

Per- and Poly-Fluorinated Alkyl Substances (PFAs) in Phase I ESAs: Screening Procedures and Best Practices

BACKGROUND

The Small Business Liability Relief and Brownfields Revitalization Act, Pub. L. No. 107-118, enacted in January 2002, amended the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) to provide certain liability protections for property owners that qualify as bona fide prospective purchasers, contiguous property owners, or innocent landowners (the “liability protections”). To meet the statutory criteria for the liability protections, a landowner must, among other things, complete an “All Appropriate Inquiry” (AAI) to identify historical uses and past or potential releases of hazardous substances on the target property. The Phase I environmental site assessment (ESA) is the standard by which parties satisfy the AAI requirement. The American Society for Testing and Materials (ASTM) standard, the ASTM E 1527-13, Practice for Phase I Environmental Site Assessment, complies with AAI requirements. The ASTM-compliant Phase I ESA is a common form of environmental due diligence that is required for any cleanup occurring under Wisconsin’s voluntary party liability exemption (VPLE) program.

The goal of the processes established by the ASTM E 1527-13 practice is to identify recognized environmental conditions (RECs), which include existing, past, or potential releases of any hazardous substance or petroleum products into structures, soil, groundwater, or surface water on the target property.

Poly- and Perfluoroalkyl Substances (PFAs) are a broad class of manmade chemicals with a wide variety of current and historic uses. Although PFAs are considered by EPA and WDNR to be an emerging contaminant, they are not currently listed as “hazardous substances” under CERCLA, presenting an encumbrance in the progression of the brownfield sites redevelopment process. Consequently, environmental professionals are not strictly required to assess PFAs in ASTM-compliant Phase I ESAs. If assessed, there is limited information available in government databases to ascertain environmental significance.

Background on PFAs compounds, including history of manufacture, use and sources; chemical nature and characteristics; and mobility within the environment, can be found in ITRC’s published fact sheets.¹

At this time, states are taking the lead in developing cleanup approaches. As part of that effort, states are using a mix of numeric and site-specific cleanup targets. The federal approach is to rely on CERCLA, which is a site-specific risk reduction program as opposed to a program that promulgates numeric standards.

In summary, determining whether there is potential for PFAs to be present at a specific site or property raises a number of issues beginning at the initial due diligence stages of property transfers and transactions.

¹ <https://pfas-1.itrcweb.org/fact-sheets/>

PROPOSAL

In an effort to support continued progress of brownfield sites redevelopment, the BSG proposes to provisionally augment the ASTM E 1527-13 process by generating supplemental due diligence screening procedures and best practices to be used as interim guidance in the evaluation of PFAs when conducting Phase I ESAs. Specifically, we propose the development of a Site Evaluation Checklist and related guidelines to aid in the identification of whether there is a potential for PFAs to be present at a property and whether such potential needs to be considered in any follow-up due diligence work.

Primary Efforts:

1. Supplemental background/state of practice review
 - a. Published and peer reviewed documents
 - b. Directed inquiries with other states as to draft guidance/procedures developed for Phase I ESA/desktop surveys (e.g. CA, MI, MN, NY, NC, NJ, NY)
2. Develop a site evaluation checklist and companion document that might include but not be limited to questions around the following concepts:
 - a. Current or historical site usage with a list of known industry sectors associated with PFAs manufacture or use. For example:
 - i. Primary producers (manufactured at the site)
 - ii. Secondary users (not manufactured, but used in manufacturing)
 - iii. Receivers (may receive PFAs-containing waste)
 - b. Manufacturing activities typically associated with PFAs and related processes where releases might occur
 - c. Product types typically associated with PFAs and related storage
 - d. General inquiries related to knowledge of PFAs-containing materials, dates and timeframe of manufacture/use, including use for fire-fighting or in fire suppressant systems, proximity to stacks/vents, waste storage, handling and treatment systems, etc.

Review Timeline:

1. May 31, 2019, complete draft outline checklist and companion document
2. June 15, 2019 stakeholder review
3. July 12, 2019 final draft interim guidance for distribution