PFOA and PFOS Are 'Hazardous Substances' Under CERCLA: Key Takeaways and Questions for Real Estate Transactions

May 21, 2024

Categories:

Multifamily Matters
PFAS Updates
Publications

Authors:

Chris Kim Kahn
Amy F. Curry
S. Bradford Butler

The United States Environmental Protection Agency (U.S. EPA) recently designated "forever chemicals" PFOS and PFOA as hazardous substances under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA). This move by the U.S. EPA adds further risk to real property ownership and requires additional due diligence for all real estate transactions, including multifamily residential projects. Frost Brown Todd's environmental attorneys put together this post to assist our multifamily clients as they navigate these new considerations.

The U.S. EPA's designation of PFOS and PFOA as hazardous substances under CERCLA means that as of July 8, 2024, both chemicals must be evaluated as part of the Phase I Environmental Site Assessment (ESA) report, including those performed for multifamily housing projects. Additional environmental investigation may be recommended by environmental professionals at properties where there has been manufacturing of PFOS or PFOA, as well as properties where operations may have released PFOS or PFOA (for example, carpet and textile manufacturing, metal finishing, areas where firefighting foams may have been utilized, etc.). It is important to note that PFOS and PFOA are two of literally thousands of compounds that fall within the general definition of PFAS.

Current owners and operators of property contaminated by PFOA and PFOS will become subject to the strict, retroactive and joint and several liability scheme under CERCLA even if they did not conduct the activities generating the contamination and may be responsible for the costs or performance of investigation and cleanup unless they can establish a statutory defense to liability. Other potentially responsible parties (PRPs) under CERCLA include owners and operators of a facility at the time that hazardous substances were disposed, generators and parties arranging for the disposal or

2026 FBT Gibbons LLP. All rights reserved. ADVERTISING MATERIAL.

transport of PFOA and PFOS, and transporters of PFOA and PFOS that selected the disposal site.

The U.S. EPA has issued guidance, *PFAS Enforcement Discretion and Settlement Policy Under CERCLA*, affirming its intent to exercise enforcement discretion to focus on "holding responsible entities who significantly contributed to the release of PFAS into the environment, including parties that manufactured PFAS or used PFAS in the manufacturing process, federal facilities, and other industrial parties." Although the U.S. EPA does not intend to bring enforcement against what they refer to as "minor PRPs," given the retroactive, and joint and several liability scheme of CERCLA, as well as the statutory cost recovery and contribution mechanisms available to private parties, even "minor PRPs" have liability and may have responsibility for the costs of contamination. Therefore, it is important to conduct the appropriate due diligence to determine whether a property is potentially contaminated with PFOA and PFOS before acquiring that property.

The U.S. EPA reiterates that there are longstanding policies (for example, its *Policy Towards Owners of Residential Properties at Superfund Sites* (U.S. EPA, 1991)) and statutory defenses, such as the Bona Fide Prospective Purchaser Defense, that arguably may limit the risk of liability to property owners and other PRPs that did not significantly contribute to PFOA and PFOS contamination. However, the guidance is noticeably silent on whether the U.S. EPA could recoup unrecovered costs by securing a windfall lien on the property, which would entitle the U.S. EPA to the lesser of the increase in the fair market value attributable to the cleanup efforts or to the U.S. EPA's unrecovered costs.

Although the U.S. EPA's final rule downplays the potential impact of the inclusion of PFOS and PFOA as hazardous substances under CERCLA on current property owners that are "minor PRPs," current property owners are not excepted from CERCLA liability, and there is significant uncertainty for persons acquiring property that may have PFOA and PFOS contamination. Contributing to this uncertainty is the current lack of cleanup standards for PFOA and PFOS that can be used to satisfy the legal obligation to remediate the property. What currently exists is a patchwork of state

2026 FBT Gibbons LLP. All rights reserved. ADVERTISING MATERIAL.

standards, health advisories, and federal maximum contaminant levels for some PFAS, which are in many cases regulating PFOA and PFOS at concentrations that are in the parts per *trillion*, making both investigation and remediation extremely difficult. In addition, the science behind remediating and treating PFAS in soil and groundwater, as well as understanding PFAS exposures and pathways, continues to evolve and develop.

There are still more questions than answers when it comes to PFAS, but below are important questions that should be evaluated with experienced environmental legal counsel before acquiring or selling real estate.

- How should buyers and sellers address PFAS, including PFOA and PFOS, in the purchase and sale agreement?
- How will PFOA and PFOS be addressed in the Phase I ESA report, and how will the parties' distinguish between risks and concerns due to PFOA and PFOS releases and threatened releases, from generalized background concentrations of PFOA and PFOS that may exist in the environment? Buyers and sellers need to engage qualified environmental consultants and carefully manage the due diligence process, as these become even more critical with the inclusion of PFOA and PFOS (and additional PFAS in the future) under CERCLA.
- Should buyers or sellers sample for PFOA, PFOS, or any of the myriad of PFAS chemicals that have been identified to date, or will obtaining data showing the presence of PFAS in soil, groundwater or other media at the property materially harm the transaction or increase the risk of liability for either party?
- What are the risks associated with selling or buying properties that may be contaminated with PFOA and PFOS, and how can these risks be mitigated?
- What role, if any, does environmental insurance serve in the purchase and sale of real estate?
- What will potential lenders require with respect to the investigation and evaluation of PFOA and PFOS, and other PFAS, as part of due diligence?

2026 FBT Gibbons LLP. All rights reserved. ADVERTISING MATERIAL.

Frost Brown Todd counsels investors, developers and other key stakeholders on multifamily housing transactions in states across the country. We stay at the forefront of all legislative and administrative efforts affecting the industry, and we are ready to assist clients with navigating the changing legislative environment. For assistance with interpreting this new legislation and understanding how it may apply to your projects, please contact the authors or any attorney on Frost Brown Todd's Multifamily Housing industry team or Environmental practice.

Multifamily Matters Blog

Providing relevant legal perspectives to keep developers, investors, and lenders at the forefront of the multifamily industry in our footprint.

Subscribe for Updates

© 2026 FBT Gibbons LLP. May be considered attorney advertising in some jurisdictions.

2026 FBT Gibbons LLP. All rights reserved. ADVERTISING MATERIAL.

FBT Gibbons