

Emerging Contaminant Considerations While Performing Due Diligence for Property Transactions

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Background/Objectives. The objective of this presentation is to provide an overview, with specific recent examples, of the timing and complications associated with assessing emerging contaminant environmental liabilities during property transaction due diligence. The purpose of environmental due diligence activities (e.g., Phase I ESA - ASTM Standard and USEPA AAI Final Rule) during property transactions (e.g., sale, refinancing, mergers and acquisitions) is to identify the presence or likely presence of any hazardous substance or petroleum products in, on, or at a property. Emerging contaminants (e.g., perfluorooctanoic acid [PFOA], per- and poly-fluoroalkyl substances [PFAS], 1,4-dioxane) are not considered CERCLA hazardous substances; however, states and potentially USEPA will adopt emerging contaminants to their list of hazardous substances at varying rates, which causes complications in classifying emerging contaminants as Recognized Environmental Conditions (REC) or Business Environmental Risks (BER), and assessing environmental liability associated with the transaction.

Approach/Activities. The presentation approach will be to provide a brief overview of the emerging contaminant life cycle and provide an analysis of environmental liability considerations that are evaluated during property transaction due diligence throughout that life cycle. A state by state overview of regulation promulgation in relation to recent emerging contaminants will be provided, with highlighted examples of the disparity between states.

Specific examples will be provided from New York State, which has listed recent emerging contaminants PFAS and PFOA. While remediation standards have not yet been promulgated, recent high-profile discoveries of emerging contaminants in sensitive locations, such as the detection of PFOA in the public water supply of Hoosick Falls, have provoked a flurry of state legislative and regulatory responses. New York enacted legislation providing the New York State Department of Environmental Conservation (DEC) with the authority to require investigation or remediation of any solid waste disposal site containing substances designated by the state as emerging contaminants, where such contaminants threaten to enter drinking water supplies.

Results/Lessons Learned. This presentation will shed light on whether and to what extent emerging contaminants, at varying points in their evaluation timeline, must be considered to satisfy transactional due diligence activities and evaluate environmental liability. Results will explore the potential listing as a BER, prior to adaptation or revision of the CERCLA hazardous substances list to include a particular emerging contaminant. Evaluation criteria for environmental liability assessment will be provided that forms a framework for navigating these gray areas until regulations are enacted.