Forever Chemicals' Forever Impact on Real Estate Transactions

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Per- and polyfluoroalkyl substances (PFAS), often called "forever chemicals" due to their long-term persistence in the environment, have become an increasing concern in real estate transactions. These chemicals, which have been used for years in everything from carpets to fire-fighting foam, are commonly found in industrial sites, landfills, drinking and sewer water facilities, airports and even farmland. The presence of PFAS on real property poses potential legal and financial risks for buyers and sellers, lenders and borrowers, lessors and lessees, and developers. These parties should carefully consider how the presence of PFAS could have a long-term impact on the value, development and resale of property.

In 2024, the United States Environmental Protection Agency (EPA) designated two PFAS as hazardous substances under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA)—perfluorooctanesulfonic acid (PFOS) and perfluorooctanoic acid (PFOA). EPA's designation of these two PFAS as hazardous substances raises the stakes for property owners and developers. As a result of the designation, the EPA will now have the "full strength" of CERCLA to compel property owners to remediate sites contaminated with those two PFAS.

While there is no way to eliminate the risk posed by these forever chemicals, there are several steps that can be taken by parties engaging in a real estate transaction to mitigate that risk.

Due Diligence

Environmental due diligence is a critical component of any real estate transaction, particularly when dealing with industrial and other properties that have a higher likelihood of containing contamination. Because EPA has designated two PFAS as hazardous substances, those two PFAS will be expressly included in the scope of most Phase I Environmental Site Assessments. However, other PFAS (of which there are several thousand) will not be addressed unless they are expressly added to the scope of the Phase I.

Additionally, certain other PFAS are regulated by other federal programs and by some state programs; thus, it is important to tailor the scope of the Phase I to align with the current applicable regulatory environment.

If a Phase I identifies the potential release of PFAS, the potential buyer or developer may wish to consider performing a Phase II Environmental Site Assessment in order to identify the location and contamination level. The decision to perform a Phase II, or to allow a Phase II that samples for PFAS, is not one to be taken lightly. The discovery of a PFAS compound, for which there are no remediation standards, can leave buyers and sellers in limbo.

Remediation and Clean Up

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If PFAS are discovered on a property, the owner or prospective purchaser should consider the regulatory and business implications. Regulatory implications may include notice, deed recordation, investigation and remediation. Whether the PFAS that are present include PFOS and PFOA, or other PFAS family members, is a relevant consideration. Remediation of PFAS contamination can be difficult and costly because of its long-term persistence in the environment and because even low levels may even pose a concern. Further, the discovery of PFAS could trigger common law claims if the PFAS contamination is impacting the property of others or is impacting
drinking water sources.

Allocating Risk

If a property is or may be contaminated with PFAS, there are several steps a buyer can take to protect its interests. Buyers should consider requesting (or demanding) an environmental indemnification from the seller. In addition, in cases where neither party is willing to assume the risk, or there is concern with the indemnitor's solvency, the parties can consider procuring (at one or both parties' expense) environmental insurance to cover potential losses and liabilities associated with PFAS contamination.

Despite early concerns that the insurance market would exclude PFAS entirely from all policies, as it did with substances like asbestos, pollution liability insurers are still willing to insure PFAS risks. This is particularly the case for facilities not involved in handling PFAS materials and that do not have an extensive history of firefighting activity due to the use of fire-fighting foam.

Issues can arise, however, when it comes to known PFAS contamination. While certain insurers are still willing to underwrite certain harms caused by known on-site contamination (e.g., bodily injury and property damage), few are willing to underwrite liabilities for cleanup cost (i.e., the cost to address the contamination). Practically none are willing to assume the cost to cleanup known contamination in the absence of a legal obligation to do so (e.g., through a voluntary cleanup program).

There are, however, certain insurance-like tools that buyers can use to liquidate risks posed by known contamination—including an environmental liability buyout, through which a cleanup company agrees to assume all environmental liability and perform cleanup for a fixed cost.

Key Takeaways for Real Estate Stakeholders

Addressing an emerging contaminant like PFAS in any transaction requires the counsel of experienced lawyers and consultants who are familiar with the unique issues presented by the developing regulatory and liability environment. As "forever chemicals," PFAS will likely have an impact on real estate transactions for the foreseeable future and can lead to a large amount of uncertainty and risk. Parties should mitigate this uncertainty and risk by taking steps to protect their interests during real estate transactions.

For assistance with protecting your interests during a real estate transaction as it relates to environmental issues, please contact one of the members of Haynes Boone's Environmental or Real Estate practice groups.

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