

Technical Brief for Environmental Professionals

New Agency File Review Language in ASTM E 1527-13: What Does It Mean for You?

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In a recent brief, [The ASTM E 1527 Standard: Update on Proposed Changes](#), EDR Insight summarized the key areas of change that environmental consultants can expect to see in the ASTM E 1527-13 Phase I ESA standard, projected to be released later this year. In this first in a new series on E 1527-13, we will closely examine five areas of change with an eye toward what environmental consultants can do to prepare.

One key area of revision in the 2013 version of E 1527 is to clarify when a review of agency files should be conducted during a Phase I environmental site assessment. Research conducted by EDR Insight in April 2012 in support of the ASTM E 1527 subcommittee's efforts showed that 60% of environmental professionals "always" or "often" perform agency file reviews as part of Phase I ESAs. According to Julie Kilgore, Chair of the ASTM Phase I ESA Task Group, "Information gathered by the Task Group suggests that the majority of environmental professionals regularly review agency file records regarding on-site releases as long as those records are reasonably ascertainable. So the Task Group has worked to strike a balance and to establish consistency surrounding the issue without creating an unnecessary burden."

Agency file reviews can bring valuable information to a Phase I ESA investigation, but are not without their challenges. They vary in complexity, obtainability, geographic location and level of effort. The purpose of this brief is to summarize the new language in ASTM E 1527-13 and share how some environmental professionals are addressing these challenges as a regular part of their Phase I ESA practice. When the revised E 1527 standard takes effect later this year, environmental professionals need to ensure that their reports adequately reflect the new language about when an agency file review should be conducted—and what to do if one is not conducted.

EDR Insight organized a focus group during January's EBA meeting in New Orleans to discuss the challenges associated with conducting agency file reviews.

The following key challenges that came out of the focus group are discussed in detail in this brief:

1. Ensuring consistency in terms of what is required under the new language.
2. Determining when an agency file review is and is not "reasonably ascertainable."
3. Adequately pricing Phase I ESAs given the significant variability in the level of effort required.

What's changing with agency file reviews in E 1527-13?

The focus group discussion began with a conversation intended to clearly outline the new language and what it means to industry consultants. An agency file review is a common industry term used to describe the search for, and review of, files maintained by agencies, typically at the local and state level, whereby an environmental professional physically travels to the file location, arranges to have the agency send the files, or accesses the files online. With the Task Group's support and obligation to reflect "good commercial and customary practice," the revised ASTM E 1527-13 includes a new section (8.2.2) that contains the guidelines for Regulatory Agency File and Records Reviews, which are summarized here:

- The purpose of a file review is to "obtain sufficient information" to assist the environmental professional in determining if a recognized environmental condition (REC), Historical REC, Controlled REC or de minimis condition exists at the target property in connection with the listing of standard environmental record sources.
- If the target property or any adjoining property is identified in the government records search (or on one or more of the standard environmental record sources in section 8.2.1) "pertinent regulatory files and/or records associated with the listing **should be reviewed**" at the discretion of the environmental professional.
- If the environmental professional's opinion is that a file review is not warranted, the Phase I ESA report **must include the environmental professional's justification** for not conducting a file review.
- Environmental professionals have the option to review files and/or records from alternative sources such as on-site records, user-provided records, records from local government agencies and interviews with regulatory officials.
- A summary of the information obtained from the file review **shall be included** in the Phase I ESA report and the environmental professional's opinion on the sufficiency of the information obtained **must be included**.

"Reasonably ascertainable" agency files

The challenges associated with determining when agency file reviews are "reasonably ascertainable" or not was discussed during the focus group, as well as at the Phase I Environmental Consultants Roundtable (ECR) meeting in Atlanta last October.

According to the focus group, there is sometimes inconsistency in the way that file reviews are being performed, which mostly falls back on how "reasonably

Putting Agency File Review Issues on the Table



ascertainable” determinations are made. Focus group members shared that some environmental professionals believe that a review of local agency files is sufficient, while others believe it necessary to consult state agency files. Still other environmental professionals feel that an in-person interview or phone call to the regulatory agency is sufficient to satisfy the standard.

Regulatory Agency Response Time and Data Gaps

In EDR Insight’s 4Q12 State of the Property Assessment Market Survey, respondents were asked to share thoughts on the common challenges associated with agency file reviews. One common answer related to the time it can take to obtain files from state or local agencies. For instance, one survey respondent stated:

“In some instances, responses to our request from regulatory agencies are taking more than a few weeks. Many of our clients are also requiring that the Phase I ESA report be completed before all responses are received which creates a data gap that isn’t eliminated for some time thereafter.”

Another respondent shared the experience of waiting six months to receive information back from a FOIA request. If the regulatory agencies charge high fees for searching and reviewing files, or are located a considerable distance from the consultant’s location, pertinent agency file reviews could also be considered not “reasonably ascertainable.” One survey respondent noted that, “Agencies are not equipped to accommodate E 1527 Phase I file reviews within a reasonable time frame.”

While regulatory files may be difficult to obtain in some areas of the country, other jurisdictions have an ease of use and accessibility. Some agencies make files available online that can be reviewed very quickly. For example, in states like Massachusetts and Florida, online files are available statewide. However, according to one 4Q12 survey respondent in Alabama, “The online file review is not up to date with everything at this point and what is updated is very poorly organized, which makes for a trying online file review.”

Inconsistent and incomplete data, sometimes due to the purging of old files, at some regulatory agencies can lead to gaps in files and records. As one environmental professional said, searching for files can be time consuming and the data that is available is often not sufficient to draw conclusions. The language in E 1527-13 regarding the review of alternative sources, along with the consultant having to provide justification in the report, allows environmental professionals the opportunity to help fill some of the potential gaps that can be found in agency data with information obtained from local records, user records, interviews and more.

Travel Time Considerations

Along with the issue of agency response time, another challenge that was mentioned during the focus group discussion and addressed by 4Q12 survey respondents was the time required for traveling to review and obtain agency files that are not made available electronically, and the associated costs. In some states, there can be a significant amount of travel involved to go to federal, state and local agencies to review files. There are also occasions when agency files for one target property address can be found in multiple locations, sometimes causing environmental professionals to travel to various places to obtain the information that is needed. As one solution to time and cost constraints, a majority of environmental professionals send junior staff to retrieve and review agency files with the contingency that they scan everything “that is needed” and bring it back to the senior environmental professional that is managing the project. The new language in section 8.2.2 of E 1527-13 supports the environmental professional providing their opinion for not being able to conduct a file review in a reasonable timeframe as long as their opinion is documented in the Phase I ESA report. Consultants can supplement their documented justification with the review of records from alternative sources.

Under the umbrella of whether a file review is “reasonably ascertainable”, EPs must consider the time it takes to travel to obtain agency files, as well as the response time of their local or state regulatory agency and the data that could be missing or incomplete once they conduct the review. Some EPs decide whether a file review is “reasonably ascertainable” based on such factors as location of the property, data needs, and accessibility of the files. Though the variability in the level of effort required to obtain agency files from one state to another is significant, the new E 1527-13 language provides clarification to help environmental professionals make “reasonably ascertainable” determinations.

Will the new version of the standard affect your pricing strategy?

Elizabeth Krol, Client Program and Northeast Due Diligence Manager at Shaw Environmental & Infrastructure Group, mentioned that when the draft standard was beginning to be developed, the users were the ones driving the inclusion of the above changes regarding agency file reviews, saying they were willing to pay more for a Phase I ESA report for a complex site that had environmental issues. Yet in the context of an already intensely competitive market, it is not surprising that environmental professionals are concerned about the difficulty of charging a higher price for conducting agency file reviews. According to Bill Tryon, Director of Technical Quality at GRS Global, “Different types of clients have different willingness to pay.”

A key issue is the uncertainty associated with not knowing upfront, during pricing discussions with the client, whether or not “if” statements will hold (i.e., if the target property or any adjoining property is identified in one or more of the standard environmental record sources), which makes it difficult to factor the cost of a potential agency file review into the price. Some consultants are already addressing this challenge in their Phase I ESA pricing practices. One 4Q12 EP survey respondent shared the following:

“File reviews are an extra and our clients understand our viewpoint. If the files are small, less than ten pages, we include this review in our fee. However, we typically charge our clients for the state copying fees plus our consulting fee for review and report writing.”

For Ryan Marcos, VP and National Partner for Due Diligence at SCS Engineers, it is very important to conduct preliminary research on a property during the bidding stages and to understand the complexity of the property vicinity. “Reviewing preliminary regulatory database reports, on-line listings and documents from regulatory agencies, etc. may provide insight as to whether file reviews may be necessary and, if so, this preliminary research can be used to estimate the time and expense for file review activities. Based on this research, if file reviews will be necessary, it can be communicated to the client during the bidding stages. We have found that our client’s appreciate this level of research, have a better sense of the additional costs and timing upfront, and understand why the cost may be higher than another consultant that has not built costs for file reviews into their proposal.”

A consensus on overall approach

As mentioned above, 60% of EP respondents to the Agency File Sources Survey “always” or “very often” conduct an agency file review as part of the Phase I ESA. The revisions reflect the Task Group’s effort to clarify the language behind this practice to ensure consistency across the industry.

In the new standard, federal, state and local regulatory files should be reviewed if the target or adjoining property is identified in a government records search at the environmental professional’s discretion. If the files are not reviewed, the environmental professional’s justification for not conducting a file review must be documented in the Phase I ESA report. For the minority of environmental professionals who are not routinely conducting agency file reviews as part of their standard Phase I ESA scope of work, the new E 1527 language may require some changes in practice and documentation procedures.

Below are a few examples from the Phase I Environmental Consultants Roundtable October 23, 2012 Workshop Summary Report, [What You Need to Know as a Phase I Environmental Professional that is Not in the ASTM E 1527 Standard](#), of different ways environmental professionals may approach the new requirements regarding agency file reviews in their Phase I ESA report:

1. The environmental professional could identify the existence of a REC on the target property and recommend to the client that a search of the regulatory agency files may provide greater certainty on the REC status. This would then be done as a follow-on investigation to the Phase I and priced separately (time and materials, preferably with not-to-exceed amount).
2. The environmental professional could put a limit on the number of hours that would be dedicated to a file review (e.g., up to 4 hours) and place a cap on any associated costs to obtain the information. Any costs incurred above these limits would be billed to the client on a time and materials basis.
3. The environmental professional could conduct regulatory agency file review as a standard part of the Phase I scope of work.

Things to think about now

In order to prepare for the upcoming changes, as an environmental professional, you might want to consider determining your strategy for conducting agency file reviews, including:

- Spend time understanding exactly what is changing and then educate your staff. Ensure that all Phase I staff agree on what agency file reviews are and establish a consistent process for making determinations regarding whether the agency file is “reasonably ascertainable.”
- Begin thinking about reviewing and updating contracts and report templates, as necessary.
- Learn more about the availability of information at both state and local agencies, and the thoroughness and consistency of files from those sources. Determine ahead of time approximately what is available and how the time it takes to obtain the information will affect your report turnaround time.
- If you are not currently conducting agency file reviews, consider what you will need to do differently in your business to accommodate the new language and build in extra time when conducting a Phase I ESA.
- Consider how best to educate your clients, especially if you plan to include the file review in your Phase I ESA pricing, so they understand the requirement and value of the service. Make sure you leave the lines of communication with clients open.

The time is now for all industry environmental professionals to begin planning for the upcoming release of the standard, which now looks to be slated for as soon as summer 2013.

NOTE TO READERS: EDR Insight wishes to thank Elizabeth Krol of Shaw Group, Beth Bailey of PM Environmental, Julie Kilgore of Wasatch Environmental, Orion Alcalay from AEI Consultants, Bill Tryon of GRS Group, Tina Huff at Farallon Consulting and Ryan Marcos of SCS Engineers for participating in our focus group and fostering an excellent discussion about agency file reviews.

Questions or comments?

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