

EPA's Hazardous Substance Designation of Certain PFAS Compounds Impacts Real Estate Due Diligence

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On April 17, 2024, the U.S. Environmental Protection Agency (EPA) issued a Pre-Publication Notice that it was submitting a final rule (Rule) for publication in the Federal Register, designating perfluorooctanoic acid (PFOA) and perfluorooctanesulfonic acid (PFOS) (two types of per- and polyfluoroalkyl substances (PFAS)) as “hazardous substances” under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), also known as Superfund. EPA’s hazardous substance designation will have a ripple effect on real estate due diligence.

What is the Effective Date of EPA’s Hazardous Substance Designation?

Barring legal challenge, the Rule will become effective sixty (60) days after it is published in the Federal Register. As of the date of this writing, the Rule has not yet been published.

Understanding PFAS Chemicals

PFAS are a family of more than 7,000 man-made chemicals containing fluorine and carbon atoms that have been used in a variety of industries around the globe since the 1940s. PFOA and PFOS have been the most extensively produced and studied PFAS compounds. These chemicals are often referred to as “forever chemicals” because of their persistence in the environment. They have been used in various consumer products and industrial applications due to their strong surfactant properties, which make them effective in fire-resistant products and products that repel oil, stain, grease, and water.

Implications of EPA’s Hazardous Substance Designation

EPA’s designation of PFOA and PFOS as CERCLA hazardous substances is intended to ensure quicker cleanup of the toxic compounds and require industries and others responsible for contamination to pay for their removal. The designations do not ban the chemicals but require that releases of the chemicals into soil, water, or groundwater be reported to federal, state, or tribal officials if they [meet or exceed certain levels](#).

The Superfund Impact

The scope of EPA's authority under [CERCLA](#) is unlike any other statute administered by EPA. Its statutory authority permits it to respond to both releases of hazardous substances and their cleanup. And so, by classifying PFOA and PFOS as hazardous substances, EPA gains greater authority to:

- **Investigate and clean up contaminated sites.** This could lead to stricter enforcement actions against polluters, potentially forcing them to remediate affected properties.
- **Hold polluters accountable.** The designation also allows EPA to recover cleanup costs from responsible parties.

Furthermore, because CERCLA imposes joint, several, and strict liability on responsible parties (that is, the statute authorizes EPA to wield a hammer to hold one or more of them responsible for the entire liability), the threat is imposing. CERCLA's bedrock principle follows the "polluter pays" framework in which polluters, known as "potentially responsible parties" (PRPs), pay for the costs of cleanup they created. CERCLA defines PRPs as:

- Past and present owners of a facility where hazardous substances occur,
- Past and present operators of a facility,
- Those who arrange for the disposal or treatment of hazardous substances at a facility, and
- Transporters of hazardous substances to a facility.

Impact on Real Estate Due Diligence

EPA's PFOS/PFOA designation has significant implications for environmental due diligence in transactions involving commercial real estate. Prior to the Rule, PFAS were addressed in ASTM's E1527-21 Standard Practice for Phase I Environmental Site Assessments (Phase I ESAs) only as an "emerging contaminant" that was outside the scope of the Phase I ESAs (although, in anticipation of various PFAS compounds being designated a hazardous substance, we had advised clients to investigate applicable properties for the possible existence of those compounds, nonetheless). Now, as CERCLA hazardous substances, PFOS and PFOA will be on equal footing with other hazardous substances under the CERCLA liability scheme.

Environmental professionals conducting Phase I ESAs will now consider PFOS and PFOA as being "in scope" of Phase I ESAs. The new designations mean that real estate environmental due diligence will increase. Here's how:

- **Increased Scrutiny for Potential Contamination:** Phase I ESAs will likely include more rigorous testing for PFOS and PFOA, particularly on properties with past industrial uses or located near potential sources of contamination, such as certain manufacturing facilities, airports, or military bases.
- **Potential Delays and Higher Costs:** Unearthing PFOS/PFOA contamination may lead to delays in closing transactions, as well as potentially significant cleanup costs. Purchasers may be more hesitant to move forward without a clean bill of health, or without contractual and other liability protections.
- **Reopening of Previously Closed Sites:** Sites that were previously closed by the issuance of a No Further Action Letter by the state or federal government are at risk of being reopened for potential PFAS contamination.

- **Shifting Liability Landscape:** With the polluter-pays principle of CERCLA in effect, there is a greater chance of past owners or responsible parties being held accountable for cleanup costs.
- **Greater Focus on Contractual Allocation of Liability:** In anticipation of currently unknown, but potentially high remediation costs, parties to transactional documents will focus more intently on express liability allocation, remedies, and other means of protection.

The Road Ahead

While EPA's action is a positive step towards protecting public health and the environment, navigating transactions involving real estate in the face of PFAS concerns will require a more cautious and analytical approach. Real estate professionals, property owners, and potential purchasers will need to stay informed about evolving regulations and testing standards. Consulting with environmental lawyers and consultants will be crucial for making informed decisions with respect to real estate-related transactions.

This is a developing situation and, while the full impact on real estate remains to be seen, one thing is certain, ***PFAS is no longer a matter to be ignored, and its presence will significantly impact property transactions.***

Key Takeaways: Hazardous Substances and Real Estate Transactions

EPA's recent designation of PFOS and PFOA as hazardous substances marks a significant shift in the landscape of environmental due diligence. It underscores the need for comprehensive environmental assessments in real estate transactions to identify potential liabilities and manage risks associated with PFOS/PFOA contamination. As the regulatory landscape continues to evolve, staying informed and proactive in addressing environmental concerns will be crucial for all stakeholders in the real estate industry. Stay tuned to our future updates and articles as things progress.

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