

The Emerging Contaminant Challenge, How PFAS Can Impact Your Deals

By George J. Tyler, Esq., Margaret B. Carmeli, Esq. and Meredith Harris, P.E.

Per- and polyfluoroalkyl substances or “PFAS” are a broad class of ubiquitous chemicals that are being increasingly regulated as emerging contaminants. When acquiring property, purchasers should consider the potential presence of PFAS as part of their environmental due diligence to protect against future liability and make sound cost-benefit decisions. This article will provide an update on recent developments in PFAS regulation, environmental liabilities and offer some practical considerations for purchasers of real property.

PFAS include hundreds of synthetic chemicals, although laboratories only typically measure the 20-30 PFAS that are characterized by their carbon-fluorine bonds. The strong carbon-fluorine bond and molecular structure typical of PFAS result in unique characteristics such as high-water solubility and resistance to degradation. PFAS are most commonly associated with fire-fighting foams but have been used in a wide range of applications including food packaging, stain repellants and cleaning products. PFAS are ubiquitous in the environment and the Centers for Disease Control (CDC) has asserted that most people in the U.S. have measurable amounts of PFAS in their blood.

The health effects of certain PFAS chemicals have been studied with varying conclusions. Some studies have shown that PFAS exposure may affect cognitive development, fertility, hormones, cholesterol levels, the immune system and may also increase cancer risk. Additional study is ongoing to better understand PFAS including a recent \$20 million study undertaken by the Agency for Toxic Substances



and Disease Registry and the CDC.

In 2016, the USEPA issued a combined health advisory for two PFAS, perfluorooctanoic acid (PFOA) and perfluorooctanesulfonic acid (PFOS). More recently USEPA initiated actions to designate PFOA and PFOS as “hazardous substances”, pursuant to the Comprehensive Environmental Response Compensation and Liability Act (“CERCLA” aka “Superfund”) as amended and develop Maximum Contaminant Levels (MCLs) under the Safe Drinking Water Act and groundwater cleanup recommendations.

New Jersey, along with several other states, made a decision not to wait for USEPA to publish standards. On April 1, 2019, NJDEP opened a sixty (60)-day public comment period for new PFOA and PFOS rules. As proposed, these rules will:

- Establish MCLs under the N.J. Safe Drinking Water Act and set groundwater quality standards for PFOA and PFOS of 0.014 ppt and 0.013 ppt.
- Require testing of private wells and newly constructed wells for perfluorononanoic acid (PFNA), PFOA, and PFOS.
- Add PFNA, PFOA, and PFOS to the permit testing requirements for Discharge to Groundwater permits.

- Add PFOA and PFOS to the list of Hazardous Substances under New Jersey’s site remediation laws.

These regulatory changes will have widespread impacts on property transactions. ASTM E1527-13 defines a hazardous substance as “a substance defined as a hazardous substance pursuant to the CERCLA”. Legislation has been proposed in Congress to designate PFOA and PFOS as CERCLA hazardous substances and USEPA already considers PFOA and PFOS contaminants for the purpose of responding to imminent threats to human health and the environment under CERCLA. As such, PFOA and PFOS must be considered when performing Phase 1 Environmental Site Assessments to satisfy the All Appropriate Inquiry requirement for landowner liability protections under CERCLA.

Similarly, under current NJDEP regulations, PFAS must be considered as part of Preliminary Assessments which are required for innocent purchaser protection under the NJ Spill Compensation and Control Act (“Spill Act”). When a remediation site has been occupied by a facility that manufactured, stored or handled PFAS, LSRPs must address these substances during the investigation and any necessary cleanup.

Given the attention and resources currently focused on PFAS, additional future regulation can be expected including development of soil and ecological criteria and the addition of other PFAS compounds to the New Jersey and the federal hazardous substances lists.

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About the Author: George J. Tyler, Esq. and Margaret B. Carmeli, Esq., Tyler & Carmeli, P.C., www.tcglaw.com (609) 631-0660, gtyler@tcglaw.com, mcarmeli@tcglaw.com. Meredith Harris, P.E. of Roux Associates, Inc., mharris@rouxinc.com.

New Public Access Law: A Codification Of The Public Trust Doctrine?

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municipalities are encouraged to include public access plan elements in their master plans. DEP is required to protect the public's right of access to tidally-flowed lands and adjacent shorelines to the greatest extent practicable. For any application involving a change in the existing footprint of a structure, a change in use of property, or beach replenishment or dune maintenance activities, DEP shall review the availability of existing public access and determine whether additional public access is necessarily consistent with principles established under the public trust doctrine. DEP is required to consider the scale of any proposed change in footprint or use of the subject property, the demand for public access, and aspects of any DEP approved municipal public access plan.

The law becomes applicable to individual permit applications starting 60 days after the May 3, 2019 effective date. For other approvals, such as general permits, GPs by certification, or permits by rule, DEP has 18 months to adopt regulations identifying activities for which no public access is required, **and identifying activities for which public access is required but no individual review is necessary**. With respect to the latter, the absence of an individual review directly conflicts public trust doctrine principles established under Matthews. Will a general permit applicant subject to public access without an individualized review challenge the public access requirement on grounds that the absence of an individualized review and determination of whether the public access condition is reasonable is inconsistent with the public trust doctrine?

Interested parties are encouraged to monitor DEP's forthcoming rule-making

to assess how the agency proposes to implement the new law through amendments to its Coastal Zone Management regulations, which currently include a lengthy public access rule recently adopted September 2018, and carefully consider the implications of those amendments.

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PFAS are tricky to sample and resistant to most treatment technologies. As PFAS are present in many consumer products and regulatory limits are very low, special handling is required to avoid contamination of samples. Many common materials, equipment and clothing cannot be used when sampling PFAS such as Teflon™, chemical ice packs, water-proof field books, Gore-Tex®, Tyvek® and certain personal care products. Not all laboratories are certified in the approved PFAS analysis methodologies and there almost certainly be a backlog of samples once the PFOA and PFOS standards in New Jersey are adopted. Currently, the only known but only somewhat effective method for groundwater remediation for PFAS is to pump-and-treat contaminated groundwater through granular activated carbon. Membrane and in situ chemical oxidation applications are under development.

Regulation of PFAS will create additional, and at present very uncertain, cost impacts for property transfers including incorporation of PFAS into the due diligence process and remediation when warranted. Other risks include uncertainties in future regulation and the potential for PFAS to cause previously approved remediation projects to be re-opened.

So what can purchasers do to protect themselves?

1. Make certain PFAS are included in your due diligence. PFAS has been used in a wide range of industries and may be present at the sites of accidents and first responder training where fire-fighting foams were utilized.
2. Know which PFAS chemicals are regulated and standards that are pending. Develop sampling plans as part of Phase 2 due diligence or other site investigation activities that target the appropriate PFAS chemicals.
3. Understand proper PFAS sampling protocols and make sure that the laboratory is certified in the approved analysis methodologies. Allow for additional time for due diligence as qualified laboratories may be backlogged.
4. Be prepared to estimate costs for investigation and cleanup and negotiate with the seller.

How Far We've Come With 10 Years Of The SRRA

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profession. The LSRPA provides information, education, and technical resources to LSRPs and other professionals involved in environmental remediation in the state. With more than 800 members, the LSRPA is recognized by the DEP as the primary representative of the profession and provides front-line feedback to the state on site remediation issues.

At this 10-year milestone, New Jersey officials are again considering updates to SRRA, but its foundation will likely remain unchanged: mandatory timeframes, requirements to remediate, and LSRPs. The program works and its dedication to clean water, land, air, and the protection of people are steadfast and constant.