

ASTM E 1527-13 Standard: Key Areas of Change

by

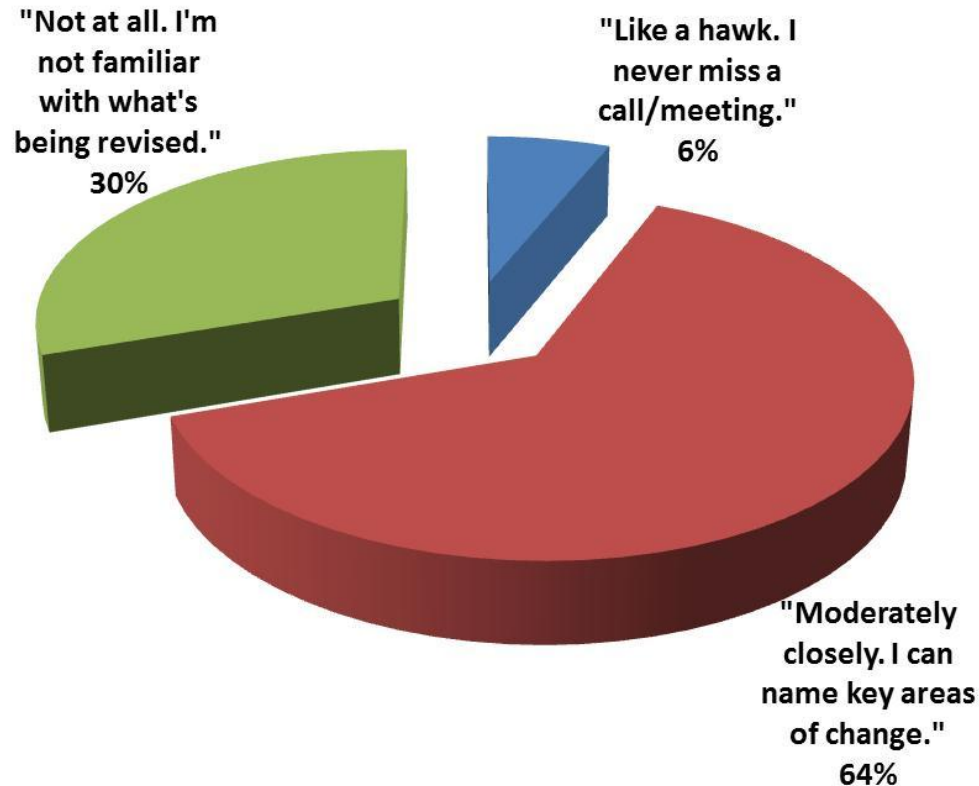
**Dianne P. Crocker, Principal Analyst, EDR Insight
EDR (Milford, CT)**

for presentation at:

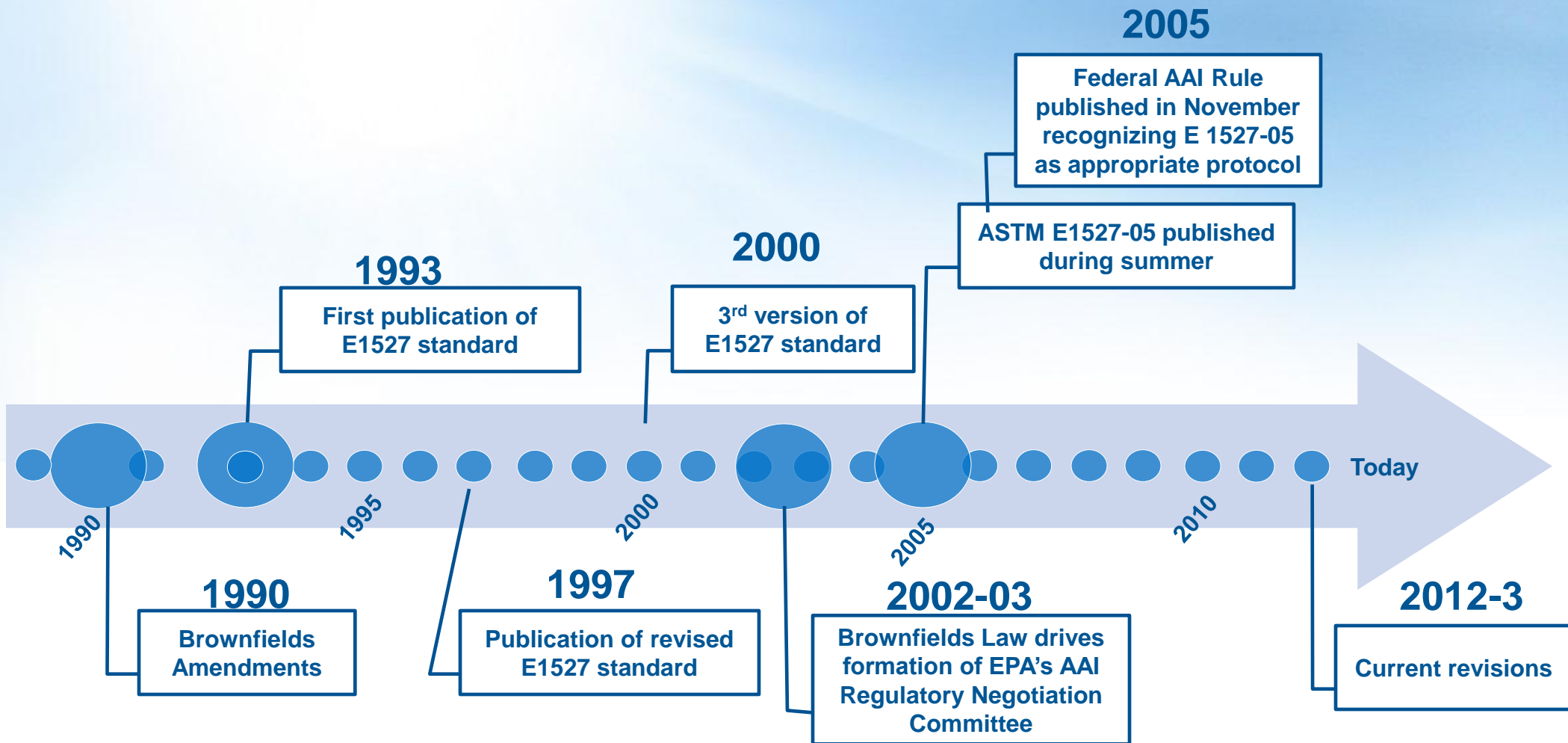
**Rutgers Environmental Audits and Site Assessments Course
February 27, 2013**

How Aware Are EPs About ASTM E 1527-13?

How closely have you been tracking ASTM's efforts to revise the Phase I ESA standard?



Timeline of E 1527 updates



ASTM E 1527 Widely Recognized As “Good Commercial and Customary Practice” for Phase I ESAs



Designation: E 1527 –





Standard Practice for
Environmental Site Assessments: Phase I Environmental
Site Assessment Process¹

This standard is issued under the fixed designation E 1527; the number immediately following the designation indicates the year of original adoption or, in the case of revision, the year of last revision. A superscript epsilon (ε) indicates an editorial change since the last revision.





U.S.C. § 9601



The NY CB Family of Banks







Key Revisions to E1527-05

Major:



RECs, HRECs & CRECs

Vapor Migration

Regulatory Agency File Reviews

Minor:

- User Responsibilities
- Industrial/Manufacturing Properties
- Appendices

1. RECs, HRECs and CRECs

- REC definition “simplified”
- Revised definition of HREC
- New definition for a “controlled” REC (CREC)

Simplified REC Definition

Old Definition:

*“the presence or likely presence of any hazardous substances or petroleum products **on** a property under conditions that indicate an existing **release**, a **past release**, or a material threat of a **release** of any hazardous substances or petroleum products **into structures** on the property, or into the ground, ground water, or surface water of the property. The term includes hazardous substances or petroleum products **even under conditions in compliance with laws.**”*

New Simplified Definition:

*“the presence or likely presence of any hazardous substances or petroleum products **in, on, or at** a property: (1) due to any **release** to the **environment**; (2) under conditions indicative of a release to the environment; or (3) under conditions that pose a material threat of a future release to the environment.”*

***De Minimis* Condition Not Touched in REC Definition**

- Condition does not represent a threat to human health or the environment; AND
- Condition would not be subject to enforcement action if brought to the attention of regulatory agency
- *De minimis* condition is NOT a REC

CERCLA Definition of a “Release”

*42 U.S.C. § 9601(22) defines a “release” as “any spilling, leaking, pumping, pouring, **emitting**, emptying, discharging, injecting, **escaping**, leaching, dumping, or disposing into the **environment** (including the abandonment or discharging of barrels, containers, and other closed receptacles containing any hazardous substances or pollutant or contaminant”*

(refer to New Legal Appendix in Revised E 1527, XI.1.1)

CERCLA Definition of “Environment”

*The term “environment” includes (A) the **navigable waters**, the waters of the contiguous zone, and the ocean waters...and (B) any other **surface water, groundwater, drinking water supply, land surface or subsurface strata...***

(refer to New Legal Appendix in Revised E 1527, XI.1.1.1)

Revised HREC Definition

Old Definition:

“an environmental condition which in the past would have been considered a REC, but which may or may not be considered a REC currently.”

New Definition:

*“a past release of any hazardous substances or petroleum products that has occurred in connection with the property and **has been addressed** to the satisfaction of the applicable regulatory authority or meeting **unrestricted residential use** criteria established by a regulatory authority, without subjecting the property to any required controls (e.g., property use restrictions, AULs, institutional controls, or engineering controls). Before calling the past release an HREC, the **EP must determine whether the past release is a REC at the time the Phase I ESA is conducted** (e.g., if there has been a change in the regulatory criteria). If the EP considers this past release to be a REC at the time the Phase I ESA is conducted, the condition shall be included in the conclusions section of the report as a REC.”*

New CREC Definition

*“a REC resulting from a past release of hazardous substances or petroleum products that **has been addressed** to the satisfaction of the applicable regulatory authority (e.g., as evidenced by the issuance of a NFA letter or equivalent, or meeting risk-based criteria established by regulatory authority), with hazardous substances or petroleum products allowed to remain in place **subject to the implementation of required controls** (e.g., property use restrictions, AULs, institutional controls, or engineering controls)... **a CREC shall be listed** in the Findings Section of the Phase I ESA report, and **as a REC** in the Conclusions Section of the...report.”*

Findings and Conclusions Sections

- **List in Findings**
 - Known or suspect RECs
 - CRECs
 - HRECs
 - *De minimis* conditions
- **List in Conclusions**
 - Known or suspect RECs
 - CRECs

2. Vapor Migration Clarified as Included in Phase I ESA Investigation

- CERCLA/AAI do not differentiate by form (e.g., solid, liquid, vapor) of the *release* to the *environment* (refer to CERCLA definition of “*release*” and “*environment*”)
 - a. *Migrate/migration* now defined in E1527 (as it is used in many places in E1527)
 - b. E2600-10 is a referenced document in E1527
 - c. Addressed in revised AUL definition
 - d. Contaminated vapor migration/intrusion now specifically excluded from IAQ (which is a non-scope consideration)

a. Migrate/Migration Definition Added

*“refers to the movement of hazardous substances or petroleum products in any form, including, for example, solid and liquid at the surface or subsurface, and **vapor** in the subsurface.”*

b. E2600-10 Included as a Referenced Document

- Referenced in Section 2.1 of ASTM E1527 Standard*

**Vapor migration must be considered no differently than contaminated groundwater migration in the Phase I investigation. While E2600-10 provides an industry consensus methodology to assess vapor migration, use of E2600-10 methodology is not required to achieve compliance with AAI – an EP may use alternative methodology as deemed appropriate, but this must be documented in the Phase I report (i.e., it must be “capable of being reconstructed by an EP other than the EP responsible for the Phase I”).*

c. Revised AUL Definition

*“activity and use limitations – legal or physical restrictions or limitations on the use of, or access to, a site or facility: (1) to reduce or eliminate potential exposure to hazardous substances or petroleum products in the soil, soil **vapor**, groundwater, and/or surface water on the property...”*

d. IAQ Non-Scope Consideration Clarified

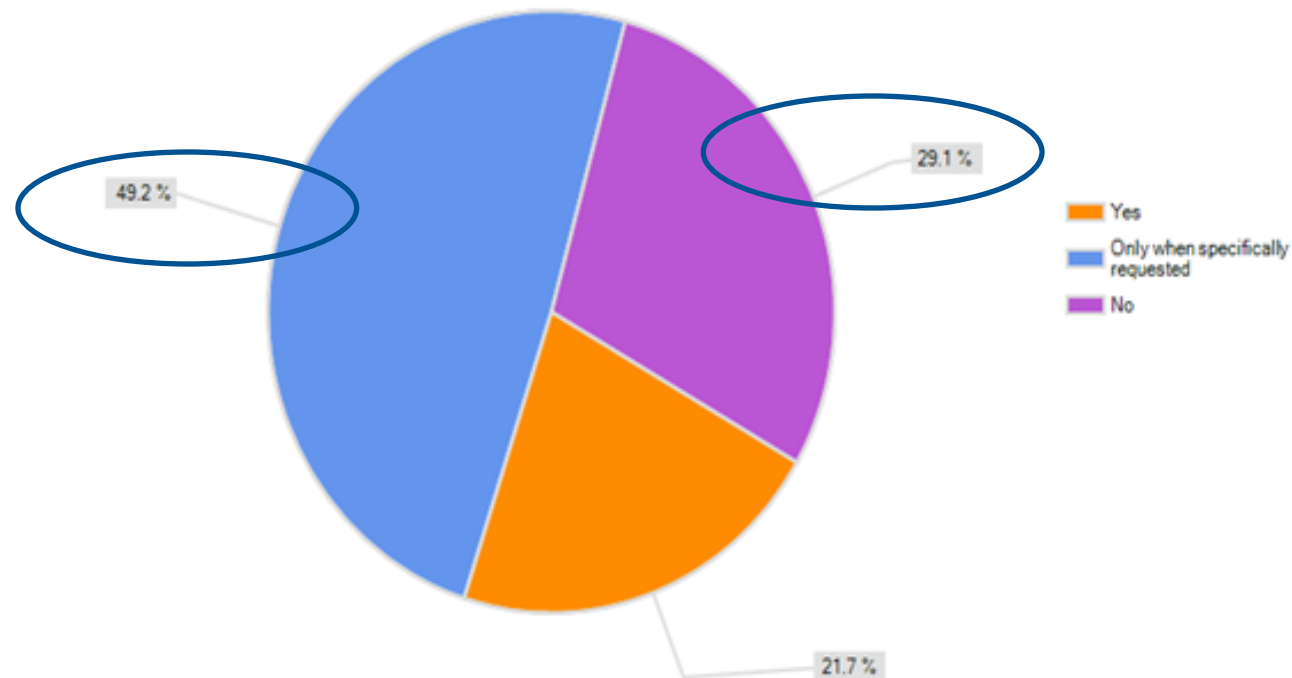
- IAQ exclusion had been used as a rationale NOT to consider vapor migration/intrusion in the Phase I investigation, e.g., vapor migration/intrusion is an IAQ issue and as such is a non-scope consideration in the Phase I
- The following words were added after IAQ: “*unrelated to releases of hazardous substances or petroleum products into the environment*”
- The words imply that if the IAQ issue is related to releases of hazardous substances or petroleum products into the environment (i.e., vapor intrusion), then this would be within the scope of the Phase I – however, if vapor migration is eliminated as a concern (and vapor migration must now be considered in the Phase I investigation), then the issue of there being a vapor intrusion problem is a moot point!

Implications of New Vapor Language

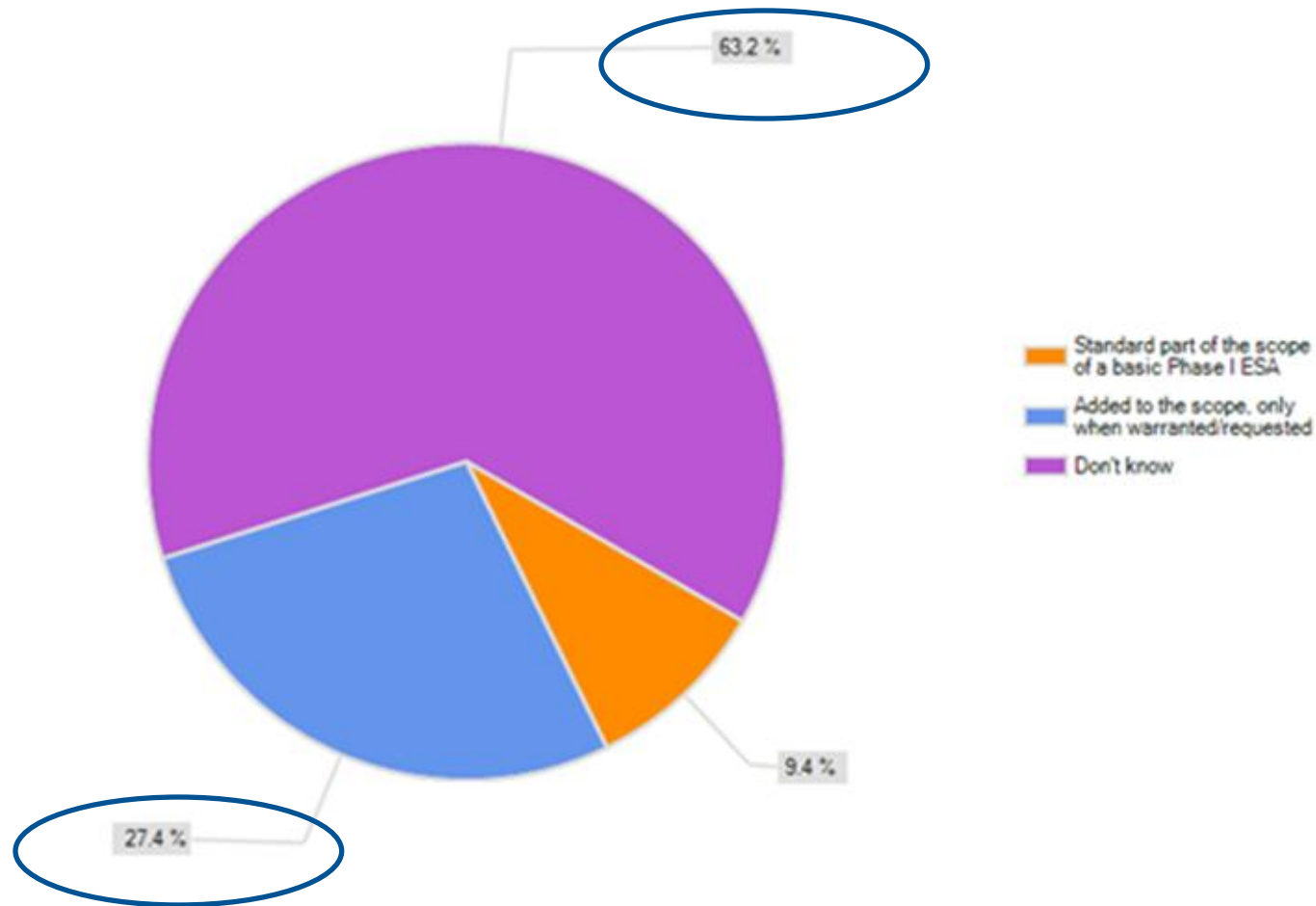
- Brings vapor-related risk front and center
- Vapor migration should be treated no differently than the way contaminated groundwater migration is considered in a Phase I ESA
- Other attention on vapor:
 - U.S. EPA Guidance Document on Vapor Intrusion
- More consistency in how vapor is treated in Phase I ESAs
- New E 1527 standard may necessitate changes to Phase I ESA process.
- Need for more client education to foster a deeper understanding about the risk that vapor migration presents to make educated decisions about how and whether to revise their environmental due diligence policies accordingly.

Do EPs Address Vapor Migration?

Today do you typically include vapor migration screening in your Phase I scope of work?



Do Lenders Have Vapor Migration Included?



Advice from NJ Attorney:

- “AAI cannot ignore vapor. It is very hard to construct a good faith argument suggesting that appropriate inquiry could ignore vapor migration/intrusion when there are reasonable bases for concluding that there may be a VI issue...**No longer can you have one eye open and one eye closed on this topic.**”
- “It is **almost malpractice** at this point for an attorney involved in a real estate transaction where we might have vapor presenting itself who does not put in writing a suggestion that testing be done so that when a third party files suit saying they got some disease [due to vapor], I know I have myself covered. **Consultants better be doing the same thing.** They better be putting something in writing. And they should not sign a report, in my humble opinion, that a complete Phase I ESA was done if at least the suggestion was not made that vapor be looked at. The case law is just starting to evolve.”



Stuart J. Lieberman
Esq. and Founding Shareholder
of Lieberman & Blecher, P.C.

3. Regulatory File Reviews

- An agency file review is a common industry term used to describe the search for and review of files maintained by local, state, or federal authorities.
- Revisions address two specific issues:
 1. What factors should the environmental professional consider in exercising professional judgment as to when an agency file review should be conducted?
 2. When are agency file reviews considered reasonably ascertainable?

New Agency File Review Language

- New section 8.2.2 added on *Regulatory Agency File and Records Review*
- If the TP or any adjoining property is identified in government records search, “pertinent regulatory files and or records associated with the listing should be reviewed” - at the discretion of the environmental professional
- If in the EP’s opinion such a file review is not warranted, the EP must provide justification in the Phase I report
- EPs may review files/records from alternative sources (e.g., on-site records, user-provided records, records from local government agencies, interviews with regulatory officials)
- Summary of information obtained from the file review shall be included in the Phase I report and EP must include opinion on the sufficiency of the information obtained

Value of AFRs

- Can provide a deeper understanding of the target or adjoining properties to assist the EP in determining if REC or de minimis conditions exist.
- Regulatory database records may indicate that a closed release case associated with the property.
- A regulatory agency file review may provide specific information in connection with the release:
 - substance released?
 - extent of release?
 - media affected?
 - sampling data available?
 - remediation efforts?
 - residual contamination in place?

One Lender's View of AFRs:

- “Agency file reviews are an **extremely valuable** part of the due diligence process at my institution. We have realized tremendous value from many agency file reviews. In many scenarios, we have been able to **address our concerns about RECs** with the information that was obtained via the file review.”

Mike Tartanella, Capital One, VP Environmental Risk Manager,
Manhattan

AFRs: Intel on Current Practice

Agency File Reviews

File reviews take place on over half of Phase I ESAs nationally



E 1527-05 is being revised to clarify when a file review should be conducted

Most EPs already perform file reviews in conjunction with a Phase I ESA

60% of EPs "always" or "very often" perform an agency file review

File reviews are included in Phase I pricing **55%** of the time

EPs decide whether to conduct a file review based on such factors as:

- Location of property
- Data needs
- Accessibility of files

Price:

Price varies from firm to firm with some including it in the cost of a Phase I ESA



Turnaround time: • **63%** are completed in 2 weeks or less
• **only 26%** can regularly access agency files online

*File reviews can take as long as **6 weeks or more**



Value of file reviews:

- File reviews are a standard data element for many EPs.
- EPs may gain a better level of understanding about a listed site, sometimes confirming or refuting the existence of a REC.

Challenges of File Reviews

- Widespread variability on exactly when AFRs are conducted.
- Factors include:
 - distance to regulatory offices
 - ease of file access and review
 - associated costs
- With 1527-13:
 - EP must document and comment on significance of limitations, if the file review is not conducted
 - EP can review files and other records from an alternative source (e.g., interviews with regulatory officials, on-site records, and records maintained online)

Implications of New File Review Language

- Impact is a function of what EPs are currently doing.
- How to prepare:
 - Review contracts and report templates.
 - Think about the types of records that might trigger the need for a file review, which offices they need to contact, and what information to look for in file reviews.
 - Build relationships with state and local offices.
 - Consider alternative sources.
 - Assess the level and thoroughness of information that each agency maintains early on.
 - Educate staff on making consistent decisions about when to conduct an AFR across offices.

Areas of Minor Revisions to E 1527



Revisions to User Responsibilities

- Environmental liens and AULs are commonly found in recorded land title records.
- Environmental liens and AULs recorded in any place other than recorded land title records are not considered to be reasonably ascertainable - unless applicable statutes or regulations specify a place other than recorded land title records.
- Environmental liens and AULs imposed by judicial authorities may be recorded or filed in judicial records only.
- In jurisdictions where environmental liens and AULs are only recorded or filed in judicial records, these records must be searched.
- Chain of title reports will not normally disclose environmental liens.

Revisions to User Responsibilities cont'd

- Although user is responsible to provide known environmental lien and AUL information to EP (unless EP given responsibility through a change in the scope of work), the search for environmental liens and AULs under User Responsibilities Section does not preclude the EP from still conducting a search of institutional control and engineering control registries in the EPs government records search (under 8.2).
- Commonly known or reasonably ascertainable information within the local community about the property which could be material to the REC determination by the EP must be taken into account by the user and communicated to EP
- If user does not communicate to the EP the information in Section 6, User Responsibilities, the EP needs to consider the significance of this shortcoming similar to any other data gap.

Implications of User Responsibilities Language

- Emphasizes that user responsibilities are required to ensure compliance with AAI
- Stronger language to encourage User Participation
 - EP “shall” request information from User
 - Failure to provide information may be considered a data gap
- Clarification of the Environmental Lien Search
 - Required by AAI
 - Chain of Title not likely to fill this requirement
- More instructive language regarding the requirements to disclose “commonly known” information about the property and any discrepancies with the purchase price and fair market value

Industrial/Manufacturing Properties

- If property use is/has been industrial or manufacturing, then “additional standard historical sources shall be reviewed if they are likely to identify a more specific use and are reasonably ascertainable, subject to the constraints of data failure.”
- Standard historical sources include: aerials, fire insurance maps, property tax files, recorded land title records, USGS topo maps, street directories, building department records, zoning/land use records, and “other historical sources” such as newspaper archives, internet sites, etc.

Revisions to Appendices

- Completely re-written Legal Appendix (made more relevant)
- Minor revisions to User Questionnaire Appendix
- Simplified Recommended Table of Contents and Report Format Appendix
- New Appendix discussing Non-Scope Business Environmental Risk Considerations

Status of ASTM E 1527 Revision Process

- Ballot closed October 17, 2012.
- At October 24, 2012 Task Group meeting in Atlanta, all the negatives resolved except for those against the HREC/CREC/Regulatory File Review revisions – 9 negatives.
- Negatives ruled non-persuasive in follow-on ballot that closed January 9, 2013.
- Final standard submitted to EPA for formal approval (to issue a ruling that the standard is AAI-compliant).
- EPA/OMB approval process and EPA public comment period most likely (assuming no public opposition) should be completed in late Spring.
- ASTM will likely publish the standard (as E1527-13) in early Summer 2013.

What EPs Should Do to Prepare

- A new version of E 1527 means education—a time to refresh!
- Start educating clients.
- Work with clients to update environmental due diligence policies.
- Ensure that internal staff are aware of the key areas of change.
- Plan for any necessary changes to the internal Phase I ESA process, scope of work and report format.
- Attend events dedicated to the E 1527 revisions.
- Stay in tune with the schedule for the standard's release as it is likely to take effect immediately at publication.

For More Information

- Sign up for FREE EDR Insight biweeklies for series of briefs on key areas of change

<http://www.edrnet.com/events--resources/edr-insight/signup>

- Visit EDR Insight's Resources page for past pubs re: E 1527-13

<http://www.edrnet.com/Events--Resources/edr-insight/resources>

- EDR Event's page for past webinars on E 1527-13

<http://www.edrnet.com/events--resources/web-seminars-current>

Questions?



Dianne P. Crocker
Principal Analyst, EDR Insight

Research and Analytics:
www.edrnet.com/EDRInsight

Twitter:
[@dpcrocker](https://twitter.com/dpcrocker)

Email:
dcrocker@edrnet.com

