

# PUBLICATION

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## Deal Killer? PFAS Impact on Commercial Real Estate Transactions

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In August 2022, the Environmental Protection Agency (EPA) proposed in the Federal Register to designate Perfluorooctanoic Acid and Perfluorooctanesulfonic Acid (collectively PFAS) as hazardous substances under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA). Based on the current timeline, the EPA anticipates PFAS will be designated as hazardous substances by the summer of 2023. This designation is intended to hold sellers strictly liable for costs associated with onsite and offsite contamination from PFAS, regardless of whether the risk of contamination is known at the time of purchase. In doing so, the PFAS designation may have major effects on the commercial real estate market, particularly manufacturing and waste disposal facilities where PFAS were handled.

### What to Know:

Before entering a business transaction involving real estate with potential environmental concerns related to PFAS, parties should consider the following to protect their interests.

## I. Impact on Commercial Real Estate Transactions

Environmental Due Diligence (EDD) is crucial to the commercial real estate transaction process, particularly when purchasing a manufacturing or related facility, due to the need to evaluate environmental conditions and risks associated with the real property. Before listing for sale commercial real estate, a seller should conduct their own pre-marketing EDD to make strategic decisions regarding its value by either resolving or mitigating a prospective buyer's potential concerns and shifting financial and legal liability away from themselves. Similarly, a prospective buyer should perform EDD before closing on commercial real estate to obtain leverage in both negotiating price and risk allocation.

## II. Utilizing EDD in Commercial Real Estate Transactions

With PFAS likely to become designated as hazardous substances under CERCLA and therefore expanding strict liability, it is important to begin including PFAS as part of any EDD going forward in commercial transactions where potential environmental liabilities are a risk. Although a Phase I environmental site assessment (ESA) is the industry standard, it does not investigate emerging contaminants – like PFAS – which have yet to be designated as hazardous substances. Thus, buyers and sellers of commercial real estate should take a two-step approach in conducting EDD. First, a Phase I ESA which expands the scope of the investigation to include PFAS should be conducted. If the Phase I assessment uncovers evidence of potential contamination (a "Recognized Environmental Concern"), then a Phase II ESA should be conducted.

A Phase II assessment is a subsurface investigation of soil and groundwater for contaminants that can confirm the existence and extent of PFAS contamination. By conducting a Phase II ESA, the existence and extent of contamination can be confirmed, providing certainty as to the nature and amount of potential liability. The baseline information at the time of the transaction allows the parties to address the allocation of potential liability.

### III. Contracting in the Face of Potential CERCLA Liability

With the likelihood the new proposed regulation will be finalized and approved, CERCLA would require sellers and buyers of commercial real estate to be subject to liability as a Potential Responsible Party (PRP). With these new proposed regulations, the EPA is likely to designate and add new cleanup sites to the National Priority List, existing sites may have additional obligations added on, or sites that have already been closed and remediated for other environmental contamination have the potential to be "re-opened" and assessed under this expanded hazardous substance definition.

As sellers and buyers work to identify potential environmental liabilities within the context of commercial real estate deals, both parties will need to begin considering the potential presence of PFAS and associated risks from these new PFAS regulations. To the extent possible, appropriate risk allocation of such environmental liabilities should be addressed within the bounds of the purchase and sale agreement (Agreement). Clear and concise language addressing the full scope of any contractually based representations and warranties or indemnity provisions that cover environmental liabilities within the Agreement will be helpful in appropriately allocating risk. For example, having language that covers both current federal or state regulations of potential environmental contaminants, but also future federal or state regulations of potential environmental contaminants.

Environmental indemnities can be wide-ranging. However, the scope and durability of these provisions depend largely on negotiations between the seller and buyer. It is crucial both parties have a full understanding of the scope of any environmental indemnities agreed upon to cover potential CERCLA liability when negotiating a transaction's terms.

### IV. Contracting for the Future

One foreseeable issue because of the anticipated PFAS regulations will be a party's ability to contract against both current and future liabilities as it relates to the proposed PFAS regulations. Narrow indemnity language limiting the seller's responsibility to environmental liabilities existing at the time of the transaction may pose serious unanticipated problems for the buyer – potentially leaving the buyer responsible for any future environmental liabilities as a result of a change in the law. On the other hand, a seller will want indemnity language to be as broad as possible in protecting themselves, not only against current liabilities but potentially also seek protection for future liabilities that may arise, such as under this newly proposed regulation of PFAS.

#### Key Takeaway

Subject, of course, to everchanging federal administration views and guidelines, PFAS will be listed as "hazardous substances". In the future, buyers and sellers in transactions where there is a potential environmental liability involved will need to expand their environmental assessment and risk allocations in this quickly changing space.

If you have any questions regarding the PFAS impact on commercial real estate transactions, please reach out to [Matt Kim](#), [Kat Statman](#), or any member of Baker Donelson's [Environmental Group](#).

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