



Emerging Contaminants and Phase I ESAs

Featuring Guest Author Arthur Siegal of Jaffe Raitt Hueur and Weiss

Liability and Liability Protection

The Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), commonly referred to as the federal Superfund Act, provides a mechanism for the federal government to clean up uncontrolled or abandoned hazardous waste sites, accidents, spills, and other releases of hazardous substances into the environment. The law also imposed cleanup liability on owners who acquired property after the law took effect and provided means for innocent purchasers to avoid liability. More recent amendments allow a purchaser of contaminated property to avoid liability as a bona fide purchaser meeting certain post-acquisition requirements. 42 USC 9601(35), (40); 42 USC 9607(r). Most states have their own comparable laws and liability protection mechanisms.

One of the key elements to avoid liability is environmental due diligence. The industry standard for conducting Phase I Environmental Site Assessments (ESAs) is the ASTM International Standard Practice known as ASTM International Practice E 1527. A proper Phase I ESA applying this standard – including certain User Responsibilities – would satisfy the United States Environmental Protection Act (USEPA) All Appropriate Inquiry Rule (AAI), 40 CFR Part 312. The Phase I ESA may help a prospective tenant or purchaser to establish Landowner Liability Protection (LLP) via qualifying for an innocent landowner, contiguous property owner, or bona fide prospective purchaser defense under CERCLA.¹

The application of the CERCLA hazardous substance definition, when conducting Phase I and Phase II ESAs, is challenging if emerging contaminants may be present at a property.

While performance of a Phase I ESA satisfies the AAI Rule under CERCLA, the practice does not protect purchasers and property owners from a myriad of other environmental responsibilities and liabilities. The federal government has issued over 10,000 pages of environmental regulations. Property owners and purchasers must consider potential environmental obligations liabilities beyond those CERCLA protections provided by a Phase I ESA. For example, a number of commonly known contaminants such as asbestos, lead-based paint, lead in drinking water, methane, mold, radon, and biological agents are not assessed during an ASTM E1527 Phase I ESA.²

¹ As amended by Superfund Amendments and Reauthorization Act of 1986 (SARA) and Small Business Liability Relief and Brownfields Revitalization Act of 2002 (Brownfields Amendments).

² Other issues such as historic or archaeologic concerns, wetlands, endangered species and operational compliance with environmental or worker safety laws are not considered during a Phase I or II ESA.

Liabilities related to Resource Conservation and Recovery Act (RCRA) hazardous waste sites must also be considered during the environmental due diligence process. RCRA regulates the generation, transportation, treatment, disposal, and storage of hazardous waste, as well as municipal landfill activity after May 1980. RCRA was created to regulate waste from “cradle to grave,” and includes detailed regulations for investigation, remediation, and closure of contaminated treatment, storage or disposal (TSD) sites. A Phase I ESA does not provide RCRA liability protection to purchasers of RCRA TSD properties. To limit RCRA liability, a property owner must obtain Prospective Purchaser Agreements, Comfort Letters, No Further Action or No Further Interest Letters from the USEPA. There are similar issues under the Toxic Substances Control Act that purchasers and lenders need to consider.

Also, compliance with continuing obligations for contaminated properties must be understood by potential purchasers of a contaminated property. Liability protections may be lost if an owner or operator does not maintain administrative and engineering controls applied to a contaminated property.

Emerging Contaminants

CERCLA Section 101(14) defines “hazardous substance” by referencing other environmental statutes, including the Clean Water Act (Sections 311 and 307), Clean Air Act (Section 112), RCRA (Section 3001), and the Toxic Substances Control Act (Section 7). That definition is critical to the ASTM International E1527 Standard as the purpose of the Phase I ESA is to identify releases and threats of releases of hazardous substances or petroleum products. The application of the hazardous substance definition becomes particularly troublesome when considering the presence of emerging contaminants at a property.

As the definition of hazardous substances correlates with existing federal laws, emerging contaminants, such as per- and polyfluoroalkyl substances (PFAS), are not necessarily included in the scope of chemicals contemplated during a typical Phase I and tested for during a Phase II ESA. Amending those laws is a time-consuming and arduous process. Emerging contaminants are chemicals of concern where understanding of their risks to human health and the environment is still evolving. Currently, the ASTM E1527 Phase I ESA Standard is under review for revision with anticipated completion sometime in 2021. The most recent balloted standard recognizes the issue of emerging contaminants, but specifically references emerging contaminants in the list of considerations that are not addressed in a Phase I ESA (similar to asbestos, lead-based paint, lead in drinking water, methane, mold, radon, and biological agents) unless agreed to in the scope of work between the Environmental Professional and user of the Phase I ESA.

The draft revised ASTM standard’s legal appendix includes proposed language noting that these substances may be considered a “hazardous substance” (or equivalent) under applicable state laws or if directed by the User of the report. In short, a consultant is not required to consider PFAS compounds under a “standard” Phase I ESA.

The USEPA regulates drinking water by setting Maximum Contaminant Levels (MCLs) for individual contaminants. The USEPA has not set MCLs for any PFAS chemicals. In 2016, USEPA established Lifetime Health Advisory Levels for PFOA and PFOS of 70 parts per trillion, both individually and combined. A Health Advisory Level is a non-enforceable value provided as guidance for evaluating the prevalence and occurrence of unregulated drinking water contaminants. In June 2020, USEPA updated the Toxics Release Inventory (TRI) to include 172 PFAS chemicals (there are reportedly over 5,000 different formulations of these chemicals). The TRI tracks the management of certain toxic chemicals that may pose a threat to human health and the environment. Although PFAS are not currently listed as a hazardous waste by the USEPA, the TRI listing was viewed as a next step toward further regulation.

Several states have been active in regulating PFAS across multiple regimes, including setting drinking water standards, wastewater discharge standards, water and soil remediation criteria and exposure to PFAS in consumer products. This process is very much in its infancy and standards are being set in the parts per trillion with regulatory criteria varying from state to state. These levels are far more stringent than criteria established for almost any other family of chemicals.

The USEPA maintains a webpage (<https://www.epa.gov/pfas/us-state-resources-about-pfas>) with resource links to each state regulatory page. For sites located in states that regulate PFAS, it may be appropriate to include those substances in a Phase I ESA. If, or when, such emerging contaminants are defined as hazardous substances under CERCLA, as interpreted by USEPA regulations and the courts, such substances must be evaluated within the scope of the Phase I ESA standard. In the meantime, evaluation of these issues remains a contractual consideration between the Environmental Professional and its client, the user of the Phase I ESA. For example, lenders rely on Phase I ESAs with other data to make risk decisions during loan underwriting, and many informed lenders already include a proprietary list of ASTM E1527 non-scope considerations in their requirements issued to approved vendors.

Conclusion

While they may provide some comfort relating to environmental risks and liabilities, a Phase I and Phase II ESAs are not a panacea. Lenders, buyers and even some tenants need to consider issues outside the scope of typical Phase I and II ESAs – from asbestos, to radon, to wetlands, to regulatory compliance, including RCRA, TSCA and emerging contaminants.

A purchaser of real estate would benefit from retaining a diligent environmental professional team with an understanding of diverse liability protections, training in the wide-ranging environmental regulations that may apply to the asset they hope to acquire, and familiarity with available financing tools to respond when issues arise.

Please look out for our next AKT Collective featuring a deeper dive into regulatory updates related to PFAS.

About the Authors

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Timothy J. McGahey Vice President of Environmental Due Diligence at AKT Peerless has over 20 years of professional experience in environmental due diligence assessments, environmental compliance, grant management, and remediation. Mr. McGahey is a member of the ASTM E50 Committee and participates in the E1527 (Phase I ESA), E1528 (Environmental Transaction Screen), E1903 (Phase II ESA), and E2600 (Vapor Intrusion) Task Groups that review and revise these industry standards. Mr. McGahey strives to provide clients with the information needed to minimize their risk when conducting complex property transactions by staying current on the ever-changing environmental regulatory landscape and understanding client goals and objectives. Mr. McGahey's projects (Piquette Square and Cardinal Health) earned multiple national awards for excellence in brownfield redevelopment, including the 2015 Phoenix Award Grand Prize for the best brownfield redevelopment project in the country.

Arthur Siegal

Arthur is a partner at the law firm of Jaffe, Raitt, Heuer & Weiss and heads the firm's environmental law practice group. Arthur is a 1983 graduate of the Wayne State University College of Business Administration with distinction and a 1986 cum laude graduate of the University of Michigan Law School. His practice encompasses many aspects of governmental regulation including environmental remediation, brownfield redevelopment and green energy. He represents clients in both litigation and administrative challenges regarding administrative agencies' actions, successfully negotiating with the USEPA and the Michigan Departments of Natural Resources and Environmental, Great Lakes and Energy. Arthur has assisted clients with numerous brownfield redevelopment projects. He helped to write the 2010 amendments to Michigan's Superfund law, recent amendments to Michigan's Brownfield Tax Increment Financing law, and was the primary author on the 2018 Michigan law regulating coal ash disposal and has served and continues to serve on a number of State-sponsored stakeholder groups. Arthur has written a number of articles addressing various environmental issues and is a past chair of the Michigan Chamber of Commerce's Environmental Quality Committee, he's currently vice chair of the Oakland County Bar Association Environmental Committee. e appears on a number of lists of superlative attorneys including being listed as a Business Top Lawyer, a Michigan Super Lawyer and one of the Best Lawyers in America.

About AKT Collective

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