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## PFAS — What You Need to Know in Transactions

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Adding to the long list of ills to consider in 2020, the Environmental Protection Agency (EPA) has [issued](#) an Action Plan and a preliminary determination to regulate PFOA and PFOS. These “Forever Chemicals” are a group of man-made chemicals that tend to persist in our bodies and in the environment over time. Used since the 1940s for their ability to effectively repel oil and water, they are commonly found in everyday items such as non-stick coating on pots and pans, stain and water repellents, food packaging, and firefighting foam. Evidence indicates that exposure to PFAS can lead to adverse health effects in humans, and PFOA and PFOS have been found to be specifically impactful to humans.

The prevalence of PFAS contamination means that it now plays an active role in the environmental aspect of property transactions. Ignoring the impacts of PFAS could lead to costly remediation or even litigation, depending upon the nature of the impact. As such, our team has compiled a list of considerations before closing a transaction that includes a potentially PFOA- or PFOS-contaminated property:

- Additional testing may soon be required during Phase II Investigations.
  - In late 2019, the EPA [announced](#) that it had developed a way to test for 29 PFAS chemicals in drinking water.
  - The EPA plans to propose nationwide drinking water monitoring for PFAS under the next UCMR monitoring cycle.
  - The agency is also validating analytical methods for surface water, ground water, wastewater, soils, sediments and biosolids; developing new methods to test for PFAS in air and emissions; and improving laboratory methods to discover unknown PFAS.

*The EPA is allocating a significant amount of time and money to develop new methods of testing for PFAS. This will likely mean that Phase II investigations may soon require investigations into any PFAS on site. These additional tests could increase the price for conducting a Phase II investigation and will place a greater importance on selection of counsel and consultants, as knowledge in this emerging science could be vital to the success of your project.*

- Now is the time to provide input regarding PFAS regulations.
  - The EPA is in the process of developing regulations that would list PFOA and PFOS as hazardous substances under CERCLA.
  - The EPA has issued an advanced notice of proposed rulemaking that would allow the public to provide input on adding PFAS to the Toxics Release Inventory—a list of toxic chemicals subject to certain regulations.
  - A supplemental proposal is currently under interagency review at the Office of Management and Budget aimed at ensuring that certain persistent long-chain PFAS chemicals cannot be manufactured in or imported into the United States without notification and review under TSCA.
  - The EPA is also gathering and evaluating information to determine if regulation is appropriate for other chemicals in the PFAS family.

*These regulations are all being formed and negotiated now under procedures designed to allow interested parties to provide insight on the effects of these regulations, whether positive or negative. If your business could be impacted by these changes, now is the time to have a hand in shaping these regulations.*

- Pending PFAS regulations may require a second look at contractual agreements and insurance policies.

- The future is uncertain regarding PFAS regulations and how they may be implemented. Having advance notice of potential PFAS regulations provides an opportunity to plan ahead.
- Prior contractual agreements defining “regulated substances” could be impacted any time EPA decides to regulate a new substance. Additionally, environmental insurance policies now in effect may or may not have contemplated the regulation of PFAS at the time they were put into place.

*Early notice of potential regulation of PFAS can provide an opportunity to review contractual agreements and environmental insurance policies to ensure that your business is not unprepared if new regulations do go into effect. Getting ahead of the curve with these pending regulations could help you avoid delays and save money in the future.*

We are only beginning to understand the way that PFAS impacts our environment, but we do know that regulations regarding PFAS will continue to evolve and will likely become more of a hurdle for those whose business involves real property.

As professionals with extensive experience in the environmental legal realm, we are well-prepared to provide counseling and assistance as you consider acquisitions, dispositions, financing, leasing and other transactions involving real property that may be impacted – legally or otherwise – by the presence of PFAS contamination. From monitoring and weighing in on proposed regulations, to aiding in the course of closing transactions to determining how to avoid potential liability for what is already in your portfolio, we stand ready to represent your interests.

## FOR MORE INFORMATION

Van Ness Feldman is closely monitoring developments related to PFAS regulations and is providing expert analysis and advice related to environmental transactions throughout these ever-changing times. If you would like more information about ways in which we can support your environmental transactions, please contact [Andrew Cooper](#) or [Robert Conrad](#).

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