ERIS WEBINARS

New CERCLA PFAS Designations: Strategies for Managing Risks and Moving Deals Forward

July 31, 2024

Q & A Document

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1. What defines a release? Does use = release in a fire-fighting situation?
CERCLA section 101(22) defines "release" as any "...spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping, or disposing into the environment (including the abandonment or discarding of barrels, containers, and other closed receptacles containing any hazardous substance or pollutant or contaminant)..."

2. Looking into your crystal ball- how could Loper Bright affect the CERCLA HS designation? Is there enough ambiguity there for this designation to be vulnerable to legal challenges?
Three parties have challenged the rulemaking, so it is possible for it to be overturned. I have not completed the analysis, but it is certain that if there is any ambiguity, the Loper Bright ruling will be used in the argument, and push the Court to analyze this without the historic discretion we are all used to.

3. Do you have a take on the recent announcement by EPA to delay the designation of the seven additional PFAS and "categories of PFAS" as CERCLA HSs?
My current thinking is that EPA has decided to visit the potential designation of other PFAS through other laws. EPA is currently looking at those same additional 7 PFAS through the RCRA pathway, which could bring them under the definition of a CERCLA hazardous substance.

4. Does a professional engineer have to sign the report?
I believe the term of art as defined in the ASTM is an "environmental professional".

5. Does a BFPP protect against 3rd party liability; i.e., adjacent landowner lawsuits? Or, just state/fed regulatory enforcement?
The land owner liabilty exemptions can be used in third party suits as defenses. This is also an area where environmental insurance can help. Most policies will give some level of coverage for 3rd party liability.

6. For Dana's "Due Diligence Practice" slide, what is the risk of considering more than just PFOA/PFOS as potential RECS instead of a BER.
The main issue/risk is what is defined as a REC under ASTM. That said, clients should want to consider non-HS PFAS risks if they might be material.

7. Isn't addressing PFOA/PFOS as in scope hazardous substances and other PFAS as BER really a difference without a distinction, in practical terms
PFOA/POFS are an ASTM in-scope item and subject to REC detemination. Non-scope items are evaluated as an additional service and a BER.

8. What are the implications of recent petition by US Chamber of Commerce within the context of recent Chevron decision by US Supreme Court?
See answer in question 2.

9. Just trying to see how much this impacts retail properties. As an example, an REI store with that use over 20-years. The store would sell Gor Tex clothing and completed ski waxing. I'm sure there are 20-30 other products with PFOS, like sun screen, packaging,... Is this a REC?

We would not consider consumer packaged products containing PFAS to be a likely issue in that setting. We have seen environmental insurance claims where an allegation was made that a store contributed to some level of on site contamination. Insurance will protect against these allegations. Another scenario we run into all the time in the insurance world is when a tenant vacates the property and leaves items that must be disposed of with special care. This is an illicit abandonment claim and frequent in the industry.

10. How do dry cleaners fare under the Enforcement Discretion and Settlement Policy? There operations may be causing PFAS releases, but PFAS are not used in their process, they are in the clothes.

Operators can certainly petition for relief, but there is no guarantee.

11. So called PFAS databases used by EDR and others are full of false positive non-sites (e.g., broad industry NSIC categories) - doesn't using this create false business risks?

The regulatory database information is but one data point when considering PFAS risks. The data, its source and curation needs to be understood to know how much weight it deserves in your weight of evidence approach.

12. I understand why PFAS are a potential concern at car washes, but, in your opinion, are PFAS a concern at auto repair facilities? If so, why?

Generally, auto repair facilities would not have the same PFAS related material use and or throughput as a car wash. That said, do make sure you evaluate the site for other PFAS risks we discussed.

13. How do CERCLA liability protections apply at the state level, where a state agency leads enforcement of investigation and cleanup?

Several states have their own liability exemptions that are similar to or even can mirror CERCLA exemptions. A party would start there (i.e. looking at the state exemptions and liability construct). If there is no liability exemption, we frequently make the CERCLA case anyway to mitigate liability. In those instances, states frequently provide releases of liability through voluntary cleanup pograms instead. Hopefully the lawyers are advising on the state law component when evaluating the deal.

14. So then fighting a fire could require spill reporting because a reportable quantity was released by "pumping, pouring, discharging"?

I don't believe there is a specific federal statutory exemption for fire fighting. I would suggest that this issue be reviewed on a case by case basis because release reporting rules are frequently dependent upon other factors. It's also important to remember that AFFF foam isnt regularly used in fire fighting. Foam is generally only deployed when there is a flamable liquid present in a significant volume.

15. When reviewing SDS materials, how will liability regarding proprietary information be determined?
SDSs can be generally limited in their disclosure of PFAS for that very reason and should be used primarily as an adjunct to other paths of inquiry.

16. Are single-family septic systems considered to be a REC with no known uses of PFAS on or near the property?
Apply REC logic to findings and make a weight of evidence argument as to whether there is the likely presence of a release of HS/PP.

17. Are hazardous waste landfills / facilities ready for receiving PFAS impacted soils?
There are several landfills in the United States that accept PFAS related wastes based upon

18. Are there limits established for surface water quality? i.e ppm/ppb?
EPA has issued guidance. Check with the authorized state as the approach and limits can vary.

19. Does diffuse anthropogenic pollution such as PFAS constitute a CERCLA release when no specific source is identified?
The regulatory framework for potentially addressing some PFAS as an anthropogenic background is in early days. Much more will be known/determined as data becomes available.

20. Are Environmental Consultants and Engineers considered "Contractors"?
Yes, in most cases they are and should have a CPL & Profesional Liability policy. These two coverages can be combined.

21. Can you expand on the risk of PFAS at car washes, given that these facilities typically use closed loop recycling systems? Are there any resources available that have evaluated how prevalent PFAS is identified at car washes?
Car washes were spefically called out by EPA as an potentially affected industry in the final rule. REC evaluation logic should be followed in making a weight of evidence argument as to whether a PFAS finding represents a likely presence of release. Like many things PFAS related much more will be known regarding this risk as more data becomes available.

22. With regards to recommending a receptor survey, would the results of the receptor survey impact whether the Phase II is performed for a PFAS REC (e.g. no receptors, low risk, so no sampling)? Or would it just reduce the necessary scope?
A receptor survey which indicates potential downgradient drinking water supplies downgradient, might suggest you.

23. How do you manage risk for sites with known PFAS contamination but limited regulatory standards? What happens when regulations are promulgated for additional PFAS compounds not originally evaluated?
Insurance may be an option depending on the levels of contamination and potential exposures.

24. General comment: it may be worthwhile to consider the potential CERCLA risk where not only moving soil in a redevelopment but also where infiltrating stormwater may exacerbate the spread of existing groundwater impacts or introduce PFAS-impacted stormwater into the subsurface.
Surface water/sediment transport is one of the migration routes which can result in a likely release of PFAS to sites receiving such discharges.

25. How long does it take a FOIA request to get a response?
Depending upon the jurisdiction: 1 to 8+ weeks (or never).

26. As it relates to the REI scenerio. What about building demo/hazmat survey.
Any building hazmat and residual process chemicals should be properly characterized and managed, including any PFAS containing materials from the wax operation.

27. My understand of the liability protection provided by a Phase I ESA is that the owner's liability is limited if they did a Phase I and it did not find any REC's then the owner would have limited liability because they did their AAI. But I thought I heard you all discussing liability protection for owners where PFAS were a REC in the Phase I but they move forward with development. I am confused. Can you calrify what liability protections are provided when REC's are identified but they move forward with development anyway?
The liability protection afforded to parties that complete a Phase I that identified contamination is the bona fide prospective purchaser protection. That party will need to implement the continuing obligations, such as taking reasonable steps with respect to contamination identified. Development sites should also consider purchasing a site pollution policy as well as an Owner Controlled CPL to backstop

28. What's CPL ?
Contractor Pollution Liability Policy

29. Are there files we need to request as part of this database entry?
ERIS provides the PFAS databases as part of their standard reporting package.

30. To Meaghan's point, only now that PFOA/PFOS are subject to CERCLA would an ASTM compliant Phase I be required to address PFAS as REC, but I believe a Phase I prepared prior to the change in CERCLA status for PFOA/PFOS would still have BFPP against a PFAS claim, correct? I guess what I am saying is that while the liability for PFAS is joint and several as long as the Phase I was compliant at time of purchase the BFPP should protect the site owner in a redevelopment scenario from a PFAS lawsuit if it is clearly from a previous site use.
This is a question that we will undoubtedly see argued before a court of law in the next few years. Since Superfund is retroactive, it is anticipated that arguments will be made on both sides - i.e. either (a) the party would have the BFPP for any issue evaluted in the Phase I, but not those that weren't evaluated; and (b) the party would have the innocent land owner defense for anything not previously identified as long as the Phase I was completed. Additional concerns on a site should be addressed with insurance.

31. Given the pervasive presence of PFAS, what criteria is ASTM looking to incorporate/consider for Phase I ESAs to evaluate PFAS as being a REC?
The pre-ballot for the ASTM E1527 update will be in 2025. PFAS and generative AI/ ML will likely be two significant topics of update.

32. Given the ubiquity of PFAS, what current or historical sources and activities should Phase I ESA investigators focus on for reporting?
Reference the US EPAs published NAICS listing of industries potentially affected by PFAS.

33. How / when does this impact ASTM reports?
As noted, two PFAS compounds, PFOA and PFOS, have been added to the CERCLA hazardous substance list effective July 8, 2024 and therefore must be considered within the scope of the ASTM E1527-21 Phase I ESA standard for REC determinations.

34. How are you incorporating PFAS into Phase I ESAs?
Terracon has incorporated PFAS into its scope and EPs apply a REC logic/ weight of evidence approach to PFAS evaluations.

35. How can we best address PFAS/PFOA in Phase I ESA's moving forward when there is so little regulatory information/databases/maps on documented release sites?
Apply REC logic and as you have with other HSs (understanding the key characteristics of PFAS) apply a weight of evidence argument using available data and EP experience as called out in the standard. In the near term, one might expect more significant data gaps and conservative findings until more data becomes available.

36. How do you efficiently make use of your time during a Phase I ESA to quickly identify PFAS and PFOS substances / industries without getting caught up in needless details? Can you provide a list of industries that we need to pay closer attention to?
See above. Refer to EPAs affected industries NAICS list and recognize manufactures, industrial users, airports and other AFFF users, landfills, WWTPs and biosolid management are considered some of the higher risk sites.

37. How do you handle potential PFAS/PFOA which may be present at non-traditional locations?
Apply REC logic and as you have with other HSs (understanding the key characteristics of PFAS) apply a weight of evidence argument using the approach, data and EP experience as called out in the standard.

38. How is historic land application of municipal sewage sludge treated - now a REC?
As noted biosolid application sites are at higher risk of PFAS concern. As with any finding, apply REC logic and as you should with other HSs (understanding the key characteristics of PFAS) apply a weight of evidence argument using available data and EP experience and approach as called out in the standard to ascertain whether a REC exists.

39. How will designation of PFAS/PFOA as hazardous substances affect influent and effluent streams, water, waste, and byproduct? How can environmental professionals parse the requirements of the new regulations into powerful key points for the C Suite?
Companies will want to understand where PFOA and PFOS are handled, stored and used in the processes as well as how PFOS and PFOA containing waste streams are being managed and disposed. Releases of PFOA and PFOS can result in release reporting requirements and potential CERLCA liability risks.

40. Is ASTM considering any updates to the Phase I standards based on PFAS?
PFAS will be a topic of discussion as we begin committee work for the E1527-29 update.

41. I am interested in the panel's opinions regarding the impacts, if any, of PFAS atmospheric deposition on Phase I ESAs.
Air deposition from nearby PFAS industrial sources which have particalized or windblown biosolid material may represent migration pathways and potential concern for adjoining/surrounding properties, depending upon the source type, volume, duration and concentration.

42. I'd love to discuss thoughtful sustainability choices around environmentally conscious products that can replace those that use PFAS. This would be for new builds, renovations, adaptive reuse, and those currently operating.
This is the direction that visibility on the issues surrounding PFAS has been driving industry. Alternatives are being developed for many of these compounds, though the sheer volume of compunds and scope of their use.

43. Please explain the transport mechanisms for PFAS. Are PFAS soil impacts at an adjacent site a concern, or are groundwater migration impacts the most concerning? Are GW impacts a concern since ubiquitous?
PFAS discharges can be transported via air deposition, stormwater discharges, soil impacts mobilized into stormwater/ groundwater and groundwater migration. Migrating groundwater impacts are a concern in particular with downgradient potable sources.

44. What is the legality of reopening or resampling sites for PFAS which have not been sampled for in the past?
This will be a case by case analysis governed by the consent order, which outlines when a scenario can be reopened, or other similar document depending on the lead agency (i.e. EPA or state) and program (Superfund, brownfield, or otehrwise). Based on observations, it appears that many of these governing document allow for an argumetn for reopening in the case of new contaminants. This is one where we have already seen some concern from environmental insurance clients. Many are now pursuing environmental insurance because it does provide re-opener coverage. This coverage could apply to contaminants that were previously remediated to acceptable levels and now the levels have changes, or new contaminants identified during the course of the investigation.

45. Risk "management" is crucial. Line out important language in both contracts & policies such that roles and responsibilities are clear between "owner" & "operator". I say thing from 40 years in loss control, incidents reduction, pollution prevention & claims/litigation.
Agree. You can take it one step further by wrapping an insurance policy around the contracts and language

46. What industries handled regulated PFAS? In what ways were they handled?
Please reference the US EPAs NAICS list of potentially affected industries. The industry dictates what, where, how and at what volume these materials were handled.

47. What are some examples of things to now be on the look-out for when completing a Phase I with regards to PFAS?
From a regulatory perspective, look for sites with EPA and state regulatory database listings and those on EPAs potentially affected industries NAICS list. Site recon and key site interview, should focus on PFAS uses including fire response, industrial uses, and waste management including biosolids, wastewater discharges, potential air deposition and surface water pathways.

48. What is the groups experience testing for and cleaning up PFAS sites? Typical dig and dump operation or specialized approach to removal? What about banks existing portfolio of real estate loans, this stuff is everywhere (and link in existing loans).
Exavation and landfill disposal is one traditional way to address soil related PFAS impacts. Insitu and exsitu remedial technologies are being developed to better address PFAS releases. Work on this will be a process of continuous improvement and developing appropriate cost to cure for PFAS related releases will evolve accordingly.

49. What is the industry standard for what types of uses are indicative of a "likely" PFAS "release" for purposes of a Phase I? Some uses (airport fire fighting training areas, etc.) are obvious, others (car washes, etc.) not so obvious.

The industry standard remains an EPs application of REC logic and weight of evidence review of findings in determination of the presence, likely presence of a release of hazardous substances. Like any such evaluations there will examples of readily obvious and more nuanced findings.

50. What is the largest risk regarding PFAS liability for commercial real estate?

A significant source onsite with downgradient potable water sources comes to mind. I'm not sure you would call this a risk, but a concern in many commercial real estate circles is what the banks will do when a Phase I identifies the potential presence of PFAS and then they request a Phase II before they will do the deal. This is one where many commercial real estate owners are already seeking lender liability coverage to provide protections for the bank without doing a Phase II.

51. What PFAS concentrations will trigger a "contaminated site" designation given the almost universal absence of soil criteria for PFAS? In Michigan, what PFAS concentrations will allow a new owner to file a Baseline Environmental Assessment (BEA)?

PFAS can impact BEA determinations and due care obligations. Check in with the Michigan EGLE and the PFAS Action Response Team on most current guidance relative to PFAS considerations for BEAs.

52. What, if any, specific language should be included in Phase I ESA's related to PFAS?

As discussed, PFOA and PFOS are now a CERCLA hazardous substance within the scope of ASTM E1527-21 and any evalaution should include review of PFOA and PFOS. One should add language to the proposal and report noting that is the case to inform clients of the recent change.

53. When conducting a Phase I ESA, what should the assessor look for to make an assessment as to whether or not PFAS is a REC at the site?

Apply REC logic and as you have with other HSs (understanding the key characteristics of PFAS) apply a weight of evidence argument using available data and EP experience as called out in the standard.

54. When is a Phase II warranted?

Like any finding/determination in due diligence, the need and scope for testing depends upon the clients objectives. That said, note PFAS investigations are typically more involved from a scope, cost and timing perspective so those aspects need to be accounted for in the deal.

55. When should potential RPs start looking at on site/off site treatment options and potentially do some pilot testing?

If there is an anticipation of future action generating waste materials with PFAS impacts, it is important to affirm what management and disposal options are available to properly weigh the cost/benefit of the options available.

56. Is there a general overview on EPA's final rule addressing PFOA and PFOS as hazardous substances and industry recommendations moving forward?
Holland & Knight's summary of the final rule and recommendations can be accessed here.

57. Will EPA and state regulatory agencies prioritize enforcement of some industrial sectors (textiles, chemical) over others and treat impacts associated with municipal entities (firefighter training facilities, airports) less stringently?
Holland & Knight's summary of EPA's enforcement discretion outlines what EPA said it will prioritize and deprioritize.
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