



Forever and Everywhere: PFAS Steps Forward in the Environmental Due Diligence Party



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Not only is PFAS known as the “forever chemical” for its tendency to linger in the environment, it’s also looking like the “everywhere chemical,” with environmental due diligence for real estate transactions being no exception. To that end, ASTM International recently developed an update to the Transaction Screen Assessment (TSA) process (ASTM E1528-22), which supersedes the earlier E1528-14 version. The TSA process may be used in certain situations to evaluate real property for potential environmental concerns (PECs). One of the goals in revising the standard was to make it clearer. The resulting update has tightened up language and requirements (see below), with possibly the biggest impact likely in states which currently regulate PFAS.

In these states, potential PFAS impacts will be identified as a PEC. As has been the case since 1993 when the standard was first developed, the TSA process is still not as rigorous as the Phase I ESA process (E1527-21). Furthermore, it does not meet All Appropriate Inquiry (AAI) standards. E1528-22 states that in general, the transaction screen process is not suitable for purposes of evaluating conditions at properties currently or formerly used as gas stations, dry cleaners, junkyards, or manufacturing properties. Some of the changes in E1528-22 include:

- Hazardous substances and petroleum products (CERCLA terms) have been changed to ‘chemicals of concern.’ Chemicals of concern is a broader term that, in addition to hazardous substances and petroleum products, also includes compounds and breakdown products that are regulated in state or federal programs requiring a response action. For

example, PFAS is regulated in certain states, and may therefore be a chemical of concern. Since PFAS is currently not a hazardous substance under CERCLA, it is only recognized as an out-of-scope item under the more stringent Phase I ESA standard (E1527-21).

- The shelf life of a transaction screen is still 180 days, with caveats. However, an acknowledgement is made that some lenders and government programs allow the use of transaction screens that were completed up to 12 months prior. For example, if appropriate, a TSA performed eight months ago may not need to be updated in certain situations.
- The Transaction Screen 'Questionnaire,' which will now be referred to as the Transaction Screen 'Process,' contains two separate parts: Part A is for owners, occupants, and operators to complete; Part B is for the TSA preparer to complete.
- The questionnaire in E1528-14 had 37 separate questions that were sometimes difficult for the owner/occupant, or layperson, to fill out properly (Example: Will a layperson know exactly what qualifies as 'industrial use' under the standard?). The new questionnaire includes 57 separate questions specifically pertaining to current/previous activities on the subject property and adjoining properties. Although there are more questions, they are clearer with less ambiguity:
 - 17 questions pertaining to business activities (machine shop, gasoline dispensing, dry cleaning, vehicle repair, warehouse, agricultural, e.g.)
 - 11 questions regarding waste disposal and storage (oil water separator, flammables cabinets, sumps, open burning, e.g.)
 - 6 questions on storage containers (drums, above ground storage tanks [ASTs], underground storage tanks [USTs], e.g.)
 - 10 questions on property conditions and features (odors, stains, vent pipes, wells, e.g.)
 - 2 questions about water supply (example: private water supply testing data)
 - 5 questions on regulatory documents (UST registrations and hazardous waste permits, e.g.)
 - 6 questions about events (releases, spills, lawsuits, environmental liens, e.g.)
- Finally, in order to help the owner/occupant, or layperson, complete the transaction screen, a detailed collection of 55 annotated photographs of various examples of PECs is provided in an appendix. The previous standard, E1528-14, only had 12 such photographs.

The new TSA standard was approved May 1, 2022, clearing ASTM's balloting process. However, only a red-line strikeout version is available at the moment. A clean copy will be available online soon after the editor finishes formatting it for publication. Going forward, it will likely take practitioners and users of the TSA some time to get acclimated to the new format, but in the long run, this version far supersedes the previous version.

Stay tuned for where PFAS will have its next environmental regulatory or real estate transaction impact.

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