

Forever Chemicals (PFAS) in Real Estate Transactions: Avoiding Forever Consequences

Corporate News: A Legal Update

By Christopher Jaekels on February 8, 2023

What are PFAS and What's the Big Deal?

PFAS, short for per- and poly-fluoroalkyls substances are man-made chemicals used to make hundreds of products for home and industry use, ranging from stain proofing and waterproofing to firefighting and non-stick surfaces. They are among the most durable and task-effective man-made chemicals, yet they can exist in the environment for hundreds of years. Unfortunately, PFAS are associated with serious health risks including cancer, children's developmental issues, immune system and endocrine disruption, and diabetes. The greatest area of public concern is contaminated drinking water. Human exposure also occurs in soils, surface water contamination, air emissions and workplace exposure (especially manufacturing and firefighting).

What Type of Real Estate Becomes Contaminated with PFAS?

PFAS are often found in government and military installations, commercial and industrial facilities, places of aqueous film-forming foam ("firefighting foam" or "AFFF") use, and farm fields spread with wastewater treatment sludge. Environmental consultants can conduct Phase I and Phase II investigations to determine the existence and scope of any PFAS impact.

What Does EPA Currently Require for PFAS Investigations?

Under the Superfund law's "All Appropriate Inquiries" rule ("AAI"), to avoid liability a real estate buyer is required to satisfy the American Society for Testing and Materials ("ASTM") E1527-21 Standard ("ASTM Standard"). The ASTM Standard requires identification of "recognized environmental conditions" ("RECs"). PFAS are exempt under the ASTM Standard and the EPA does not currently consider RECs a "hazardous substance."

What are the Risks of Forever Chemical Impacts on Transactions?

PFAS, along with asbestos and lead paint, are considered “non-scope items” under the ASTM Standard, but they can nevertheless be the basis for liability or loss of property value. For that reason, buyers should be advised regarding the likely or actual presence of PFAS on a target property.

Forever Chemicals Here and Now and Tomorrow.

PFAS investigations should be conducted as part of regular due diligence. It is imperative that buyers arm themselves with knowledge of the risks involved with a target property because the EPA’s approach to PFAS is evolving. According to the EPA’s PFAS Strategic Roadmap, certain PFAS are scheduled to be classified as hazardous substances, and therefore within the scope of the ASTM Standard and the AAI rule as soon as the summer of 2023. This will begin a landslide in which many of the 7,000+ PFAS chemicals may be listed as hazardous substances, subjecting them to the ASTM Standard. This creates new risks of liability and diminution of value for buyers of contaminated properties.

What are Options to Avoid or Mitigate PFAS Impacts?

Buyers can limit risk by investigating for PFAS and, if contamination is discovered, cancelling the purchase, leasing rather than buying, requiring price reductions, escrows, environmental remediation insurance, holdbacks, and seller indemnification for PFAS-related risks. Creative teamwork among counsel, client, and environmental consultant can ensure a client’s interests are protected from forever consequences.

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