



A Landmark Step: EPA Designates PFOA and PFOS as Hazardous Substances Under CERCLA

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The [U.S. Environmental Protection Agency's \(EPA\) announcement on April 19, 2024](#), of its [final rule](#) designating perfluorooctanoic acid (PFOA) and perfluorooctanesulfonic acid (PFOS) as hazardous substances under the [Comprehensive Environmental Response, Compensation, and Liability Act \(CERCLA\)](#), marks a significant moment in environmental regulation of [per- and polyfluoroalkyl substances \(PFAS\)](#). At the same time, the EPA released a new [PFAS Enforcement Discretion and Settlement Policy under CERCLA](#) ("Enforcement Policy"). These two announcements have wide-ranging implications for Superfund cleanups, development projects, public health, and the scope of environmental liability under CERCLA.

The Persistent Threat of "Forever Chemicals"

PFOA and PFOS belong to the PFAS class, a large group of man-made chemicals known for their exceptional resistance to degradation. These chemicals have been widely used since the 1940s in countless industrial applications and consumer products. Their unique chemical structure makes them highly effective in repelling water, oil, and stains. However, this same property also makes them incredibly persistent in the environment, earning them the nickname "forever chemicals." Over time, PFAS have infiltrated various environmental media, including soil, water, and air.

[Extensive research over the past few decades has linked PFAS exposure to a range of human health problems](#), including:

- Certain cancers, particularly testicular and kidney cancers
- Liver damage
- Increased cholesterol levels
- Thyroid issues
- Developmental problems in infants and children, including low birth weight and impaired immune function

The EPA Takes Action: An Important Step in PFAS Regulation and Liability

The EPA's final rule designating PFOA and PFOS as hazardous substances under CERCLA represents a major step forward in addressing PFAS contamination. Previously, the EPA's ability to enforce cleanups did not explicitly apply to PFAS contamination. This designation effectively streamlines the process by bringing PFOA and PFOS under the umbrella of CERCLA's hazardous substances. This allows the EPA to leverage its existing enforcement powers to compel responsible parties to remediate contaminated sites. The CERCLA classification also allows other stakeholders to pursue legal action against polluters to recover costs associated with cleaning up PFOA and PFOS contaminated sites.

The rule also mandates stricter reporting requirements for these two chemicals. Entities must now report any PFOA or PFOS releases exceeding one pound within a 24-hour period to national, state, or tribal emergency response teams. This facilitates quicker response and containment measures to minimize further environmental spread.

The PFAS Enforcement Discretion and Settlement Policy

The EPA's enforcement approach for PFAS contamination is outlined in the Enforcement Policy. This policy clarifies who the EPA will prioritize for enforcement actions under CERCLA. At present, the policy only applies to PFOA and PFOS as the only PFAS designated as hazardous substances under CERCLA.

The policy emphasizes holding parties who significantly contributed to PFAS contamination accountable. This includes manufacturers of PFAS, companies that use PFAS in industrial processes, and other major industrial dischargers.

The policy recognizes the varying degrees of responsibility for PFAS contamination. It outlines the EPA's intent to not pursue enforcement actions against entities with minimal contribution, such as community water systems, publicly owned treatment works (POTWs), municipal separate storm sewer systems (MS4s), and publicly owned landfills, airports, fire departments, and farms applying biosolids. These entities often receive PFAS contamination

passively and play a minimal role in its spread.

It is important to remember that the policy doesn't eliminate enforcement altogether against entities with minimal connection to PFAS. Even these entities have a responsibility to cooperate with investigations and not impede cleanup efforts. The EPA retains the authority to pursue any party whose actions significantly worsen PFAS contamination or pose an imminent threat to public health.

The Impact on Development Projects

The new investigation and cleanup requirements could potentially impact development projects on land with unknown or suspected PFAS contamination. Developers will need to carefully consider potential delays and costs associated with PFAS testing and remediation, factoring these into their project timelines and budgets. Given the uncertainties related to clean-up technologies, both due diligence activities and indemnification provisions in property transactions will be impacted. Construction activities might be delayed or halted depending on the scope of remediation that may be required.

The EPA's PFAS Designation: A Critical Step in a Broader Effort

The EPA's rule is just one piece of a broader government effort to tackle PFAS contamination comprehensively. President Biden's administration has emphasized a multipronged approach that includes:

- [Development of the 2021 PFAS Strategic Roadmap](#)
- [Setting the first-ever drinking water standards for PFOA, PFOS, and other PFAS variants](#)
- Investing in research and development of new technologies for PFAS remediation
- Collaborating with states and local governments to develop effective PFAS management strategies

Furthermore, this designation represents a critical step forward in addressing PFAS contamination. It acknowledges the growing concern over the presence and potential health risks of these chemicals in our environment. This rule is a significant development,

but it is important to view it within the context of a broader effort. The coming years will be crucial in determining the effectiveness of this rule and the overall success of efforts to address the complex and far-reaching environmental challenge presented by PFAS.

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