

# WELCOME

THE WEBINAR WILL BEGIN SOON



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

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

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





## POWER SUITE



## SCRIVA

Do. Diligence.  
**Anywhere.**  
Field to Office



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

**Wednesday, July 31, 2024**

## Presented by:



**Meaghan Colligan**

Partner, Holland & Knight LLP



**Dana Wagner**

Director of Environmental Due Diligence Services / Senior Principal & Vice President, Terracon



**Jared Dubrowsky**

Senior Vice President, NFP



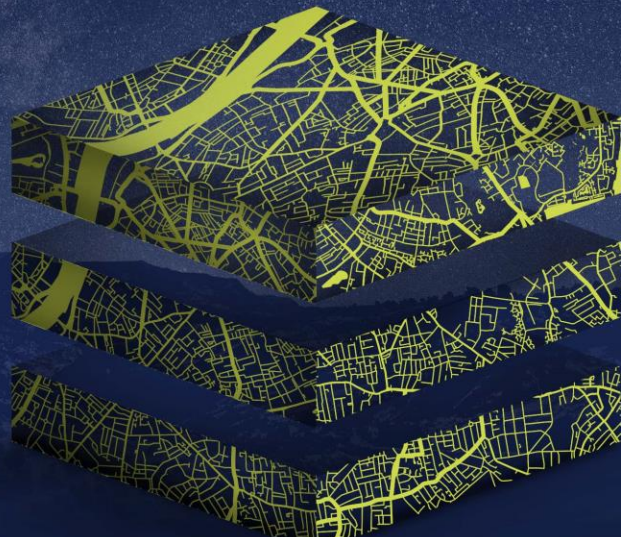
**Scott Davis** Host

Senior Vice President, Industry Engagement, ERIS



# Legal Framework

Meaghan Colligan, Partner, Holland & Knight



# The Rule Making

- On April 19, 2024, the U.S. Environmental Protection Agency (EPA) issued its Final Rule listing perfluorooctanoic acid (PFOA) and perfluorooctanesulfonic acid (PFOS), including their salts and structural isomers, as hazardous substances under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA or Superfund).
- It became effective on July 8, 2024.



# The Ramifications

- PFOA and PFOS releases of 1 pound or more in a 24-hour period must be reported.
- The EPA may include an evaluation of PFOA and PFOS in its five-year review of sites included on the National Priority List (Superfund sites).
- The EPA may order investigations and cleanups of PFOA and PFOS and recover such costs from Potentially Responsible Parties (PRPs).
- Private parties that conduct cleanups consistent with the National Contingency Plan may seek to recover cleanup costs associated with PFOA and PFOS from other PRPs and also seek contribution from other PRPs for costs paid.
- Federal entities that transfer or sell property must provide notice about the storage, release or disposal of PFOA or PFOS on the property, as well as guarantee that any PFOA or PFOS contamination has been cleaned up or, if needed, that additional cleanup will occur in the future.
- The U.S. Department of Transportation (DOT) will be required to regulate PFOA and PFOS as hazardous materials under the Hazardous Materials Transportation Act.

# CERCLA Liability

- **Under CERCLA, Potentially Responsible Parties (PRPs) include:**
  - current facility owners and operators,
  - past facility owners and operators at the time PFOA and PFOS were disposed of,
  - parties that arranged for the disposal or transport of PFOA and PFOS,
  - transporters that selected the disposal site for the PFOA and PFOS.
- **Superfund liability is retroactive, strict and severe.**
  - PRP can be held liable for PFOA and PFOS releases that occurred before the Final Rule was issued.
  - PRP cannot claim that it was negligent or operating in accordance with industry standards.
  - Any amount of waste identified at a contaminated site that was sent by a party triggers that party's liability.
  - Any one PRP may be held liable for the entire cleanup of the site (when the harm caused by multiple parties cannot be separated).

# Liability Defenses

- Innocent parties can achieve exemptions from this liability if they take certain steps prior to and after purchasing contaminated properties
  - Phase I
  - Continuing obligations
- Landowner Liability Protections
  - Bonafide Prospective Purchaser (BFPP)
  - Contiguous Property Owners (CPOs)
  - Innocent landowners (ILOs)

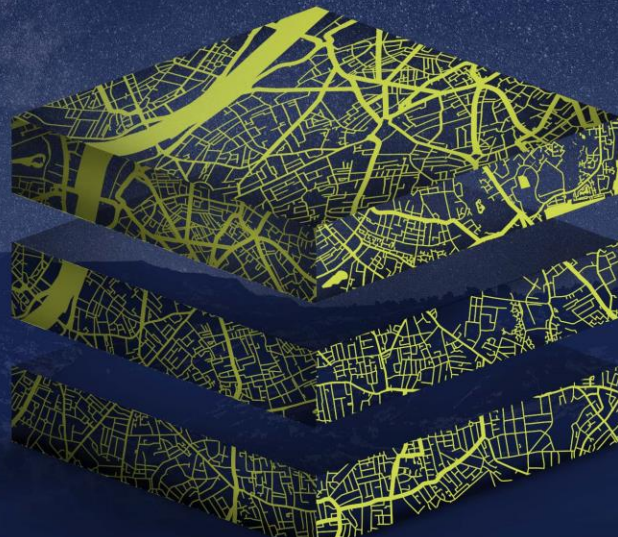


# EPA's Enforcement Discretion

- EPA issued its [PFAS Enforcement Discretion and Settlement Policy](#) on the same day as the Final Rule.
- EPA intends to focus on entities who "significantly contributed" to the release of PFAS contamination into the environment
  - PFAS manufacturers
  - Users of PFAS in manufacturing processes
  - Federal facilities
  - Industrial parties
- The EPA indicates that, subject to limitations, it does not intend to pursue entities where equitable factors do not support seeking response actions or costs under CERCLA, including:
  - community water systems and publicly owned treatment works (POTWs)
  - municipal separate storm sewer systems (MS4s)
  - publicly owned/operated municipal solid waste landfills
  - publicly owned airports and local fire departments
  - farms where biosolids are applied to the land

# Technical Considerations

Dana Wagner, Director, Terracon Consultants, Inc.





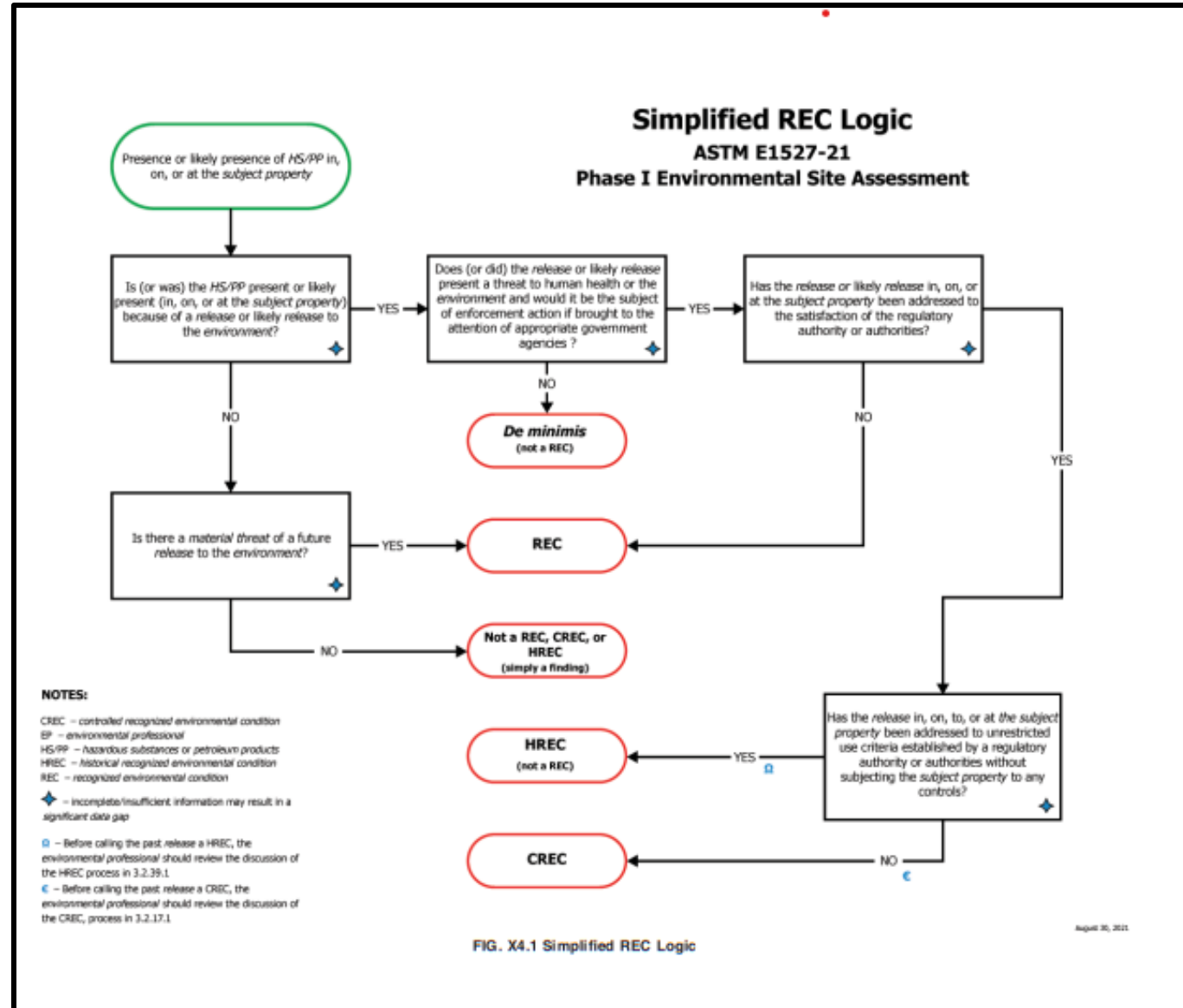
# Due Diligence Practice

- ASTM E1527-21 included PFAS as ASTM Non-Scope item and Additional Service.
- Discussion of PFAS as an emerging contaminant in the ESA proposal. Client “Opt-in” if they want it included.
- Note as Business Environmental Risk, if PFAS concern.
- Effective July 8, PFOS and PFOA concerns are to be addressed with the scope of ASTM E1527.
- Other PFAS compounds may still be considered a BER.
- Use REC-logic approach and establish site-specific risks accounting for use factors and state regulatory framework.





REC Logic=PFAS  
REC Logic





# Due Diligence: PFAS Key Characteristics

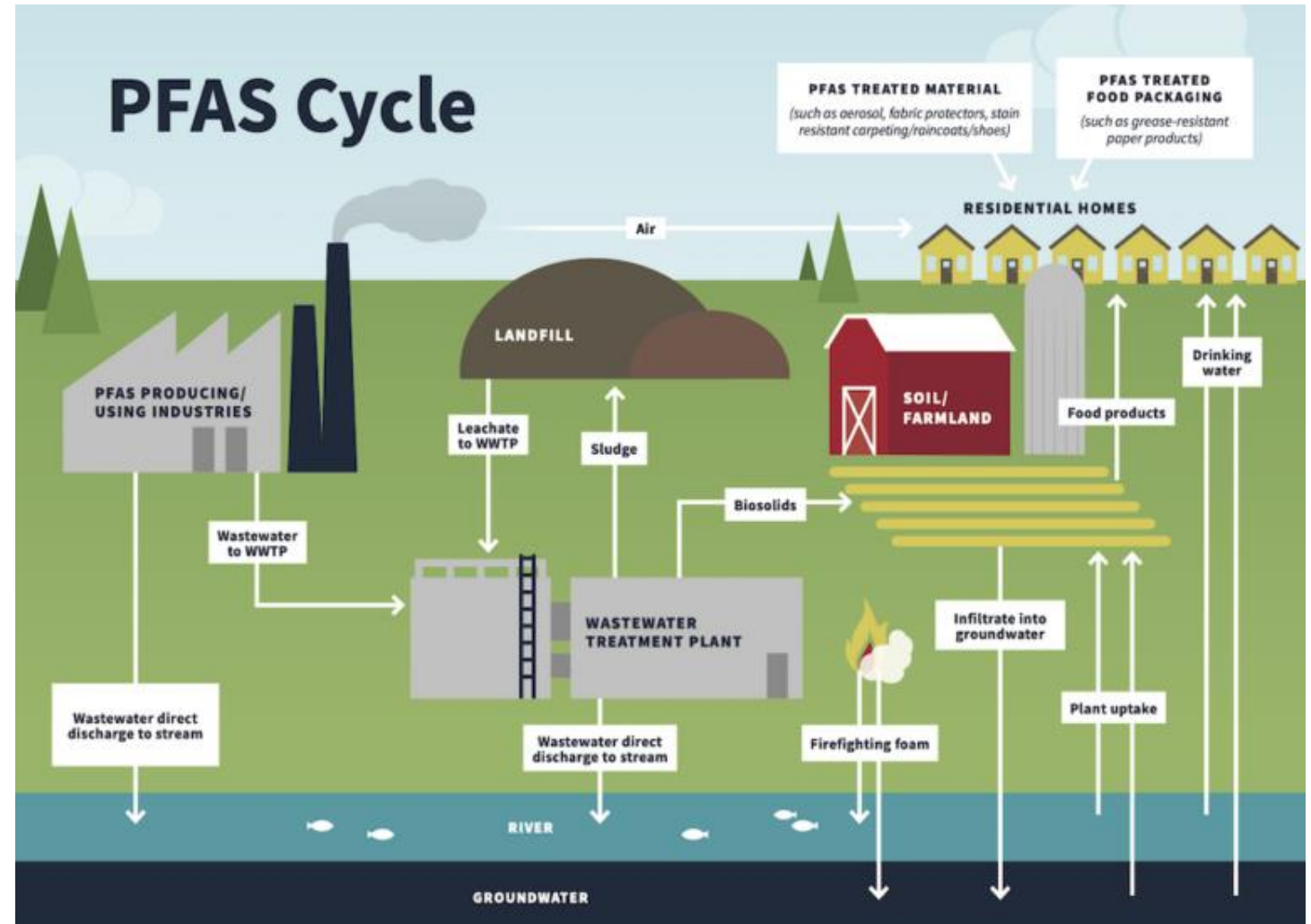
- Physical Setting: Critical
- Soil: Readily mobile
- Air emissions: Deposited over area, then entrained
- Surface water: Conveyance into drainage features
- Groundwater: Does not readily degrade, plume length can be multiple of typical COCs
- Regulatory Limits: Low and getting lower (MCL=federally enforceable standard, state standards)
- Ubiquity: Found in multiple settings, hard to pin-point source



# PFAS Pathways

## Conduits/Migration Pathways

- Surface disposal (leaks, spills)
- Subsurface conduits (tanks, OWS, pits, sumps, drains)
- Wastewater discharges (wastewater lines, septic systems, leach fields)
- Stormwater discharges (swales, ditches, ponds, municipal systems)
- Air deposition (vents/stacks/windblown)
- Groundwater
- Vapor



Source: ITRC





# Due Diligence: PFAS Facilities

## Facilities with Higher Likelihood of PFAS Concerns

- PFAS or PFAS Containing Chemical Manufacturing
- Onsite AFFF use (Public/Private Airports, Hangars, Refinery/Bulk Facilities, Fire stations, Fire suppressions systems, Fire training areas)
- Past Fire Responses where AFFF used
- Electroplating Operations (primarily hard chrome)
- Landfills/Waste Disposal
- Wastewater Treatment Plants- biosolid
- Agricultural sites with storage/deposition of WWTP biosolids

## Sites with Moderate to Higher Likelihood of PFAS Concerns

- Surficial applications for textiles, apparel, carpet, leather or paper
- Coatings manufacturing/Plastic and rubber production uses
- Heavy Equipment/Ordnance/Electronics manufacturing
- Car washes
- Dry-cleaning/Laundries
- Other Facilities with Industrial/Commercial PFAS Uses (PFAS NAICS codes)



# Regulatory Records Review

- 3<sup>rd</sup> Party Database Listings
  - PFAS-related Databases
  - NAICS Codes: review for onsite and adjoining facilities using NAICS PFAS List and other regulatory sources
  - Higher risk facility types: Airports, DOD facilities, Landfills, WWTP, Large industrial/electroplating
- EPA's PFAS Analytic Tool
- FOIA: Fire Department Records
  - Use of AFFF
  - Record of Fire Responses (actual fires)



# The PFAS Data Landscape

- Federal level PFAS databases
- State level PFAS databases in 37 states (highly variable)
  - firefighter training sites
  - survey responses
  - groundwater sampling locations
  - potential PFAS handlers based on NAICS code
- Information reported varies
- Other data sources



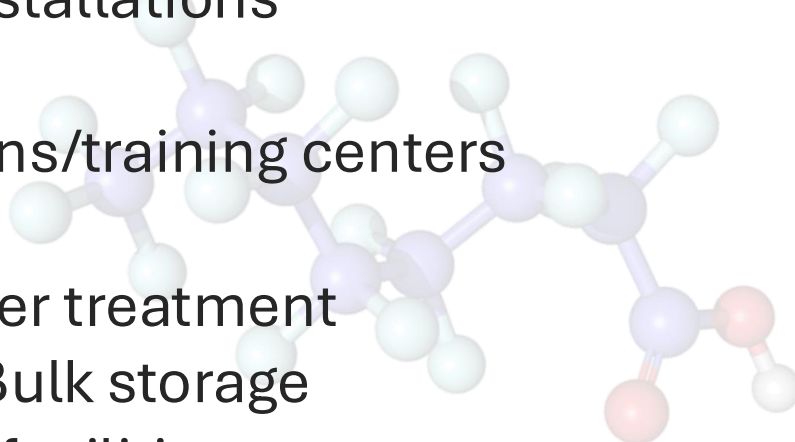


# Historical Review

## Site, Adjoining and Surrounding:

### Aerial photographs/ Fire Insurance Maps/ Topo/ CD

- Military installations
- Airports
- Fire stations/training centers
- Landfills
- Wastewater treatment
- Refinery/Bulk storage
- Industrial facilities
- Dry-cleaners/Car washes
- Powerplants/Stacks/Vents



Confirm database info, as needed.



# Site Reconnaissance

- Site Recon/PFAS Questionnaire
- Key Site Manager Interview
  - NAICS Code for operating business? Confirm with other sources.
  - Are they currently using PFAS-containing materials?
  - Are they aware of PFAS being historically used at the site?
  - Fires/Water supply/Septic systems?
  - Waste stream review.
  - SDS review, as needed.
- Observations of storage, use or release of PFAS containing materials.



# Is a Phase II necessary?

- Phase I ESA is not definitive. It should be viewed as part of the Site Risk Profile, along with other considerations.
- Phase II should not be automatic.
- Broader analysis is required to refine the Risk Profile- what is the clients intention?
  - Sell/Purchase/Lease/Finance/Refinance
- Phase II for baselining conditions, as necessary.
- Understand possible onsite genesis and extent and magnitude.
- PFAS-related investigation: Experience, SOPs, Reproducibility.



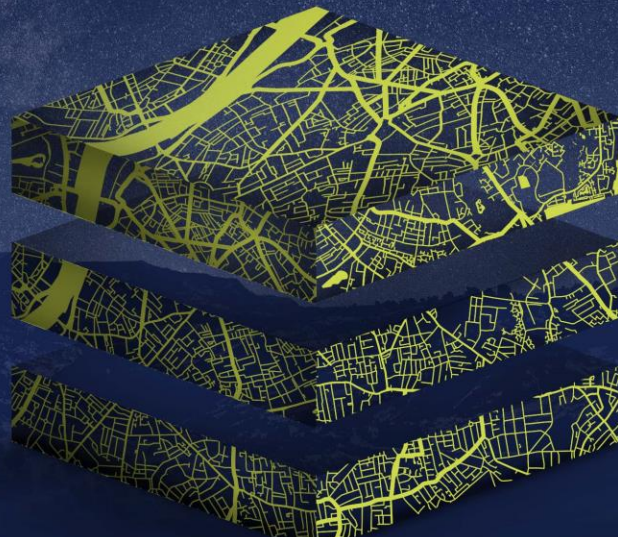
# How far do you take an investigation?

- Align with deal-requirements.
- There will be scenarios that may prescribe additional characterization:
  - Voluntary Cleanup Program? That will require adequate site characterization as well as other requirements.
  - Expansion and Redevelopment? If so, consider characterization, management and disposal of PFAS-impacted materials and associated costs.
  - Off-site characterization- challenging.
- Potential impact to drinking water sources – significantly escalates the risk and liability analysis.



# Insurance Considerations

Jared Dubrowsky, Senior Vice President,  
NFP Environmental Risk and Insurance Practice



# History of Environmental Insurance

Environmental liability insurance has existed as a separate insurance coverage since the late 1980s in the US.

Created to address pollution exclusions added to general liability

Why does any of this matter ?

- Because policies before 1986 may be a source of coverage for PFAS-related claims

# Types of Environmental Insurance Policies for PFAS Coverage



Contractors  
Pollution Liability



Site Pollution Liability



Lender Liability

# Contractors Pollution Liability Policy

## **Provides coverage for:**

- Remediation
- Bodily Injury
- Property Damage
- Legal Defense
- Transportation
- Non-Owned Disposal Sites
- Natural Resource
- Etc.

Covers pollution conditions created by or exacerbated by contractors “work”

Covers third party bodily injury, property damage, clean up costs and defense costs

*Can include coverage for transported cargo, non-owned disposal site liability, and emergency response costs*



# Site Pollution

## **Provides coverage for:**

- Remediation
- Bodily Injury
- Property Damage
- Legal Defense
- Transportation
- Non-Owned Disposal Sites
- Natural Resource
- Etc.

Site pollution policies provides coverage for pre-existing and new conditions.

Unknown conditions that have been present on the site

Re-opener coverage (Brownfields / NFA, etc.)

Claims from former employees

New Conditions

Illicit Abandonment

Operational exposures

# Lender Liability Policy

Designed to protect commercial real estate lenders from financial loss in the event of property owners' default and the existence of a pollution condition at the insured site.

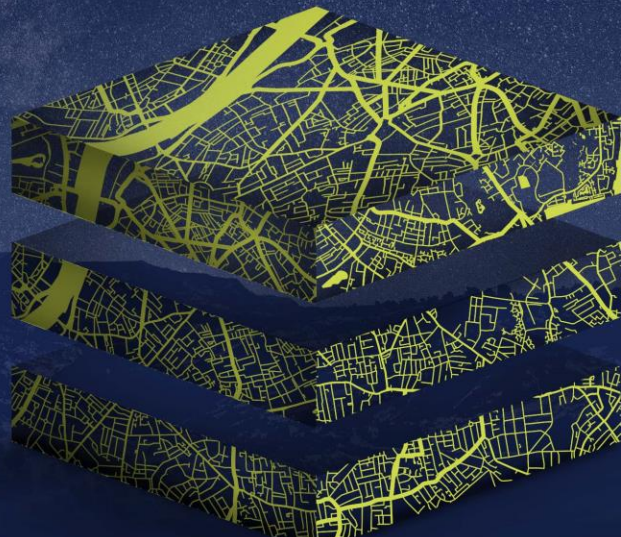
Can be used in lieu of a Phase II

Only provides protection for the lender

Pays the lesser of the estimated cost of remediation or the remaining balance of the loan

Underwritten off the borrowers' financials

# Risk Scenarios



# PFAS Risk Scenario

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**Site:** Former Air Force base hangar and fire station.

**Seller:** Local Economic Development Authority

**Buyer:** Real Estate Investment Trust

**Proposed Use:** Redevelopment as a data center.

**Physical setting:** Shallow groundwater, silty-sand and nearby creek. Site on Municipal water supply.

**Regulatory/Records Review:** Site appeared on the PFAS facility database. No past site investigations.

**Historical Review:** Evidence of hangar and fire station from 1950 to 1980.

**Site Recon:** Evidence of fire suppression piping in hangar and floor drains with oil/water separator in fire station.

**Findings:** REC related to past PFAS use.

**Recommendation:** Receptor survey, subject to findings perform Phase II of subsurface features and stormwater drainage areas.

**Phase II Findings:** Soil and shallow groundwater impacts. GW impacts near MCLs for PFOS and PFOA.



# Now let's consider other PFAS...

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## **Non-CERCLA PFAS: PFNA and PFBS**

- Selected State regulated hazardous substances.
- If detected individually and in absence of PFOA and PFOS, would arguably be addressed as a non-scope item and BER.
- Still follow thread of release and risk management.
- PFOA and PFOS findings would be considered under ASTM and if there is the presence or likely presence of a release it would be addressed as a REC.
- Water Supply Concerns

# How about biosolids?

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**Review:** Interviews, FOIA, Historic records, Visual evidence

**Pathways:** Infiltration-GW Migration, Run-off, Wind-blown

# Solar development?

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**Brownfield Tax Credits:** Evidence of releases

**Liability Protections:** Federal, state, continuing obligations

# What if the site could have been C&D landfill?

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**Review:** Boundaries, Operating history,  
Former personnel

**Liability concerns:** Superfund/PRPs

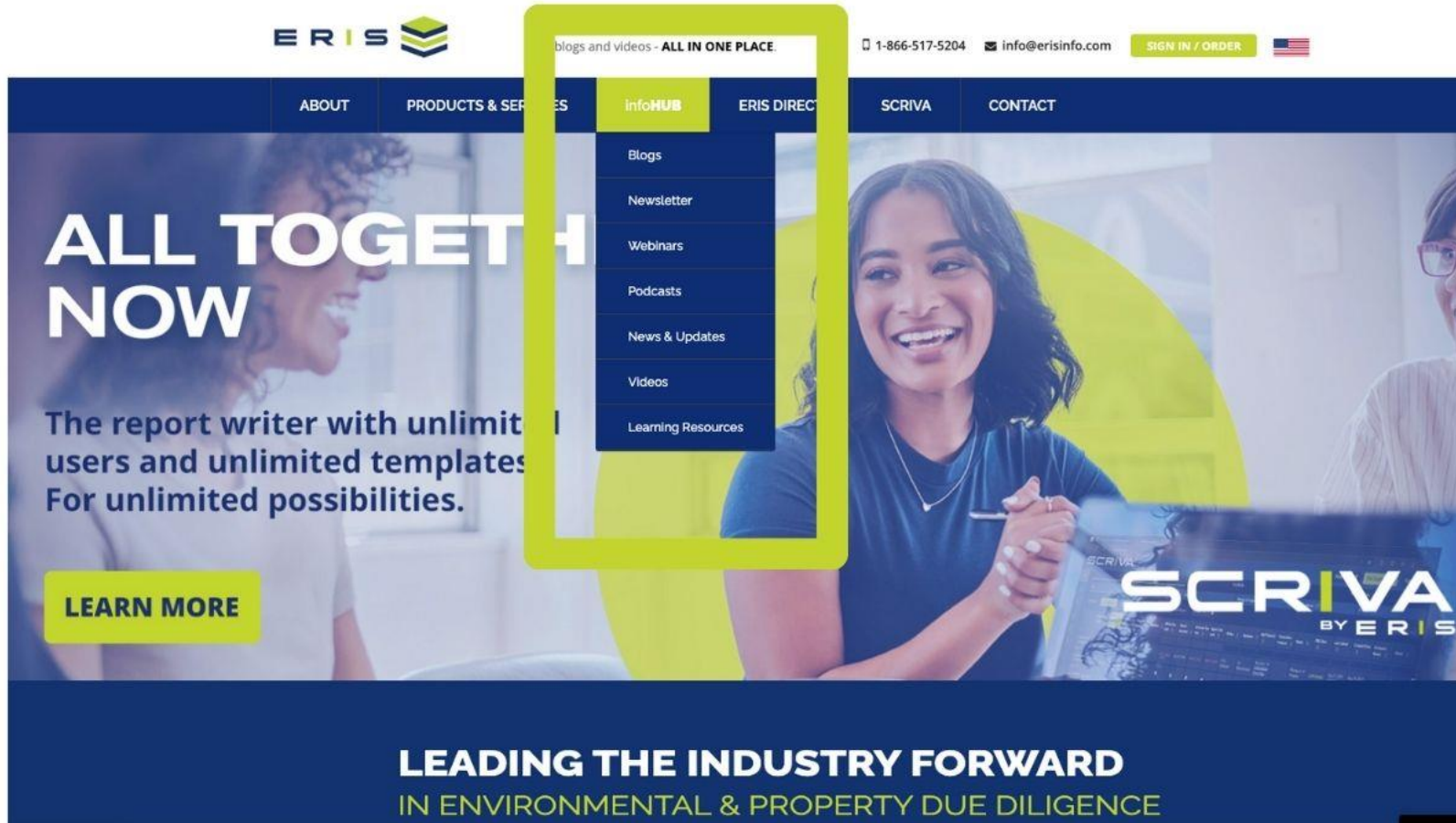
**Insurance:** Contractors/subcontractor  
insurance

# QUESTIONS?



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# To learn more

## **Dana Wagner**

Director of Environmental Due  
Diligence Services & Sr  
Principal and VP, Terracon  
[dana.wagner@terracon.com](mailto:dana.wagner@terracon.com)

## **Jared Dubrowsky**

Senior Vice President, NFP  
[jared.dubrowsky@nfp.com](mailto:jared.dubrowsky@nfp.com)

## **Meaghan Colligan**

Partner, Holland & Knight  
[meaghan.colligan@hklaw.com](mailto:meaghan.colligan@hklaw.com)

## **Scott Davis**

SVP, Industry Engagement,  
ERIS  
[sdavis@erisinfo.com](mailto:sdavis@erisinfo.com)

# THANK YOU



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