

PFAS UPDATE: Key Strategies for Navigating Environmental Due Diligence

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Mary Ann Grena Manley
Founder & President,
[15E Communications LLC](#)
magmanley@15ecomms.com
Twitter: [@magmanley](#)



PFAS can be a game changer in commercial real estate transactions. As evolving policies expand the scope of potential liabilities and cleanup costs, environmental professionals must consider what steps they can take to address, mitigate, and manage PFAS-related risks at potentially impacted properties.

Per- and polyfluoroalkyl substances (PFAS) are a group of manufactured fluorinated chemicals that have made their way into drinking water supplies nationwide and are suspected of leading to adverse health effects.

PFAS are ubiquitous, and contamination is widespread. In fact, a [recent paper](#) based on a presumptive contamination model of likely PFAS sources identifies over 57,000 sites potentially contaminated with PFAS in the United States.

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Over \$10 Billion Earmarked for PFAS Remediation

Due to the potentially staggering liability and cleanup costs estimated in the billions, both the federal government and numerous states are looking for regulatory solutions to PFAS contamination. The landmark [Infrastructure Investment and Jobs Act](#) specifically earmarks \$10 billion to address PFAS remediation in drinking water, and this year's annual

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spending bill for the Department of Defense includes over \$400 million for investigating PFAS.

Liability and cost considerations extend to the commercial real estate market, affecting how property can be developed and who must pay for cleanup, containment, and disposal costs.

ASTM and Regulatory Approaches to PFAS

[ASTM's Phase I standard \(E 1527-21\)](#) represents the best practice for pre-purchase environmental site assessments. It requires substances defined as hazardous under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) to be considered during a Phase I environmental site assessment. CERCLA does not currently regulate PFAS, so they are not yet “in scope” for ASTM Phase I assessments.

However, that could change with the U.S. Environmental Protection Agency's [recent proposal](#) to designate perfluorooctanoic acid (PFOA) and perfluorooctanesulfonic acid (PFOS) as CERCLA hazardous substances. The 60-day comment period closed on November 7, and EPA's goal is to finalize the rule in 2023. However, more than 60,000 public comments were filed, with numerous commenters calling for liability protection for parties that did not cause contamination and better cost and regulatory impact assessments, [positions that might form the basis of legal challenges to the rule](#).

Proposed Rule Would Have Sweeping Impacts

Once finalized, this designation will have sweeping impacts on environmental due diligence, moving PFOA and PFOS squarely into the scope of an ASTM Phase I site assessment. It will also mean the addition of new PFAS-contaminated sites to the [National Priorities List \(NPL\)](#) and increased costs

at existing cleanup sites. Even for non-NPL sites, investigation and remediation costs are likely to skyrocket for parties looking to address PFOA and PFOS-related risks.

The final rule could also cause the "reopening" of sites to address PFOA and PFOS where cleanup is already complete. This could result in significant additional cleanup costs and potential third-party litigation related to site investigation and cleanup as new potentially responsible parties (PRPs) are identified. Reopening previously closed sites may also impede current and future redevelopment efforts.

No Uniform Approach for PFAS

Although EPA is moving full steam ahead [in implementing its PFAS Roadmap](#), there currently is no uniform approach to PFAS regulation in the United States.

On the [state level](#), there is a patchwork of various regulatory requirements. Some programs are relatively stringent. Texas, for example, developed initial toxicity standards to be included for sites within its risk reduction program. Other states, like Mississippi, don't have a regulatory framework. Efforts at the state level to address PFAS are ongoing, with new bans, standards, and requirements being rolled out in [California](#), [New Jersey](#), and [New York](#), to name a few.

That's why environmental professionals must understand the regulatory frameworks at the federal level as well as in states where affected sites are located, and have a strategy to manage potential PFAS impacts.

10 Practical Considerations for Addressing PFAS Risks on CRE

In a [recent ERIIS webinar](#), speakers discussed best practices for addressing PFAS as part of due diligence, including strategies for managing and mitigating PFAS contamination and addressing regulatory, transactional, and litigation risks for PFAS-affected (or potentially affected) properties. Ten practical considerations are listed below.

1. **Consider the previous use of the property.** Was it an industrial facility? Was it home to a car wash, landfill, or agricultural field? Knowing that history will help determine if there's a known or suspected source of PFAS at the site, which is a good starting point for testing for specific PFAS compounds.
2. **Understand the site's topography,** including drinking water sources on or near the property, as well as the permeability of the soil. That will help determine the extent of potential PFAS contamination and potential liability. Regulators are primarily concerned with the potential impact on the drinking water supply, making this an important consideration.

TRACKING PFAS IN GROUNDWATER

When it rains, the water either soaks into the ground or runs off hard surfaces (like roads and sidewalks), flowing into storm drains that lead to rivers and other bodies of water.



In **FLORIDA**, drinking water primarily comes from aquifers, and when PFAS contaminates groundwater, it migrates relatively easily. In that state, groundwater depth at a PFAS site would be part of an environmental assessment.



But in **MINNEAPOLIS**, there was an issue with a former plating shop where PFAS material contaminated stormwater swales and migrated off-site. In that situation, containment and soil permeability might be a consideration.

Location, geography, and site-specific factors all are important when assessing PFAS risk.

“If you discover PFAS during a Phase I assessment, consider how that affects the **PROPERTY'S FUTURE USE.**”

3. **If you discover PFAS during a Phase I assessment, consider how that affects the property's future use.** State regulations may limit what you can build on that property based on the level of PFAS contamination.
4. **Before collecting and analyzing potential PFAS samples, consider whether you need this data and how you would use it.** What would be actionable about this data? Is there a regulatory process for cleaning up any detected PFAS? Requirements vary by state.
5. **During Phase II, look at the data, evaluate the risk, and then advise the client.** Think about the next steps depending on the state where the property is located. For example, in certain jurisdictions where you must test for PFAS, it becomes a disposal issue if you can't identify its source onsite.

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6. **Note that unfortunately, technology related to PFAS cleanup and disposal is extremely limited.** That's why containment is important. Carbon filtration is one method for removing PFAS from drinking water and preventing PFAS migration.

7. **Understand the transactional risk.** Who is responsible for the remediation if PFAS is discovered during the environmental assessment? Again, keep in mind that different states have different requirements.
8. **Consider litigation risks,** particularly when PFAS contaminates the water supply. It doesn't matter if the contamination existed before you purchased the site; its presence could still bring you into a lawsuit. Potential litigation is a major reason a PFAS investigation should be part of the due diligence process.
9. **Both buyers and sellers should care about PFAS as part of their due diligence.** Sellers need to avoid making false representations about environmental compliance and whether hazardous substances have been released. And buyers should understand what they're getting into when negotiating the transaction.
10. **Be aware that policy is moving ahead of science.** Although investment in research on exposure pathways, health risks, and toxicity values has increased significantly, there is still a gap between the science and regulatory requirements. And the science related to best cleanup and disposal practices just isn't there yet. Until these gaps close, it will remain challenging to fully understand the actual risks when conducting due diligence. But the best practices listed above can help.

Conclusion

As the science and policies related to PFAS continue to evolve, environmental professionals must stay on top of the latest developments. Developing strategies to address and manage human health, regulatory, transactional, and litigation risks related to PFAS-affected properties — incorporating the tips above — will be critical to avoiding unnecessary costs and liabilities as new regulatory frameworks emerge. 🌱

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