

Attys Wary Of 'Zero Tolerance' Approach In New PFAS Rule

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The U.S. Environmental Protection Agency (EPA) has heightened the stakes for real estate due diligence by finalizing a rule that designates two per- and polyfluoroalkyl substances (PFAS) as hazardous under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA).

However, many are concerned that the rule's broad language and the extremely low levels of PFAS that now constitute a hazard could lead to a "zero tolerance" policy, sparking widespread enforcement actions. Properties previously considered "clean" might require additional remediation, and future real estate transactions could face more rigorous scrutiny.

Louise Dyble, an associate in Sheppard Mullin's Real Estate, Energy, Land Use and Environmental Law practice group, observed, "It puts these two substances officially on the list of hazardous substances, but it does so in a way that's so broad and so open to interpretation that a lot of the same questions we had before are still open but more urgent than ever because we suddenly have this prospect of action."

In light of this, Dyble highlighted the importance of meticulous due diligence in transactions to navigate the complexities of liability protections under CERCLA. "What this does do is make it more important to be careful, when you're in transactions, to do due diligence and meet the requirements for liability protections under CERCLA, which are robust and available, but require some care and thoughtfulness," she said.

The final rule's implications are expected to be far-reaching, with ongoing discussions, legal challenges, and possible congressional actions anticipated to address unresolved issues. Dyble noted, "It just brings out the big question on how the EPA is going to implement this. How are they going to exercise their tremendous discretion when it comes to this listing? I think it goes without saying that there's going to be a lot of entities and groups that are going to be questioning this listing. It's novel, it's new, and I think this will end up in court with the EPA needing to explain and defend its position and priorities when it comes to enforcement," she added.

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