



Including PFAS in your next Phase 1 ESA - by Rachel Ataman

August 15, 2023 - Owners Developers & Managers



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Per – and polyfluoroalkyl substances (PFAS) have garnered significant attention in recent years due to their widespread presence, persistent nature and potential adverse health effects and environmental impacts. PFAS chemicals were created to make natural products more resilient to heat, water and oil and are used in numerous industrial and commercial applications including facilities that used AFFF for fire training or have class B firefighting systems, electroplating operations, car washes, plastic production or industries that use surface/fabric protectors. Unfortunately, their unique properties also lead to their resistance to degradation, causing them to accumulate in the environment and the human body, earning them the label “Forever Chemicals”.

As awareness of the potential dangers posed by PFAS continues to grow, regulatory standards surrounding these substances are rapidly evolving. Both the New York State Department of Environmental Conservation (NYSDEC) and the New Jersey Department of Environmental Protection (NJDEP) recently regulated PFAS levels in the soil and groundwater, acknowledging the significance of addressing PFAS contamination. However, the American Society for Testing Materials (ASTM) updated Phase I Environmental Site Assessment (ESA) standard, E1527-21, indicates that until a contaminant is listed as a hazardous substance under the Comprehensive Environmental Response Compensation and Liability Act (CERCLA), it is not required to be addressed in a Phase I ESA. This clarification excludes PFAS from the required scope of the Phase I ESA and “all appropriate inquiries” (AAI) requirement under CERCLA. The current exclusion of specific PFAS considerations in the Phase I ESA poses challenges for prospective property owners and lenders alike.

The Phase I ESA is a crucial process in property due diligence, providing an evaluation of potential environmental liabilities before property transactions, acquisitions or refinancing. The constantly evolving regulatory landscape introduces the possibility of acquiring a property without PFAS being a required Phase I ESA scope item and then years later attempting to sell or refinance it when PFAS is heavily regulated and part of the Phase I ESA scope. This dichotomy may lead to identifying PFAS contamination in the soil and groundwater after a property is purchased creating substantial financial and liability risks. The costs associated with investigations, remediations and potential legal liabilities can be substantial and severely impact the property’s value. Moreover, the presence of PFAS contamination may hinder property transactions and financing opportunities.

To safeguard against these risks, it is crucial for property buyers and lenders to be proactive in their due diligence efforts. Engaging qualified environmental consultants to conduct Phase I ESAs that include PFAS as an outside the scope item is essential before finalizing property transactions. The Phase I ESA should evaluate suspect PFAS sources by establishing a detailed site history including current site usage, types of chemicals used on-site and specific manufacturing applications as well as identifying potential pathways through which chemicals could enter the subsurface. It is crucial for the environmental professional to understand that while PFAS may be present throughout our environment and even in our bodies, they do not have a source on every property. And even properties that might have a source don’t necessarily have a pathway into the subsurface. In the future, a Phase I ESA could be used to document the lack of a source or pathway of PFAS into the

subsurface, thereby potentially protecting the stakeholder from future liability. If potential PFAS contamination is identified in the Phase I ESA, stakeholders can then make informed decisions and implement appropriate risk management measures prior to the purchase of the property.

Touchstone Environmental Geology, PC has performed hundreds of Phase I ESAs across multiple states including the tri-state area, Georgia and Florida. With extensive experience in the field of environmental assessments including, Phase I ESAs, Phase II ESA, NYSDEC spill site and hazardous waste site investigations we have earned a reputation for excellence in delivering comprehensive and reliable Phase I ESAs. At Touchstone Environmental Geology, PC we prioritize staying ahead of emerging environmental concerns. That is why we have proactively incorporated PFAS as an Outside of Scope item in our Phase I ESAs. We believe that addressing PFAS in the due diligence process is paramount to safeguarding our client's interests. Our recent Phase I ESAs have identified suspect PFAS contamination, empowering our clients to make well-informed and prudent decisions during their property transactions. At Touchstone Environmental Geology, PC our commitment to excellence and addressing emerging environmental challenges ensures that our clients receive the utmost support and guidance throughout their property transactions. Our dedication to environmental due diligence underlines our role as a trusted partner for all environmental consulting needs.

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