

American Society for Testing and Materials Adds PFAS Guidance to Phase I Due Diligence

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On November 1, 2021, the American Society for Testing and Materials (ASTM) approved **changes** to its Phase I Environmental Site Assessment (ESA) standard to include guidance on when per- and polyfluoroalkyl substances (PFAS) should be included in the scope of an ESA. The new guidance is published as ASTM E1527-21 and will likely take effect in the first quarter of 2022 as the current standards (ASTM E1527-13) were scheduled to sunset on December 31, 2021. However, the U.S. Environmental Protection Agency (USEPA) has not yet released any information as to the adoption of ASTM E1527-21. In light of this change, the current regulatory sensitivity surrounding PFAS, and the explosion of PFAS-related litigation, parties seeking to acquire, develop, or finance the acquisition of real property and parties considering acquiring or merging with businesses that may have been involved with PFAS must carefully consider whether to include PFAS in the scope of work.

What Are PFAS?

PFAS are a class of approximately 4,700 synthetic chemicals that have been widely used in a variety of industrial and commercial processes since their introduction in the 1940s.¹ They are mobile and water soluble, which allows them to travel vast distances, as well as thermally, chemically, and biologically stable. As a result, PFAS do not easily break down in the environment, earning them the moniker “forever chemicals.” Although the toxicity of many PFAS compounds is still being analyzed, some compounds have been linked to adverse human health effects, including but not limited to cancer, hormone disruption, and low infant birth weights. Since 1999, there have been 5,153 complaints concerning PFAS filed in 40 courts, naming 193 companies and spanning 82 industries.²

Despite the flood of litigation, the USEPA has not yet designated any PFAS compounds as hazardous substances under the federal Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA).³ However, some states—including New Jersey—have begun to regulate certain PFAS compounds, and there has been increased political pressure for continued and increased regulation. The state PFAS standards developed to date are exceedingly low. For example, in New Jersey, the groundwater standard is 14 parts per trillion for perfluorooctanoic acid (PFOA) and 13 parts per trillion for perfluorooctane sulfonic acid (PFOS).

EPA’s All Appropriate Inquiries Rule

ASTM’s Phase I ESA standard is designed to comply with the USEPA’s All Appropriate Inquiries (AAI) rule. The AAI rule sets forth a process for evaluating a property for the existence of environmental contamination to, ideally, achieve liability protection under CERCLA⁴ and, potentially, comparable state innocent purchaser defenses. Note, however, that certain states have requirements that deviate from the AAI rule. For example, in New Jersey, a Phase I ESA is not sufficient to meet the innocent purchaser defense under the New Jersey Spill Compensation and Control Act, which instead requires a party to conduct a “preliminary assessment” in accordance with New Jersey’s Technical Requirements for Site Remediation.⁵ In evaluating the availability of innocent purchaser defenses, it is important for prospective purchasers to carefully consider the requirements of each state.

ASTM’s New Standard to Include PFAS Guidance

Under ASTM’s current Phase I ESA standard, PFAS are “non-scope” considerations. Non-scope

¹ <https://www.wbur.org/news/2019/11/08/what-are-pfas-chemicals-and-should-i-be-freaking-out-about-them>

² <https://www.praedicat.com/the-past-present-and-future-of-pfas-litigation-in-the-united-states/>

³ 42 U.S.C. § 9601 et seq.

⁴ https://www.epa.gov/sites/default/files/2015-05/documents/aa_i_reporting_factsheet.pdf

⁵ N.J.A.C. 7:26E-3

considerations identify issues that may create an environmental risk associated with a property but are not required to be assessed under the AAI rule to claim a CERCLA liability defense. This conflicts with certain states that have enacted PFAS regulations. In such states, a party conducting due diligence using the ASTM standard would not be compelled to conduct a PFAS review to achieve a defense to federal liability and, as a result, might miss its potential exposure to PFAS liability under state law. ASTM's updated standard attempts to resolve this friction by adding a footnote to the definition of "Federal, State and Local Environmental Laws" advising that a party seeking to avail itself of certain state liability defenses should include PFAS in the scope of the Phase I ESA if the state in which the property exists defines PFAS as hazardous substances.

Practical Considerations

Maine, Massachusetts, New Hampshire, New Jersey, New York, and Vermont have already adopted PFAS regulations.⁶ Prospective purchasers seeking to avail themselves of state liability defenses in those states are strongly advised to include a PFAS review in their due diligence. Going forward, the need to include PFAS in the scope of a Phase I ESA will continue to increase as additional states and, eventually, the federal government adopt PFAS regulations.

Recently, USEPA published its "PFAS Strategic Roadmap: EPA's Commitments to Action 2021-2024," explaining that a Notice of Proposed Rulemaking to designate PFOA and PFOS as "hazardous substances" under CERCLA is under development.⁷

Once published, this designation would, among other things, allow USEPA and third parties to seek cost recovery or contribution under CERCLA for the cleanup of PFOA and PFOS contamination. It would likely have retroactive effect, thus allowing USEPA to apply CERCLA enforcement power to PFOA and PFOS issues that predate the "hazardous substance" designation. In addition, several states have published informal PFAS regulations, such as guidance or notification levels. These include Alaska, California, Colorado, Connecticut, Delaware, Illinois, Minnesota, New Mexico, North Carolina, and Ohio.

Moreover, given the current flood of PFAS-related litigation and the likelihood that such litigation will continue and grow, it is prudent from a pure risk-management perspective for a prospective purchaser to assess PFAS-related exposures in evaluating a transaction.

As a result, anticipating that nationwide formal PFAS regulation will be instituted at some point, prospective purchasers should carefully consider whether to always include PFAS in the scope of a Phase I ESA. Although in certain states and under CERCLA a PFAS review may not yet be formally required in order to achieve an innocent purchaser defense, a PFAS review would nonetheless provide a comprehensive understanding of site conditions in the context of contaminants that will, in all likelihood, be regulated at some point in the near future.

If you have any questions about ASTM's updated PFAS guidance and environmental due diligence, please contact the authors of this article.

⁶ <https://www.law360.com/articles/1444126/why-new-phase-i-site-standard-matters-for-real-estate>

⁷ https://www.epa.gov/system/files/documents/2021-10/pfas-roadmap_final-508.pdf

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