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Client Alert: EPA Designates PFAS Substances as Hazardous Substances

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US EPA is taking action to designate two of the most common per- and polyflouroalkyl substances (PFAS) as hazardous substances under CERCLA, also known as Superfund. This action is part of EPA's PFAS Strategic Roadmap, a comprehensive effort across multiple regulatory authorities to address these chemicals. These rules will take effect 60 days after they are published in the Federal Register and will have an impact on many businesses, particularly in commercial real estate.¹ The EPA rule addresses PFOA and PFOS, two of the most-commonly used PFAS chemicals that EPA has now determined may be linked to harmful health effects in humans.

What are PFAS?

PFAS chemicals are a class or family of thousands of chemicals that have been used in many products to make them waterproof, non-stick, stain-resistant, or other desirable qualities. In some cases, they have been mandated, such as in fire-fighting foams or fume suppressants. Often referred to as "forever chemicals" because they do not readily degrade and therefore linger in the environment, they have been found in most of the nation's drinking water supplies, human bodies, and in many environmental samples.

Commercial Real Estate Impacts

Once the rules go into effect, there will be an impact on commercial real estate. First and foremost is that Phase I Environmental Site Assessments will need to consider PFOA and PFOS as hazardous substances and evaluate whether there are indications of their release, as they would any other hazardous substance. The challenge is that these substances were used in many products and businesses may not be aware they are (or were) using them. How will environmental professionals conducting a Phase I identify a Recognized Environmental Condition ("REC") regarding PFOS and PFOA? Simply observing that a facility contains products with PFOA or PFOS, such as stain-resistant carpets, should not be sufficient to be a REC. There are a few uses or products that are generally understood to create a concern over releases, such as use of fire-fighting foams for training or fire-fighting. Consultants have been identifying those types of conditions as risks recently, but much is yet to be learned about what

¹ https://www.epa.gov/system/files/documents/2024-04/pre-publication_final-rule-cercla-pfoa-pfos-haz-sub.pdf

uses rise to the level of a REC and warrant further investigation. Sampling, analytical and remediation techniques are available but on a limited (and costly) basis so far.

In addition, properties that have a No Further Action status (by whatever name) may face the possibility of agencies re-opening their investigation files if there is a concern that PFOA or PFOS were used and released at the property. Properties have been investigated and remediated for decades without any awareness of these chemicals, so we do not know if this will be a significant issue or not.

EPA Guidance

EPA has issued enforcement guidance that states that they intend to focus enforcement actions on those who manufactured PFOA or PFOS or used those chemicals in manufacturing their products.² They do not intend to pursue other entities that have likely been impacted but did not play an active role in creating the problem, such as wastewater treatment systems or the farmers who used biosolids from wastewater treatment on their fields. However, CERCLA is often used by private parties to allocate response costs and those parties are not required to pay heed to EPA's enforcement policies.

What Next?

The final rule has not yet been published in the Federal Register but that is expected to happen soon. Assuming no litigation successfully obtains a stay of the rule pending the outcome of the litigation, the final rule would take effect as soon as early July. Commercial real estate businesses should prepare for that by having discussions with their due diligence teams, including consultants, advisors, and environmental attorneys, on how to integrate the new requirements into their processes. If you have any questions about these new laws, please reach out to Braeden Mansouri or Alicia Guerra.



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² <https://www.epa.gov/system/files/documents/2024-04/pfas-enforcement-discretion-settlement-policy-cercla.pdf>