

**WHAT ARE PFAS AND WHY DO THEY MATTER?**  
**By: Katherine R. English, Esq. and Irene Kennedy Quincey, Esq.**

---

Compliance Officers and General Counsels are now challenged to help their companies prepare for EPA's planned PFAS regulations as part of its effort to protect the public and the environment from a little understood, but long lasting class of chemicals that are widely used.

What are PFAS?

Per- and Polyfluoroalkyl Substances (PFAS) are man-made chemicals that have been used since the 1940's in such products as firefighting foam, cosmetics, non-stick cookware, water-repellant clothing, and stain resistant fabrics and carpets. Some types of PFAS, specifically perfluorooctanoic acid (PFOA) and perfluorooctane sulfonic acid (PFOS), have been phased out of production in the United States, although other countries still manufacture and use them. Other varieties of PFAS remain in production and are in use today in the United States.

PFAS are made by joining carbon and fluorine, one of the strongest bonds that can be formed in organic chemistry. The strength of that chemical bond is why most PFAS chemicals have long half-lives, meaning that they do not readily break down in the environment. Because of their resilience, PFAS are sometimes referred to "forever chemicals" which persist in the environment where they can and do bioaccumulate in people and animals. While there has been some research about the impact of PFAS exposure, the health effects of PFAS are not well understood and more research is needed to understand this class of chemicals.

Why does PFAS matter now?

In April 2021, the Administrator of the United States Environmental Protection Agency established the EPA Council on PFAS and charged it with developing a comprehensive strategy for EPA to protect public health and the environment from the impacts of PFAS. Thereafter, the Council developed the "PFAS Strategic Roadmap" laying out a whole agency approach and setting timelines for the agency to address PFAS using

every tool at the agency's disposal based on three central directives, research, restriction, and remediation. The Council on PFAS released the PFAS Strategic Roadmap in October 2021 laying out key actions based on EPA's existing statutory authority to address the issues related to PFAS.

- (1) Full lifecycle accounting for PFAS from manufacture to use to pathways for exposure;
- (2) Prevent PFAS entering the environment;
- (3) Hold polluters and other responsible parties accountable for PFAS remediation efforts;
- (4) Pay for the research needed to understand PFAS' impacts on the environment and human health and determine ways to effectively address PFAS; and
- (5) Prioritize protection of disadvantaged communities.

The EPA's slides on the PFAS Strategic Roadmap are available at <https://www.epa.gov/system/files/documents/2021-10/slides-epa-pfas-roadmap-public-webinars.pdf>

The Office of Chemical Safety and Pollution Prevention released a National Test Strategy in October 2021 to increase understanding of PFAS and potential hazards to human health and the environment.

This PFAS testing strategy uses EPA's Toxic Substances Control Act (TSCA) authority to require PFAS manufacturers to provide information on PFAS regarding the quantities of manufactured PFAS.

EPA also issued a memorandum announcing its intentions to use its Clean Water Act permitting authority to reduce discharges of PFAS at the source and to generate comprehensive monitoring information on sources of PFAS in surface waters.

[https://www.epa.gov/system/files/documents/2022-04/npdes\\_pfas-memo.pdf](https://www.epa.gov/system/files/documents/2022-04/npdes_pfas-memo.pdf)

The Office of Land and Emergency Management proposes regulation under the authority of the Comprehensive Environmental Response Compensation and Liability Act (CERCLA) and the Resource Conservation and Recovery Act (RCRA), specifically, designating certain PFAS as CERCLA hazardous substances to require reporting of PFAS releases, and assure that cleanup costs can be recovered by the agencies.

Why should PFAS matter to me?

This area of regulation is developing rapidly, making risk assessments associated with PFAS challenging for real estate investors and businesses. EPA uses the American Society of Testing and Materials International (ASTM) Standard E1527 as the gold standard for preparation of Phase I Environmental Assessments that satisfy "all appropriate inquiries" (AAI) required to raise the safe harbor defenses under CERCLA if the property is later found to be contaminated, triggering enforcement and cleanup. In November 2021, ASTM issued E1527-21 updating the standard to include, among other things, a reference to PFAS. While PFAS (and other emerging contaminants) are referenced, they still are "a non-scope" consideration, meaning that a Phase I environmental assessment need not consider PFAS for the assessment to meet the AAI standard for establishing CERCLA defenses.

Careful consideration of PFAS' inclusion in ASTM standard E1527-21 is merited given the active regulatory environment relative to PFAS. As a non-scope consideration, the Phase I user would need to request that PFAS be addressed as part of the scope for the Phase I assessment as it is not included in the required scope. The addition of PFAS as a non-scope consideration is a strong signal from ASTM that although PFAS is not yet regulated by CERCLA, regulation requiring its inclusion is very likely forthcoming. Failure to address PFAS during the Phase I assessment could leave the issue of liability for PFAS outside the safe harbor defenses in CERCLA. Including PFAS in the Phase I is prudent given the lack of clarity in the requirements and costs for remediation of PFAS contamination.

Practically, a Phase I environmental assessment is a risk assessment tool for parties to a real property transaction, whether the party is a seller, a purchaser, or a lender. In its amendment to the standard, ASTM is providing these parties an opportunity to obtain a Phase I assessment for PFAS prior to implementation of PFAS regulations. While including PFAS in the AAI is not required, the risk/reward profile should be carefully considered before rejecting the option.

On March 14, 2022, EPA published notice of its intention to amend the Standards and Practices for All Appropriate Inquiries to reference ASTM International's E1527-21 "Standard Practice for Environmental Site Assessments: Phase I Environmental Site Assessment Process" and allow for its use to satisfy the requirements for conducting all appropriate inquiries under the Comprehensive Environmental Response, Compensation, and Liability Act. See 87 FR 14224.

In addition to the federal efforts to address PFAS, the Florida Department of Environmental Protection through the Division of Waste Management (DWM) is investigating potential sources and environmental impacts related PFAS. The Department's has plan for addressing PFAS and its impact on human health and the environmental at [https://floridadep.gov/sites/default/files/Dynamic\\_Plan\\_March\\_2022.pdf](https://floridadep.gov/sites/default/files/Dynamic_Plan_March_2022.pdf).

PFAS are very likely going to matter, a lot, and soon.

---

*A note to the reader: This article is intended to provide general information and is not intended to be a substitute for competent legal advice. Competent legal counsel should be consulted if you have questions regarding compliance with the law.*

Katherine R. English and Irene Kennedy Quincey are Partners and experienced agricultural and environmental attorneys with Pavese Law Firm, 1833 Hendry Street, Fort Myers, FL 33901; Telephone: (239) 334-2195; Fax: (239) 332-2243.

We are a full-service law firm and capable of handling all your legal needs.

Firm Practice Areas include:

- Agricultural
- Banking and Finance
- Bankruptcy
- Business and Corporate
- Civil Litigation
- Condominium and Homeowners' Association Law
- Construction
- Employment
- Environmental and Water
- Estate Planning, Probate and Trusts
- Land Use and Local Government
- Marital and Family
- Real Estate

Visit us on the web at [www.PaveseLaw.com](http://www.PaveseLaw.com).



**PAVESE  
LAW FIRM**  
*est. 1949*

**MAIN OFFICE**

FORT MYERS  
239.334.2195

**BRANCH OFFICES**

CAPE CORAL  
239.334.2195

WEST PALM BEACH  
561.471.1366

**PaveseLaw.com**