm. Ensuring proper disposal of these items was a major challenge, especially in cases involving foreign equipment. To make matters worse, most local waste collection and transport equipment had been redeployed to other areas in support of ongoing Hurricane Katrina cleanup activities.

Fortunately for this facility, natural gas processing plants are relatively clean operations, with only small quantities of hazardous materials stored onsite. Therefore, no long-term remediation of spilled material was needed. However, storage of even relatively small quantities of lubricating oils, fuels, and other regulated substances requires that facilities maintain spill prevention and response plans. Therefore, even the small amount of materials lost from damaged equipment resulted in the activation of portions of the site's Spill Prevention Control and Countermeasure and Facility Response Plans. Although spills were small, the pictures suggest that these plans were severely tested and required some major changes to account for the storm's ad hoc rearrangement of the facility.

Critical equipment that was damaged or destroyed included air emission sources, such as storage tanks, large natural gas-fired compressors, and heaters. This, in turn, created an unexpected type of environmental challenge — the need to obtain proper environmental authorizations prior to repair or replacement. Most equipment could be replaced without additional permitting, but one exception involved two totally destroyed gas-fired generator sets, for which no similar replacements were available and

*trenches >>> continued on page 6*

## *Don't Overlook the Not So Obvious: Tap into Old Insurance Policies to Fund Environmental Clean-Ups*

**T**he new “All Appropriate Inquiry” (AAI) rule will require a more careful examination of a site’s environmental liabilities. In keeping with this, corporations should give added attention to how to fund the remediation of their contaminated sites.

Corporations with environmental exposures originating 25 years or more ago may have an excellent opportunity to fund present — or future — remediation obligations by tapping into historical liability insurance policies dating from the days of the original site operations. For the uninitiated this may seem a bit bizarre, but for those companies that have conducted such projects, standard-issue insurance policies have proven to be a source of unanticipated funds that, if untapped, would have eventually been wasted.

Determining the size of any recovery is typically the key factor in deciding whether or not to move forward. Although the absolute amount of any recovery cannot be known with certainty until the project is complete, a working estimate can be made that serves as a useful benchmark and as a basis to move forward. The information required to make this estimate, though typically not extensive, originates from three diverse sources of historical knowledge: corporate transactions, environmental liabilities, and insurance coverage.

### CORPORATE TRANSACTIONS

Many companies grew via acquisitions or divestitures to arrive at their current corporate structure. And whether the purchase (or divestiture) was an asset or stock purchase generally established how the liabilities flowed through the corporation. After identifying the universe of corporate entities involved in these transactions, pay particular attention to those that have past or future environmental liabilities that may warrant further scrutiny with respect to insurance recovery opportunities. Following this identification of candidate sites, evaluate any indemnities in their purchase and sale agreements and whether there were any provisions for rights to the historical insurance policies. In many cases, even with sufficient documentation, the available information is less than perfect. Nevertheless, a determination is made of whether the company has insurance rights and, if so, the process moves on to deal with the nature of the environmental liabilities.

### ENVIRONMENTAL LIABILITIES

On a site-by-site basis consider whether remediation has occurred or whether there is some probability that remediation or other

related issues (e.g., natural resource damage) might occur in the future. If so, a rough dollar estimate of the past or future liability should be made. Screen out those sites with liabilities that do not exceed policy deductibles. Then analyze when the polluting events took place and whether the events fell into a workable time period based upon the location of the site and whether relevant insurance coverage exists without pollution exclusions.

### INSURANCE COVERAGE

Various means can be employed to reconstruct the relevant corporate entity’s insurance coverage program. It always helps if the company has good historical records of its insurance but most companies either have document destruction policies, or for other reasons, have not maintained these valuable records. Fortunately, various external means can be used to reconstruct a company’s insurance coverage year-by-year. Following reconstruction, determine whether any claims have already been tendered against any of the insurance policies and, if so, how much coverage remains available.

Finally, combine all the pieces to determine whether 1) there is sufficient liability, 2) coverage exists that coincides with the time period over which the liabilities were created, and 3) the corporate entity has legal rights to the historical insurance asset.

### CONCLUSION

Given all this, the decision should be made to move forward with the detailed preparation of a claim while such an opportunity still exists. Saving your old insurance policies for a “rainy day” is not so much “good conservative risk management” as it is “rolling the dice” about unfavorable future changes in insurance law that could eliminate the possibility of recovery, and ignores the inevitable increase in carrier insolvencies that can hopelessly minimize your claim value.

From a management perspective, not to do insurance recovery means the loss of asset value or perhaps loss of the entire asset. ✨

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# News Briefs

## national news

### **EPA Reconsiders Aspects of Clean Air Mercury Rule**

In response to four petitions for reconsideration, EPA is taking a second look at aspects to the Clean Air Mercury Rule, which establishes standards of performance for emissions of mercury from coal-fired power plants. Petitioners have objected on procedural grounds claiming that they did not have adequate opportunity to comment on aspects of the final rule because they were not addressed in the proposed version. EPA has announced that it will resolve these issues in a timely manner after the December 19, 2005 deadline for public comments. For more information, contact David Cabe at 512.879.6644 or [dcabe@zephyrenv.com](mailto:dcabe@zephyrenv.com).

### **EPA Reconsiders Aspects of Clean Air Interstate Rule**

Responding to an industry petition, EPA is reconsidering aspects of its Clean Air Interstate Rule (CAIR) potentially affected by a recent court decision which removed the pollution control project exclusion from the New Source Review rules. Although EPA is soliciting public comments on this issue, it maintains that the court decision will have no impact on the analyses used in developing CAIR. Promulgated in March, 2005, CAIR is aimed at helping the eastern U.S. meet air quality standards for ozone and fine particles through significant reductions in emissions of sulfur dioxide and nitrogen oxides in 28 eastern states. For more information, contact Jennifer Seinfeld at 410.312.7915 or [jseinfeld@zephyrenv.com](mailto:jseinfeld@zephyrenv.com).

### **EPA Establishes All Appropriate Inquiry Standards**

On November 1, 2005, EPA finalized a rule establishing standards for the preparation and content of Environmental Site Assessments relied on by landowners to receive liability protection under CERCLA. After November 1, 2006, these standards must be met to obtain protection from potential liability under CERCLA as an innocent landowner, a contiguous property owner, or a prospective purchaser of a property. Parties planning to acquire commercial or industrial properties should strongly consider compliance with these new regulations now rather than waiting until 2006 (*see related article on page 1*). For more information, contact David Sorrells at 512.879.6626 or [dsorrells@zephyrenv.com](mailto:dsorrells@zephyrenv.com).

### **EPA Proposes Amendments to MON**

On December 8, 2005, EPA proposed to amend the miscellaneous organic NESHAP (MON) rule to correct inconsistencies discovered during a review process and to address certain issues including applicability of specific operations and processes, new definitions of various terms, new options for complying with the emissions limits, and revised recordkeeping requirements. For more information, contact Shahjabeen Hashim at 281.668.7359 or [shashim@zephyrenv.com](mailto:shashim@zephyrenv.com).

### **EPA Proposes Changes to its Ambient Standards for Particles**

On December 20, 2005, EPA proposed to lower the primary and secondary National Ambient Air Standard for fine particulate matter (PM<sub>2.5</sub>) from 65 micrograms per cubic meter ( $\mu\text{g}/\text{m}^3$ ) for a 24-hour period to 35  $\mu\text{g}/\text{m}^3$ . In addition, it proposed to redefine inhalable coarse particles from those with diameters smaller than 10 micrometers to particles with diameters in the range of 10 to 2.5 micrometers (PM<sub>10-2.5</sub>) and to set a 24-hour standard for this particle size range at 70  $\mu\text{g}/\text{m}^3$ . The inhalable coarse particle standard would only apply primarily to emissions from industry and to high-density traffic on paved roads. EPA's rule proposal does not address the designation of attainment and nonattainment areas or the development of implementation strategies. For more information, contact Ed Fiesinger at 281.668.7353 or [efiesinger@zephyrenv.com](mailto:efiesinger@zephyrenv.com).

### **EPA Mandates Use of Renewable Fuels**

Responding to a mandate of the Energy Policy Act of 2005, EPA has promulgated a rule requiring that 2.78 percent of gasoline used in the United States for 2006 be renewable fuel. The new rule affects refiners, blenders, and importers of gasoline. Unlike fossil fuels, of which there is a finite supply, renewable fuels, such as methanol and biodiesel, are, primarily, produced through renewable agricultural methods. For more information, contact David Cabe at 512.879.6644 or [dcabe@zephyrenv.com](mailto:dcabe@zephyrenv.com).

### **EPA Proposes Fine PM Implementation Rule**

On November 1, 2005, EPA proposed requirements that States and Tribes must meet in their plans for demonstrating attainment with the fine particulate matter (PM<sub>2.5</sub>) air quality standards. Important topics this proposal addresses include attainment dates, attainment demonstrations and modeling, local emission reduction measures (RACT and

RACM), emission inventories, stationary source test methods for PM<sub>2.5</sub>, and reasonable further progress. The proposal also describes options for revising the New Source Review program to specifically address PM<sub>2.5</sub>. Within three years, each State containing a PM<sub>2.5</sub> nonattainment area must submit to EPA an attainment demonstration. For more information, contact Lou Corio at 410.312.7912 or lcorio@zephyrenv.com.

#### **EPA Removes MEK from HAPS List**

On December 19, 2005, EPA delisted methyl ethyl ketone (MEK) as a hazardous air pollutant, acknowledging that exposures to MEK from certain processes may not be harmful. MEK will still be regulated as a volatile organic compound. Sources that are Major under Title V of the Clean Air Act due to their MEK emissions could potentially be reclassified as “minor”, thus eliminating the need for a Federal Operating Permit. However, sources subject to Maximum Achievable Control Technology standards with compliance dates prior to December 19, 2005 will remain subject to the standards even if they become “minor” sources. For further information, contact Elena Rivera at 512.879.6625 or erivera@zephyrenv.com.

#### **EPA Proposes to Replace Storm Water Discharge Permit for Industrial Activities**

On December 1, 2005, EPA proposed an NPDES Storm Water Multi-Sector General Permit for Industrial Activities (MSGP-2006) to replace the existing permit (MSGP-2000) that expired October 30, 2005. The proposed permit is similar to the existing permit and will authorize the discharge of storm water associated with industrial activities. For more information, contact Brad Watson at 512.879.6624 or bwatson@zephyrenv.com.

#### **EPA Issues Final 8-hour Ozone Rule**

On November 29, 2005, EPA issued a final rule to implement the 8-hour air quality standard for ozone. The rule, which will become effective on January 30, 2006, provides guidance to states in dealing with a number of issues related to 8-hour standard compliance planning including reasonably available control technology and measures, reasonable further progress reporting, modeling and attainment demonstrations, and new source review (NSR) permitting. The rule clarifies that emission limitations and other requirements established under existing NSR permits will continue to be in force when the 1-hour standard is revoked. Additionally, most areas currently required to use reformulated gasoline will continue to be required to do so at least until they meet the 8-hour standard. For more information, contact Curtis Harder at 512.879.6643 or charder@zephyrenv.com.

#### **EPA Adds AERMOD to Modeling Guideline**

On November 9, 2005, EPA added AERMOD to its *Guideline on Air Quality Models*. AERMOD replaces the Industrial Source Complex (ISC3) model, but ISC3 may still be used as a preferred model until November 9, 2006. AERMOD applies to simple and

complex terrain and incorporates a new building downwash treatment referred to as PRIME. The promulgation of AERMOD is the culmination of a collaborative effort between the American Meteorological Society and EPA, initiated in 1991, to develop a new state-of-the-art air quality model. For more information, contact Roger Brower at 410.312.7907 or rbrower@zephyrenv.com.

#### **California Regulators Pass First Air Quality Rule for Wineries**

On December 15, 2005, the San Joaquin Valley Air Pollution Control District approved the nation's first air quality controls on wineries in an attempt to reduce emissions of ethanol, methanol, and other organic compounds that contribute to ozone formation. The rule requires the 18 largest wine makers in the region to reduce pollution by 35 percent. The rule, however, provides some flexibility, allowing a winery to pay another industry to achieve its required emissions reductions if the winery deems the change in its process required to reduce its emissions would be too expensive. For more information, contact Bill Jones at 410.312.7910 or bjones@zephyrenv.com.

## **state news**

#### **Texas Governor Urges Expedited Approval of State Energy Project Permits**

On October 27, 2005, Texas Governor Rick Perry issued an Executive Order to encourage diversity of the State's energy supply, directing the TCEQ to prioritize and expedite the processing of environmental permit applications for electrical power projects. To satisfy this order, the TCEQ established a goal to draft permits for all pending electric generating units by December 23, 2005 but established no goal for issuing them. The draft permits may require further review, discussions and permit provision negotiations before proceeding through the air permit process. For more information, contact Karen Olson at 512.879.6618 or kolson@zephyrenv.com.

#### **TCEQ Adopts NSR Streamlining Rules**

On January 11, the TCEQ Commissioners adopted changes to their Chapter 116 air permitting rules to incorporate federal New Source Review streamlining concepts. Focusing on the process of netting out of federal New Source Review, the federal initiatives limit the circumstances under which facilities that are undergoing modifications would trigger the requirements for Prevention of Significant Deterioration review and Nonattainment New Source Review. The TCEQ has adopted aspects of the federal program related to such NSR applicability determinations including those pertaining to plant-wide applicability limits, the actual-to-project actual emissions test, and baseline determinations. For more information, contact David Cabe at 512.879.6644 or dcabe@zephyrenv.com

### TCEQ Proposes Repeal of PM Property Line Standard

The TCEQ is proposing to repeal its decades-old property line standard for particulate matter emitted from sources on a single property or from multiple sources on contiguous properties that are not used for agricultural purposes. The standard is 400 micrograms per cubic meter ( $\mu\text{g}/\text{m}^3$ ) for a 1-hour period and 200  $\mu\text{g}/\text{m}^3$  for a 3-hour period. The Commission cites several reasons for the proposed repeal, including research indicating that smaller particulates ( $\text{PM}_{10}$  and  $\text{PM}_{2.5}$ ) are of much higher concern than the total particulate fraction, the presence of a national standard to address acceptable exposures to these smaller particulates, and the subjectivity of determining nuisance conditions that the property line standard was designed to address. For further information, contact Kevin Ellis at 512.879.6647 or [kellis@zephyrenv.com](mailto:kellis@zephyrenv.com).

### TCEQ to Replace Permits by Rule 106.261 and 106.262

The TCEQ is proposing to repeal existing PBRs 106.261 and 106.262, citing that they are based on improper health data and outdated technology and methods. In their place, the Agency is proposing a new 106.261 that will require notification for all new projects and will require that all emissions authorized under multiple PBR's meet the emissions limit calculated per 106.261. To better account for the dispersion of emissions, the proposed 106.261 considers the heights of releases in determining distance-based maximum allowable emission rates. The proposed rule would also revise the amounts of chemicals with disaster potential that can be stored or handled onsite by a facility to be authorized under the proposed PBR. For more information, contact Ellen Ward at 512.879.6634 or [eward@zephyrenv.com](mailto:eward@zephyrenv.com).

### TCEQ Adopts Emission Events Rule and Proposes MSS Permitting Rule

On December 14, 2005, the TCEQ adopted changes to sections of its General Rules affecting emission events and maintenance, startup, and shutdown (MSS) activities. These changes affect reporting, recordkeeping, and affirmative defense provisions of the rules and add a requirement to apply for permits for planned MSS activities. Permit applications must be submitted on a schedule ranging from one to seven years depending on the facility type. For example, petroleum refineries have one year to apply, chemical plants have two years, and electric utilities have five years. The Commission also initiated rulemaking to address the requirements and procedures for the air quality permitting of scheduled MSS activities, including new Permits by Rule and a Standard Permit. A hearing on this proposed rule package will be held on January 31. For more information, contact Karen Olson at 512.879.6618 or [kolson@zephyrenv.com](mailto:kolson@zephyrenv.com).

### TCEQ Extends Alternate Language Publication Requirement to Multimedia Permitting

To encourage public participation in the permitting process, the TCEQ, on November 30, 2005, amended its Chapter 39 rules to expand the alternative language public notice obligation,

previously only imposed on certain air quality permits. Under the revised rule, applicants for permits issued under most of the Agency's programs, including municipal solid waste, industrial or hazardous waste, and wastewater discharge permits, will have to publish newspaper notices in an alternative language under specific circumstances. For more information, contact Kimberly Brandt at 512.879.6641 or [kbrandt@zephyrenv.com](mailto:kbrandt@zephyrenv.com). ❀



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without which the facility could not restart in early December as anticipated.

Upon learning that the replacement generators were larger than the originals, Zephyr contacted the air permitting authority to define the site's air authorization options. Unfortunately, despite emergency orders issued by the agency following Hurricane Rita, there was no quick mechanism in place for permanently authorizing such large, continuously operated units. However, with the help of information gathered through intermittent communications with the site personnel, the company was able to demonstrate that the replacements were actually more efficient and cleaner running than the originals. Therefore, the agency temporarily authorized installation, which provided the approximately six- to nine-month lead time needed to revise the site's existing air permit. In addition, due to the urgency of the situation, the agency expedited approvals and even faxed a copy of the signed authorization to the facility owner.

With a lot of hard work under adverse conditions by corporate and site staff, regulatory agency personnel, consultants, and contractors, such facilities are meeting the operational and environmental challenges dealt out by Hurricane Rita. As a result, they will be providing much needed energy resources to consumers just in time to meet the higher demand as the coldest weather arrives this winter. So to celebrate their success in true southern fashion, we suggest everyone involved have another 'Rita' . . . this time frozen, with no salt. ❀

Pete Stevenson

Project Engineering Associate

## New Reasons for Measuring EHS Performance

It's a truism in the business world that "what gets measured gets done." Put another way, if you can't measure activities, it's really not possible to effectively manage them. It's also true that, in business, those activities that have a significant impact on the bottom line are the ones that get measured.

Increasingly, businesses are starting to measure their EHS performance more rigorously, and it's taking on much broader importance than just regulatory compliance. This trend may be driven somewhat by increased and more stringent regulation — whether it takes the form of new disclosure requirements, emissions trading programs, or traditional "command-and-control" measures. But companies are also improving environmental information management to meet demands from external stakeholders for more transparency — and to improve the efficiency of their own internal processes.

For sure, as we go forward into the New Year there will be new reasons for measuring environmental performance. Increasingly, new trends are starting to make a company's EHS performance not only a "cost item", but also, potentially, an "income item."

As an example, Reuters recently published an interesting article about the French multi-national chemical firm Rhodia SA. After five years of struggling for profitability, Rhodia seems to be convincing investors to pony up more cash by positioning itself as a trailblazer in fighting pollution. At the heart of this strategy, Rhodia has been one of the first companies to win tradable credits for cutting greenhouse gas emissions, and, in November, the Secretariat of the United Nations Framework Convention on Climate Change (UNFCCC) approved Rhodia's plans to cut carbon emissions at plants in South Korea and Brazil. Rhodia can earn certificates from the UNFCCC for these reductions and, beginning in 2007, can sell them to other companies that fail to meet pollution restrictions under the Kyoto Protocol on climate change.

Rhodia serves as just one example of how improved environmental performance may lead to improved financial performance — other new "carrots and sticks" are also becoming available, and EHS managers may want to look for these new ways to "collect carrots" rather than to just continue "ducking the sticks." In particular, ad hoc coalitions of companies, industries, and local



governments present new opportunities. For example, the Regional Greenhouse Gas Initiative (RGGI) is an initiative by states in the northeastern U.S. to reduce greenhouse gas emissions. The RGGI is designing a cap and trade program for emissions from power plants, and, in August 2005, proposed an emissions reduction program that would start in 2009 and lead to a stabilization of emissions at current levels by 2015. This would be followed by a 10-percent reduction in emissions between 2015 and 2020. The proposal would also allow participants to purchase offsets to meet 50 percent of their emission reductions.

As of September 13, 2005, nine northeastern states are involved in the Regional Greenhouse Gas Initiative. It is believed that in addition to offering electric utilities incentives to reduce greenhouse gas emissions, the state-level program will also apply pressure on the federal government to support the Kyoto Protocol.

At the beginning of a new year, we often wonder what new developments and challenges we might be dealing with in our EHS careers. I think the examples I mentioned above certainly illustrate that there will be new incentives for solid environmental improvement — the question is, are we collecting the right information and developing the right systems to measure and manage our performance? ❀

**Joe Zupan**  
President

Zephyr is a professional services firm providing worldwide consulting, training and data systems to the industrial, commercial and public sectors. The firm's major areas of practice are air and water quality, waste issues, worker and community safety, and incident management.

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9. Commonly known or reasonably ascertainable information about the property
10. The degree to which the presence or likely presence of contamination at the property is obvious, and the ability to detect the contamination by appropriate investigation

In response to this legislation, EPA developed the new AAI rule, which will go into effect on November 1, 2006. Depending on who you ask, the impact of the rule will range from “slight” (according to EPA) to “significant” (according to many environmental professionals, including the authors).

What is it about the AAI rule that would result in a “significant” impact? It is estimated that approximately 250,000 Phase I Environmental Site Assessments are conducted annually. Two major problems with the former ESA process were the absence of qualifications necessary to become an “Environmental Professional (EP)” and the latitude afforded the EP to choose what would be considered reasonable for the scope of the assessment. The new AAI rule goes a long way towards ensuring that a genuine effort will be made to evaluate properties with the full intention of identifying all environmental concerns and ensuring that the person identifying those concerns is qualified to do so. In addition, property owners and realtors may find themselves significantly more involved in the assessment process with regard to disclosures of prior property activities.

Since 1993, EPs have relied on ASTM Standard E1527 for defining the standard practice for conducting Phase I ESA’s. The EPA’s AAI rule, however, does not build upon the ASTM standards. Accordingly, ASTM revised its Standard E1527-05 shortly after the AAI rules were finalized to bring its procedures in line with AAI requirements.

Changes to the ESA process introduced by the new AAI rule include:

- ◆ User obligations — users must identify institutional and engineering controls placed on the property and report them to the EP preparing the ESA.
- ◆ Qualifications of the EP — education, experience and certifications are now required for an EP to conduct these inquiries.
- ◆ EP Declarations — the EP is required to declare that he/she meets the definition of an EP and that he/she has conducted the inquiry in accordance with the AAI rule.
- ◆ Data Gaps — an EP must identify any data gaps in the assessment and evaluate whether those gaps have affected his/her ability to provide an opinion as to whether there are any indications of releases or threatened releases on the property.
- ◆ Shelf Life — a user must not rely on an ESA that is more than twelve months old to satisfy an AAI standard.

If you now use environmental site assessments or will likely engage in the ESA process in the future, we recommend that you become familiar with the provisions of the AAI rule before its use becomes mandatory next November. In particular, you should review the credentials of EPs you may plan to hire, and you should consider increasing your budgets to accommodate the higher costs that ESAs will no doubt entail. At stake is your ability to qualify for a defense to CERCLA liability, and your ability to be “newly, duly diligent”! ✨

**David Sorrells** *Senior Project Engineer*  
**Joe Zupan** *Principal*

