

Author



Ned B. Witte

414.287.9518

nwitte@gklaw.com

Contributors

Nicole R. Moshang

Partner at Manko, Gold,
Katcher & Fox LLP

Rula A. Deeb

Senior Principal at
Geosyntec Consultants

Lydia R. Dorrance

Senior Scientist at
Geosyntec Consultants

The information in this article is based on a summary of legal principles. It is not to be construed as legal advice. Individuals should consult with legal counsel before taking any action based on these principles to ensure their applicability in a given situation.

Managing PFAS in environmental due diligence: The future's uncertain

Environmental lawyers and consultants remember Feb. 14, 2019, as the day the U.S. Environmental Protection Agency (EPA) delivered a heart shaped box of promised regulatory actions called the PFAS Action Plan. It was a much anticipated, and to some, overdue response to [per- and polyfluoroalkyl substances](#) (PFAS). However, as Forrest Gump said about a box of chocolates, “you never know what you’re going to get.” The PFAS Action Plan has provided little aid to, and actually a few impediments in, the field of environmental due diligence in business transactions.

What the PFAS Action Plan promised

A cornerstone commitment of the EPA's PFAS Action Plan was listing two of the most widely studied PFAS, perfluorooctane sulfonate (PFOS) and perfluorooctanoic acid (PFOA), as hazardous substances under the federal Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) or, as it's more commonly known, Superfund.

The more obvious anticipated effects of the as-yet unfulfilled listing of any PFAS as a CERCLA hazardous substance would be empowering government agencies and third parties to clean up PFAS-contaminated sites and then sue the party responsible for the PFAS contamination to reimburse the cost of the cleanup. A CERCLA listing for PFOS and PFOA could also mean that responsible parties would need to cover the costs of providing a drinking water supply and repairing damage to natural resources caused by PFOS and PFOA for which they are responsible.

The consequences of listing PFAS as a CERCLA hazardous substance may represent a case of “be careful what you wish for.” In particular, the specter of revisiting or reopening sites, including once-federally listed Superfund sites that were closed by federal or state action, could be particularly troubling.

Developments since the PFAS Action Plan

Since the announcement of the PFAS Action Plan in Feb. 2019, the U.S. Congress has introduced multiple pieces of proposed PFAS-related legislation. This legislation includes the [PFAS Action Act](#) (H.R. 535), which the U.S. House of Representatives passed on Jan. 10, 2020. The PFAS Action Act would require the designation of PFOA and PFOS as hazardous substances under CERCLA within one year of enactment. It would further require the EPA to determine whether to designate all PFAS as hazardous substances within five years of enactment and publish its determination with 60 days of its final decision.

So far, however, legislation like H.R. 535 that calls for the designation of PFOS, PFOA and/ or all PFAS as hazardous substances remains in the U.S. Congress. A recently enacted

legislation, The National Defense Authorization Act (NDAA), which was signed into law in December 2019, contains multiple PFAS-related provisions, but falls short of providing a mechanism to compel clean-up of PFOS or PFOA via designation as a hazardous substances under CERCLA.

CERCLA hazardous substances in environmental due diligence

A more nuanced effect of a CERCLA hazardous substance listing of PFAS would be in the area of environmental due diligence in real estate and business transactions. Environmental due diligence is the process of evaluating the current and historical use and ownership of a property to ascertain the possible presence of a “release” of hazardous substances. Forty years after the passage of CERCLA, the American Society of Testing and Materials (ASTM) International Standard E1527-13 Phase I Environmental Site Assessment (Phase I) process remains the gold standard for environmental due diligence.

However, it is the interplay between industry-standard environmental due diligence using the ASTM Phase I process and the unfulfilled PFAS Action Plan promise to list certain PFAS as CERCLA hazardous substances that is making environmental professionals uneasy.

A party that completes an ASTM Phase I, and thereby meets the CERCLA “all appropriate inquiry” standard¹, potentially qualifies for EPA sanctioned exemptions from liability, including as an “innocent purchaser,” as a “bona fide prospective purchaser” or as a party affected by an off-site discharge. These qualifications on liability are particularly critical in high profile redevelopments of brownfields, the term used for properties that are tainted and stigmatized by the real or perceived presence of hazardous substances.

Parties to deals with potentially contaminated real estate such as buyers and their lenders have embraced the ASTM Phase I process because it reduces or eliminates the uncertainty of environmental costs and liability—and environmental uncertainty is a sure fire way to scare away buyers in a transaction and their lenders as well as developers and municipalities considering brownfield redevelopments.

So the fact that PFAS, or even two of the approximately 5,000 PFAS that are more well-known, such as PFOA and PFOS, are not CERCLA hazardous substances has a particular significance for environmental due diligence under ASTM practice. This is because the purpose of an ASTM Phase I is to identify “recognized environmental conditions,” a term that ASTM limits to CERCLA hazardous substances and petroleum. Therefore, the unwary user/buyer of a Phase I who otherwise wants to assess a property for the presence of PFAS will not receive such an evaluation².

Current practices regarding PFAS due diligence

Based upon interviews with environmental consulting and engineering professionals³, the environmental professional industry has responded to this gap in ASTM Phase I coverage with a wide range of practices, policies, protocols and programmatic approaches to including PFAS in environmental due diligence.

Addressing environmental concerns outside the scope of the ASTM Phase I process is not a novelty for environmental consultants. One of the most significant environmental concerns that has fallen outside of the ASTM Phase I scope, since its inception, is asbestos. Many environmental consultants address gaps in environmental due diligence by including the consideration of asbestos—or now, PFAS—as “non-scope considerations.” Other tools that consultants can utilize to address environmental concerns that fall outside of the scope of the common Phase I process include flagging these issues, which might usually be

¹ See the U.S.EPA webpage on All Appropriate Inquiry: <https://www.epa.gov/brownfields/brownfields-all-appropriate-inquiries>

² There are additional consequences of PFAS not being listed as CERCLA hazardous substances, including the inability to use U.S.EPA CERCLA grant funding, including funding underwritten by federal grants such as municipally administered “revolving loans,” to respond to and address PFAS risk and contamination.

³ The authors wish to thank representative and leading professionals from AECOM, Geosyntec, GZA GeoEnvironmental, Ramboll and TRC in developing the background for this article.

identified in an ASTM Phase I as a Recognized Environmental Condition (REC), as “otherwise noteworthy conditions” or as “business environmental risks,” under ASTM parlance.

Some environmental professionals have also managed PFAS concerns in environmental due diligence under an independent exercise that complements the ASTM process with a work deliverable to the client, sometimes in the form of a privileged communication⁴, identifying the findings of the PFAS-specific evaluation.

Also influencing this process is the growing, but often disparate, state regulation of PFAS in the form of groundwater and drinking water standards or limits. Many states are developing databases of sites with documented releases of PFAS, which is a valuable resource for environmental consultants performing due diligence. For example, California’s State Water Resources Control Board (SWRCB) maintains an [interactive map](#) of all locations assessing PFAS under California’s Statewide PFAS Investigation orders, and includes links to available PFAS environmental data associated with these investigations.

The appetite for addressing PFAS in transactional environmental due diligence depends largely on the motivation of the party to the deal:

- Buyers are risk-averse and, in most cases, absolutely want to understand the possible presence of PFAS.
- Most selling parties, in contrast, have no desire to be the trailblazer and identify PFAS, because their ownership status may make them legally responsible for the contamination.
- Lenders are typically risk-sensitive, particularly where their financing is secured by an interest in property that may be contaminated. To date, however, anecdotal experience shows that the lending community has been less alarmed by PFAS than might be expected, while other investment sources (venture funding and portfolio management companies) have proven to be ahead of the PFAS curve.
- And, finally, municipalities and developers addressing brownfields have felt the chill of uncertainty that a topic like PFAS can introduce, creating significant concern of a slowdown in urban redevelopment.

How PFAS comes up in transactions

From practical experience, the consultants interviewed indicate that PFAS is playing a significant and prevalent role in transactions, particularly for four classes of site use:

1. Facilities that have directly produced or handled PFAS (like a chemical formulation company)
2. Facilities that used or incorporated PFAS to manufacture a product (like incorporating PFAS into firefighting foam, known by the acronym AFFF for “aqueous film-forming foam”)
3. Facilities that utilized PFAS in a manufacturing activity (like PFAS as a mist suppressant in the plating industry)
4. Facilities that assembled products that contain PFAS (like application of PFAS-containing Teflon into nonstick cookware).

More indirect but still significant targets for PFAS due diligence include sites where PFAS-containing biosolids (such as municipal waste water treatment plant sludge) have been land applied (e.g. to farm fields), sites where firefighting events utilizing AFFF have occurred and land downgradient (or potentially downwind) of such sites.

The consultants interviewed also report that experience has shown that where environmental due diligence identifies one of these PFAS use indicators, and a Phase II investigation ensues, PFAS is commonly found in the environment or, as one consultant noted, “everywhere” one looks.

⁴The utility of such privileged communications, and the ability characterize information related to the suspected, potential, known, or actual presence of PFAS as privileged, depends on state law and interpretation of standards applicable to attorney-client communications, and the context within which the environmental consultant was retained or engaged.

This leads to an additional conundrum unique to PFAS: what does a detection mean for the parties and for the property? This will largely depend on the applicable and effective state law. In a state like Michigan, with (nearly) established groundwater standards and the Part 201 Baseline Environmental Assessment procedure, the path appears to be clear to report and resolve PFAS detection. In a state like Wisconsin, however, which is a year or years away from developing groundwater guidance values or standards for PFAS, the need for reporting to the government is quite black and white, but the process for further response and closure is not as obvious, again raising the concern for uncertainty.

Litigation risks loom

While the need to evaluate PFAS impacts at current and future sites vulnerable to re-openers may be uncertain, history informs us that potential litigation implications are certain to follow. Indeed, looking back at recent years, we saw how a relatively unknown environmental concern, vapor intrusion, quickly rose to the forefront of the minds of environmental professionals as they attempted to navigate environmental due diligence obligations in the absence of established protocols and quickly developing federal and/or state regulations and guidance.⁵ And, as federal and state regulations and guidance developed, so too did cost recovery actions and toxic tort litigation seeking personal injury and/or property damages.

For responsible parties that were already engaged in ongoing investigation and remediation of vapor intrusion impacts at sites, the litigation that followed was likely anticipated. For responsible parties associated with sites that had been considered remediated years earlier, but were now being investigated for vapor intrusion impacts, the notion of litigation risks arising several years later was likely not anticipated, and in many cases, likely not considered in subsequent transactions.

One such example involved residents that asserted toxic tort damages arising out of soil vapor intrusion impacts to their properties from a facility that had been alleged to be the source of groundwater contamination in the area, and the subject of a prior lawsuit for damages caused by impacts to private residential wells. See *Aiken v. General Electric Co.*, 57 A.D. 3d 1070 (3d Dept. 2008). The defendant challenged the action as untimely because the plaintiffs had known of the groundwater contamination in the area for more than twenty years. The court rejected the defense, finding that while the plaintiffs may have been aware of the groundwater contamination, they had no reason to know that their properties had been potentially damaged by soil vapor intrusion and thus did not know of the specific injury they were now seeking damages for as a result.

The *Aiken* case should serve as a reminder that even before the regulatory landscape of emerging contaminants, such as PFAS, is fully established, it is not too soon to consider and address the litigation risks and uncertainties that are certain to follow.

Best practices for addressing PFAS in deals

There are certain best practices that parties to a transaction with PFAS concerns should be employing:

1. Assemble an informed and experienced team of environmental consulting and legal expertise who understand the risk tolerance of the client;
2. Wrap PFAS (and perhaps other, unregulated emerging contaminants) into the due diligence process, either as an element of the Phase I (e.g., non-scope consideration/business environmental risk) or as a discrete but complementary effort;
3. Identify applicable and currently effective state law, including reporting obligations and groundwater standards, remembering that multi-state deals may mean differing rules;
4. Understand that state PFAS laws may change after the deal—this will affect the terms and conditions that allocate environmental liability in the deal documents; and,
5. Anticipate creative tools (e.g. insurance and state brownfield incentives) to address known and unknown environmental liability.

⁵ Notably, USEPA did not adopt ASTM Standard E 1527-13 until November 2013 addressing the assessment of the potential for hazardous vapors to migrate onto or within the target property in Phase 1 ESAs. By such date, however, many buyers and lenders were already conducting vapor migration assessments as part of their Phase 1 ESAs as the risks vapor presented were already well known.

Key takeaways

For environmental lawyers and environmental consultants tasked with the process of identifying and allocating environmental risk in transactions, the challenge of evaluating the possible presence of PFAS in such deals is déjà vu all over again. Before the advent of PFAS, the environmental due diligence and liability allocation had become somewhat commoditized, particularly in comparison to the 1980s and 1990s, when the mere identification of an underground storage tank could bring a deal to its knees.

PFAS is having a profound effect on transactions because:

1. It is a new and relatively unknown concern;
2. It is regulated in differing ways by different states with no consistent federal baseline to rely upon; and
3. If discovered during a transaction or otherwise, the standards for PFAS investigation and remediation—and the prospect for closure—are unclear.

The disconnect between the proposed CERCLA listing of certain PFAS as hazardous substances and the ASTM Phase I process only adds confusion to the mix. Although environmental consultants and lawyers are adapting to address challenges, concerns like these can cumulatively mean uncertainty and anxiety, conditions that can upend an otherwise trouble-free deal.

For more information on this topic, or to learn how Godfrey & Kahn can help, contact our Environmental Strategies Practice Group.