

Beyond Compliance: Addressing PFAS in Transactions and Site Remediation

Top Ten Takeaways

- 1. Consider Adding Out-of-Scope PFAS to Phase I and Phase II Investigations**

While the new ASTM standard does not require that PFAS be investigated, consider asking consultants to add PFAS to the scope of your Phase I investigations in order to have a better idea of potential PFAS concerns, particularly given that further federal regulation of PFAS is anticipated (e.g., designation of certain PFAS as CERCLA hazardous substances) and, particularly, for property located in a state that regulates PFAS as hazardous substances. If the results of your Phase I demonstrate that PFAS contamination may be likely, conduct sampling for PFAS as part of a Phase II.
- 2. Explore Historical Uses and Handling of PFAS by the Relevant Facility/Company**

In addition to considering the inclusion of PFAS as an added-scope item for Phase I (and possibly Phase II), buyers of industrial facilities and entities should inquire as to historical manufacture and use of PFAS (e.g., aqueous film forming foam (AFFF)), as well as how wastes containing PFAS chemicals were handled.
- 3. Draft Agreement Definitions to Account for PFAS and Future Regulations**

It is important to ensure transaction document definitions are appropriately tailored to maximize protection—for example, pushing to include or omit PFAS in the definition of “Hazardous Materials” and/or limiting or expanding the specific PFAS to include in that definition. Parties should also pay close attention to whether the term “Environmental Laws” is defined to include such laws as amended in the future, which will likely eventually address PFAS.
- 4. PFAS Coverage Under Representation & Warranty Insurance**

Representation and Warranty insurance is an instrument pursuant to which the accuracy of seller’s representations and warranties is insured by an insurance carrier, and this can extend to seller’s environmental representations and warranties. Policy exceptions or exclusions may apply generally or to specific deals (e.g., PFAS). It is helpful to work with counsel and insurance brokers to determine whether a policy would be beneficial and cost-effective in specific deals (i.e., typically, deals of approximately \$20mil. or more) and whether such policies would address PFAS issues in the future.
- 5. Consider PFAS Implications for Post-Closing Obligations**

For agreements with post-closing cleanup obligations, parties should be careful to define the scope of potential obligations related to PFAS and whether those obligations are limited to addressing certain contaminants or areas of a property. Parties should also consider the potential for future PFAS regulations when agreeing upon the appropriate trigger or time limitations for releasing escrow funds.



6. Who is Responsible for PFAS Contamination?

Different liability scenarios may apply and should be explored. For example, transaction documents should be reviewed to determine whether previous owner/seller is liable vs. the current owner and operator of the property. A PFAS manufacturer may also have liability, as may the property insurer under pre-absolute pollution exclusion policies.

7. How Clean is “Clean”?

Federal PFAS cleanup standards are still being developed, and state standards are varied. It is critical to understand the cleanup levels that apply in the jurisdiction where the property is located, as well as to be aware of upcoming or anticipated changes to those levels. It may also be helpful to identify whether risk-based cleanup options may be available under state voluntary cleanup programs.

8. Who Must Be Notified of PFAS Contamination?

State reporting requirements will apply with regard to reportable quantities (typically in parts per trillion), when to report, and to whom to report. It is important to understand and be prepared for such requirements, as they often carry substantial penalties for non-compliance.

9. Effective Management of Off-Site Contamination

If off-site contamination is found, there will often be multiple adjacent properties likely involved. If private water wells are impacted, community engagement and effective communications become increasingly important to ensure affected communities feel informed about and are comfortable with the remediation process. Those working on the site (e.g., collecting samples or installing treatment systems on individual wells) may be well-positioned to develop positive community relations, and in some cases, public relations firms may be necessary.

10. PFAS Remediation Options

Certain remedial options (e.g., biodegradation, air sparging, chemical oxidation) used in site remediation for other contaminants, such as petroleum or chlorinated solvents, are not effective because of the characteristics of PFAS. Therefore, groundwater pump-and-treat (using granular activated carbon) and soil excavation and off-site disposal are the current methods typically used in remediating PFAS contamination. Other technologies are being developed and/or tested for larger scale projects (e.g., incineration). For off-site contamination of private drinking water wells, extension of an existing municipal water line to the affected area may be the best long-term solution.

Day 1 Presenters:



Christopher B. Clare

Christopher B. Clare advises clients on environmental litigation, regulatory compliance matters, and business transactions involving environmental issues.

+1 (202) 572-8671

cclare@ClarkHill.com



Loukas P. Kalliantasis

Loukas P. Kalliantasis advises and counsels clients with respect to a wide range of business matters, including mergers and acquisitions, commercial transactions, and general corporate representation.

+1 (248) 988-5859

lkalliantasis@clarkhill.com

Day 2 Presenters:



Joseph R. Brendel

Joseph R. Brendel assists clients in all aspects of environmental law including, but not limited to, regulatory compliance counseling, administrative enforcement actions, transactional matters, and site remediations.

+1 (412) 394-2373

jbrendel@clarkhill.com



Jeffrey L. Arps, LSP

Jeffrey L. Arps is a Vice President at Tighe & Bond with 30 years of experience in the site assessment and remediation field. He recently served as the only Licensed Site Professional on the Massachusetts PFAS Interagency Task Force.

+1 (413) 572-3227

JLArps@tighebond.com

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Recordings of both webinars [can be viewed here](#).

Summary provided by: [Maram T. Salaheldin](#).