

Implications of PFAS CERCLA liability for the commercial real estate industry

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What do you get when you combine a strict liability statute that could apply to every commercial property and a “forever chemical” that could exist almost everywhere? Designation of Perfluorooctanoic Acid (PFOA) and Perfluorooctanesulfonic Acid (PFOS) as CERCLA Hazardous Substances, 89 Fed. Reg. 39,124 (May 8, 2024) (<https://bit.ly/3XcY6jV>) (the Final Rule).

On May 8, 2024, the Final Rule designating Perfluorooctanoic Acid (PFOA) and Perfluorooctanesulfonic Acid (PFOS) as “hazardous substances” under the Comprehensive Environmental Response, Compensation & Liability Act (CERCLA) was published in the Federal Register. This latest action by the U.S. Environmental Protection Agency (EPA) may quietly be the most significant and consequential step taken by the Agency in the regulation of PFAS to date.

As of July 8, 2024, the effective date of the Final Rule, PFOA and PFOS will be listed as “hazardous substances” under CERCLA. These chemicals will now not only trigger the “reportable quantity” release reporting requirements of CERCLA § 103, but also the overall strict liability scheme of CERCLA. Under CERCLA, “reportable quantity” refers to the quantity of a hazardous substance which, “when released into the environment may present substantial danger to the public health or welfare or the environment,” and which must be reported pursuant to CERCLA § 102.

Under the Final Rule, a release of one pound of PFOA and/or PFOS within a 24-hour period requires immediate reporting and notification to the National Response Center and to state and local emergency response groups (in addition to a few ongoing and follow-up reporting requirements).

Compounding the general risks of CERCLA liability, the chemical properties of PFOA and PFOS pose unique concerns which have likely never before been considered in connection with implementation of the statute.

Like many PFAS, PFOA and PFOS have been manufactured in the United States for over 70 years and used in many different products and processes across industry sectors largely due to their chemical properties and resilience to degradation. Their most useful asset is now their greatest flaw as the carbon-fluorine bond of PFOA and

PFOS has allowed them to persist in the environment. Further, their water solubility resulted in extraordinary mobility such that they can be found across the planet and in practically all media, including living tissues in as far-reaching locations as polar bears in the Arctic.

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Therefore, the regulation of PFOA and PFOS as “hazardous substances” is likely to create uncertainty within the commercial real estate industry and have wide-ranging impacts for current property owners and for those engaged in buying, selling, financing, or developing affected properties:

- Overnight liability implications for property owners. One of the most significant implications of the listing is the exposure that could result from the law’s strict liability scheme. Under CERCLA, current and former owners and operators of property with contamination can face strict, joint and several liability for cleanup costs imposed by government entities and/or other private potentially responsible parties (PRPs). The recent listing now gives EPA authority to investigate and require remediation of releases of PFOA and PFOS by PRPs, and PRPs can initiate civil cost recovery or contribution actions against other PRPs for the costs of doing so — unless one of the defenses or exemptions from CERCLA liability applies. Importantly, this liability framework is triggered by *any amount* of PFOA or PFOS because the operative definition under CERCLA — that is, a “facility” — is defined broadly to include “any site or area where a hazardous substance has been deposited, stored, disposed of, or placed, or otherwise come to be located.”
- Phase I scope and transactional diligence considerations. PFOA and PFOS have not traditionally been within the scope of Phase I Environmental Site Assessments (Phase Is) in real estate transactions. However, prospective buyers and lenders may

now need to include consideration of potential PFOA and PFOS sources or contamination in the scope of their transactional due diligence, especially if there is reason to believe a property may have been impacted from historic uses or identified contamination from nearby properties. Of course, the more a buyer or lender knows about the existence of PFOA or PFOS prior to finalizing a transaction, the more they can protect themselves or mitigate related risks before closing.

- To sample or not to sample? Even if prospective purchasers or lenders include PFAS within the scope of their transactional due diligence, the question of whether to sample for that set of contaminants, and which set of contaminants to include, is also likely to present additional challenges. While a few sampling protocols have been approved by EPA, there are currently only a small number of laboratories and samplers fully capable of implementing them. Furthermore, if sampling identifies PFAS, treatment is expensive and there are only a few viable options available.
- Sellers stuck between a rock and a hard place. Notwithstanding sampling and treatment issues, prospective buyers and lenders are likely to face reluctance from sellers to permit pre-acquisition sampling on their properties. Given the strict liability scheme for property owners under CERCLA, sellers will understandably resist sampling prior to Closing for fear that they could themselves face liability for PFOA or PFOS identified on their property should the transaction fall through. Similarly, some states require that all sampling results be reported to the local or state environmental agency, regardless of the context surrounding the sampling activities.
- Relief in sight? Along with this Final Rule, EPA published its PFAS Enforcement Discretion & Settlement Policy Under CERCLA, which gives some qualified comfort amidst the broad, consequential authority described above. The Policy reflects

EPA's intention to not wield this authority toward certain parties based on equitable factors and the public interest. The Policy makes clear that "EPA intends to focus its enforcement efforts on entities who significantly contributed to the release of PFAS contamination into the environment, including parties that manufactured PFAS or used PFAS in the manufacturing process, federal facilities, and other industrial parties." In that regard, private owners or operators of contaminated property might take some comfort that they will not be targeted for liability (unless, of course, they caused a significant release of the contaminants themselves). While the Policy does state that EPA does not intend to pursue response actions for five specifically listed categories of entities, each of those categories relates to public interests and services rather than private landowners. Of course, it is not yet clear how EPA will carry out this Policy, which is not binding and is freely revocable, so the apparent risk mitigation is not absolute.

While stakeholders should begin preparing for the Final Rule's effective date, they should also pay close attention to Congress, the courts, and the actions of their respective states, all of which are likely to shape the ultimate reach of the Final Rule. For example, several proposed bills were introduced before Congress in response to the proposed version of this Final Rule which would exempt certain facilities and dischargers from CERCLA liability for PFAS, including, amongst others, those listed in the Policy. However, those bills remain in the committee stage and have yet to see significant progress as of this writing.

Of course, the commercial real estate industry is only one of many industries likely to be impacted by EPA's recent actions under CERCLA. However, those engaged in all aspects of real estate — including current and former property owners, current and former operators of property, prospective buyers, sellers, or lenders, and developers — could face unique challenges as the Final Rule is implemented over the course of the next several months and years.

About the authors



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