

SUBMITTED TESTIMONY

7 March 2010

To: Commerce Committee  
Connecticut State Legislature

By: Dennis Waslenchuk, Ph.D., LEP *Dennis Waslenchuk*

Subject: Public Hearing, 8 March 2011  
HB 6526: An Act Concerning Brownfield Remediation and Development

Dear Members:

I am a Licensed Environmental Professional (LEP) in Connecticut. As a consulting environmental scientist, I have conducted and been in responsible charge of environmental site assessments of contaminated properties, including brownfields, in Connecticut for more than 25 years. As a DEP-appointed Task Group member, I have contributed to prevailing Connecticut environmental regulations and protocols concerning environmental assessment. As a long-standing member of ASTM, the international standards-setting organization, I was a key participant in the creation of the ASTM E1527 Phase I Environmental Site Assessment Standard Practice, and I was ASTM's Chair (2004-2009) of its E1903 Phase II Environmental Site Assessment Task Group charged with the current update and revision effort for that Standard.

I believe that HB 6526 intends to promote and facilitate the redevelopment of brownfield properties, and I agree this is a laudable goal. However, the Bill is **fatally flawed** by one technical provision in Section 17(a)(2)(B) which can be easily corrected by incorporating good scientific/engineering practice, to the benefit of brownfield re-development; the provision now reads as follows (ellipses and highlights added):

HB 6526, Section 17

(a) As used in this section:

(1) "Blight" means ...;

(2) "Bona fide prospective purchaser" means a person that acquires ownership of a property after January 1, 2012, and establishes by a preponderance of the evidence that:

(A) All disposal ...;

(B) Such person made all appropriate inquiries, as set forth in 40 CFR Part 312, into the previous ownership and uses of the facility in accordance with generally accepted good commercial and customary standards and practices, including, but not limited to, the standards and practices set forth in the ASTM Standard Practice for Environmental Site Assessments, Phase I Environmental Site Assessment Process, E1527-05. ...

The cited Federal "**all appropriate inquiries**" (known as "**AAI**") and commercial "**ASTM standard**" for environmental assessment are not consistent with prevailing Connecticut practice for investigating and remediating properties, and set a bar that is much too low to protect the interests of brownfield developers, the State and its tax payers, and human health and the environment. Please note that in order to be a **bona fide prospective purchaser (BFPP)**, a brownfield developer must identify conditions indicative of contamination prior to purchase. Having done so, the BFPP/developer must address those conditions, but is granted relief from responsibility and liabilities for existing contamination that is leaving the property. However, if the environmental assessment standard set by the Bill is inadequate,

then the developer will fail to identify contamination, resulting in acute post-acquisition re-development problems, as follows:

- Contamination that is not discovered until after the property is purchased will cause financial and schedule impacts to the project, threatening the success of the project if not killing it.
- The responsibility and liability for contamination not identified by the BFPP/developer prior to purchase might have to be assumed by the State.
- Contamination left to be mitigated by DEP would have to be done at tax-payers' expense, and DEP does not have the staff to direct the remediation of brownfield properties at the speed of a development project.
- Public resources for State funding of such programmatic brownfield-related environmental cleanups are increasingly scarce, if available at all.
- Contamination might not be remediated due to lack of public funds – posing a continuing threat to human health and the environment.
- The public might be forced into unplanned but programmatic, emergency expenditures in order to “save” laudable development projects that could revitalize the economy and reduce blight. The tax payers will be left holding the bag without knowingly consenting to it!

Our DEP has determined (as stated in its “Site Characterization Guidance Document”) that the **ASTM Standard** and Federal “**AAI**” may not include all protocols required for environmental assessment of a Connecticut property. The more accurate DEP protocols for Phase I assessments require little or no additional assessment cost, but they require the Connecticut environmental professional to use more brain power to recognize contamination that typically arises from Connecticut’s specific legacy of industrial/manufacturing operations and activities, which the lesser standards did not contemplate.

As an ASTM “insider”, I can say that the **ASTM E1527 Phase I standard** does indeed have a severe shortcoming when strictly applied to brownfield properties. The Federal “**AAI**” standard does likewise. Regardless of its wide use nationally, the ASTM/AAI standards are most suited to, and are defended by, parties who wish to apply a modicum of effort to give the appearance of due diligence, while having no real desire to identify all contamination. It is the product of unfortunate compromise between technical and “deal-maker” interests. Originally, the ASTM/AAI standards were intended to define good and customary practice, but ultimately they came to reflect only customary, not good, practice. Even so they successfully grease the wheels for deals involving properties with benign histories as suburban shopping plazas and office buildings. But clearly, these lesser standards are not up to the challenges of brownfield projects with industrial, manufacturing, or chemical-handling legacies, which by their very nature will involve excavations during re-development, and where contamination will not remain hidden.

I have written in more detail about the failure of the ASTM / AAI standards for brownfield redevelopment sites, and attach my recent essay on this topic from the American Bar Association’s “Environmental Transactions and Brownfields Newsletter” for your further consideration.

**I recommend** that the references to “*all appropriate inquires*” (*Code of Federal Regulations citation 40CFR312*), and the *ASTM E1527-05 Standard*, **be deleted** from the bill, and that the tried-and-true **Phase I protocols of the DEP “Site Characterization Guidance Document” be substituted** as the standard required to qualify as a bona fide prospective purchaser (BFPP).

Thank you for your consideration.

Attachment: “Phase I Site Assessments Are Not For Brownfields”, ABA *ETAB Newsletter*, v.13(1), 2011

# Environmental Transactions and Brownfields Committee Newsletter

see article  
attached

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## MESSAGE FROM THE CHAIR

### Rebecca Wright Pritchett

For those fortunate enough to attend the 18th Section Fall Meeting in New Orleans, we heard from a terrific group of experts on obstacles and incentives in green development projects, sustainable remediation, vapor intrusion, and rebuilding New Orleans and the Gulf Coast after Katrina. Nearly thirty people attended our committee dinner at Arnaud's for fantastic food and stimulating conversation, followed by an entertaining evening in the French Quarter. Thanks to everyone who made the Fall Meeting so productive and enjoyable, especially the Committee members and vice chairs who worked on programs and shared their time, knowledge, and company.

As your new chair, I want to welcome all of you and invite you to join us in committee activities. As usual, we're planning an active year for the Environmental Transactions and Brownfields Committee (ETAB). Steve McKinney—our Section chair for 2010-11—has committed the Section to “delivering the goods” to our members. We want to make sure that the ETAB Committee is providing you the information and assistance you need to become a better lawyer. Our committee traditionally has benefited from strong member participation, and the quality of our programs and activities springs directly from your involvement. If you would like to be a part of this effort and get involved in the committee's activities, please let us know and send us your ideas. Our committee web site

has the list of vice chairs, and any of us would welcome your input and participation.

The new year brings with it some interesting issues related to environmental transactions and brownfields in today's uncertain economy. We plan to track and alert ETAB members about these issues, new developments and notable cases through Section of Environment, Energy, and Resources (SEER) conference panels, newsletters, the ETAB list serve, and Quick Teleconferences, where appropriate. The articles in this issue address five of those issues: the latest evolutions regarding environmental insurance for transactions, the appropriateness of Phase I site assessments for brownfield sites, proposed changes to the ASTM Phase II due diligence standards, proposed alternatives to existing public notice requirements under the National Contingency Plan, and an interesting analysis of laws relating to a natural gas shale play in Pennsylvania.

We continue to work to provide you with better tools to keep you up-to-date on the latest developments which affect your practice. On our Web site (<http://www.abanet.org/environ/committees/envtab/>), we have added links to other useful sites and announcements of upcoming conferences that we think may be of interest to you; we welcome your additions to the list. We are providing you with information regarding conferences and recent developments through our list serve and encourage you to participate in the discussion. In addition, we hope you will participate in our One Million Trees Project (<http://www.abanet.org/environ/>

**Environmental Transactions and  
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Thomas R. Doyle, Dean Calland, and  
Robert Gelblum, Co-Editors**

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Association or the Section of Environment,  
Energy, and Resources.

projects/million\_trees/home.shtml). We're planning  
tree-planting events around the country. If you don't  
see one planned in your area, contact us about  
organizing one.

If you have topics that you would like to see addressed  
in future newsletters, let me know. I can be reached at  
rebecca@pritchettlawfirm.com. If you would like to  
get more involved in any of the committee's activities,  
just let me or any of the ETAB vice chairs know. All of  
our contact information is listed on the ETAB Web site.

**Upcoming Section  
Programs—**

**For full details, please visit  
[www.abanet.org/environ/calendar/](http://www.abanet.org/environ/calendar/)**

February 1, 2011  
**Wave Energy in the U.S. Today: How  
Technology, Academia, Regulations, and  
Policies are Shaping the Industry**  
Quick Teleconference

February 3, 2011  
**Criminal Enforcement of Environmental  
Laws: A Conversation with the Former  
Head of EPA's Criminal Investigation  
Division**  
Quick Teleconference

February 10, 2011  
**Hot Topics in Diversity Law**  
Live Audio Webinar and Teleconference  
Primary Sponsor: ABA Section of State and  
Local Government Law

February 23-25, 2011  
**29th Annual Water Law Conference**  
San Diego

March 17-19, 2011  
**40th Annual Conference on  
Environmental Law**  
Salt Lake City

## PHASE I SITE ASSESSMENTS ARE NOT FOR BROWNFIELDS

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Dennis Waslenchuk, PhD  
*Aquademia—Environmental Consulting*  
New London, Connecticut

*“Facts do not cease to exist because they are ignored,”* Aldous Huxley, *Proper Studies*, 1927

A Phase I environmental site assessment (ESA) is not an adequate baseline for identifying the host of subsurface environmental problems likely to be encountered while redeveloping a brownfields property. Phase I ESAs performed to ASTM’s E1527 standard or the U.S. Environmental Protection Agency’s All Appropriate Inquiries (AAI) rule fail to recognize as many as 75 percent of the areas of concern (AOCs) at sites whose histories involved manufacturing or handling of potentially contaminating substances. Such standard Phase I ESAs do not offer the brownfields developer reliable protection against unforeseen contamination that often leads to construction delays and cost overruns.

With the advent of the two standards, Phase I ESAs have focused only on three prescribed lines of evidence that collectively comprise the keystone for identifying releases, while failing to exercise an all-important fourth line of evidence—*professional knowledge of inherent releases*. The standard Phase I ESA keystone evidence sources are (1) visual observations made during a property reconnaissance; (2) interviews with property personnel; and (3) agency records. Even on a collective basis, these sources only scratch the surface and are unlikely to reveal many AOCs (or “Recognized Environmental Conditions” (RECs) in ASTM terminology), considering (a) the chances are slim that an assessor will find visible evidence of many sorts of historical releases on the day of the site visit; (b) it’s not reasonable to expect that site personnel will be aware of and reliably disclose all historical releases; and (c) regulatory agency records typically are poor indicators of release histories since many releases were never reported.

It’s true that these prescribed Phase I ESA keystone evidence sources *could* reveal a historical release, so of course they’re worth pursuing, but absence of

affirmative evidence in no way means absence of releases. Whereas checking the prescribed keystone evidence sources in performing a standard Phase I ESA may promise to secure landowner liability protections under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), the usefulness to the brownfields developer is limited.

The most prescient line of evidence, not articulated by the standards, is the site assessor’s knowledge of releases that are *inherent* to the kinds of activities and operations that have taken place at a property. For example, most environmental practitioners would conclude that a twenty-year tenure of a dry cleaner at a property would likely have led to contamination, even if there was no visible evidence of a release on the day of the site visit, the property personnel did not disclose any releases, and the regulatory agency databases contained no records of a release. This is because the accumulated knowledge of the assessment community has established that releases are inherent to the dry cleaning industry.

A Phase I ESA assessor commonly will cite such dry cleaning operations as a potential release (REC) despite the lack of affirmative evidence from the prescribed keystone evidence sources. In so doing, the assessor is going beyond the keystone evidence sources prescribed by the standards—unwittingly or not, the assessor is deducing the potential release based on professional knowledge of releases inherent to that specific site use. Ironically, the assessor could have concluded that the dry cleaning operation did not constitute a REC, and still have been in strict conformance with ASTM E1527 and AAI, because the standards do not prescribe this line of evidence; the exercise of deduction based on professional knowledge of releases inherent to certain activities and operations is not articulated by the standards. It’s rare that an assessor will not identify a dry cleaning operation as a REC though, because dry cleaning enjoys such notoriety amongst the spectrum of site uses that dismissing it does not pass the straight-face test.

Contrarily, the same sort of deductive logic is not used in standard Phase I ESAs, so a host of other well-

known potential releases that are inherent to specific site uses are often not identified. Hence, the opportunity to forewarn the brownfields redeveloper of lurking problems is lost.

An ESA of a brownfields site warrants special consideration. By their nature, brownfields redevelopment projects involve construction and, very often, subsurface construction. Once a developer starts digging, the chances are high he will encounter any contamination that the standard Phase I ESA might have failed to predict, with significant negative impacts to the project's schedule and budget. This makes the transfer of a brownfields site unlike most other commercial real estate transfers. The brownfields developer cannot afford to let sleeping dogs lie—in contrast to parties to non-brownfields transactions who can often be content to let potential releases go undiscovered and to lean on the ASTM/AAI standard to meet their “innocent landowner” burden of proof.<sup>1</sup>

In order to more reliably identify the universe of AOCs (i.e., potential release areas) at a brownfields site, an assessor can use his knowledge of the generic activities and operations associated with the former uses of the site to deduce potential release areas that are not revealed by the three lines of evidence prescribed by the Phase I standards. The brownfields industry has experienced many instances of stumbling upon site contamination and, in retrospect, this has given us insight into the historic operations and activities that typically result in such subsurface contamination. Likewise, the long history of regulatory-driven remedial investigations has provided the assessment community with many lessons as to activities and operations that commonly lead to site contamination. And so it is that we now know much about the sorts of releases that are inherent to a given site use.

We professionals know, for example, that widget manufacturing entails metal plating and degreasing. We know that drips of heavy metal-laden solutions from plating tanks, and solvents from degreaser units, are endemic and go through floors, and leak out of floor drain systems. We know that prior to the modern era of hazardous waste management, widget manufacturers stored messy, odorous drums of waste liquid on the ground outside the back door. If, in conducting the

standard Phase I ESA, we learned only that widget manufacturing occurred at the site in the past but no REC's were identified through the prescribed keystone evidence sources, we can still identify these AOCs through deduction based on the assessment community's knowledge of releases inherent to widget manufacturing, without ascertaining any affirmative evidence from the site reconnaissance, the site personnel interviews, or agency records.

One might acknowledge that such AOCs are more speculative than REC's identified in strict conformance with the Phase I ESA standards; nevertheless, they are obvious to, and able to be detected by, assessors who benefit from retroactive insights gained from brownfields cleanups and comprehensive remedial investigations. Simply said, a Phase I site assessment that follows the narrow prescription of the ASTM/AAI standards, but does not avail itself of the knowledge and experiences gained from brownfields redevelopment and remedial investigations, is deficient.

All good information is worth having, even if it is limited, so standard Phase I ESAs are valuable to a point. But their limitations—the evidence they do not consider—must be understood so that the brownfields developer can supplement the evidence and minimize surprise contamination, construction delays, and cost overruns.

## Endnote

<sup>1</sup> Note, by the way, that a developer would likely lose any “innocent landowner” or “bona fide prospective purchaser” status he might think he'd earned (having performed his ASTM/AAI Phase I ESA) when contamination is newly discovered during site construction, if the court determines that the “ability to detect” and the “degree of obviousness” of the contamination were high. On this issue, “consult your attorney!” It is this writer's opinion that a large portion of AOCs missed by ASTM/AAI Phase I ESAs are indeed obvious, and that we have an adequate ability to detect them using information developed in Phase I ESAs, as averred in this essay.