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## CERCLA – One Potential Landing Spot for Regulation of PFAS

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Per- and Polyfluoroalkyl Substances (PFAS) are a broad category of man-made chemicals that have been manufactured since the 1940s and have been used in a variety of products for their heat- and stain-resistance, including stain- and water-repellant fabrics, nonstick products, paints, lubricants, cleaning products and fire-fighting foams. PFAS are often referred to as “forever chemicals” due to their persistence in the human body and their resistance to degradation in the environment. PFAS have been found throughout the environmental, including on top of Mount Everest.<sup>[1]</sup> The potential pathways to regulate PFAS have been hotly debated for several years, including the possibility of designating PFAS as CERCLA “hazardous substances.” The two most studied PFAS compounds—perfluorooctanoic acid (PFOA) and perfluorooctanesulfonic acid (PFOS) – gain the most regulatory attention but the opportunity remains to regulate all or an increased number of PFAS chemicals.

Potential regulation of PFAS as CERCLA hazardous substances predates the Biden Administration.<sup>[2]</sup> EPA’s February 2019 [PFAS Action Plan](#) and February 2020 [PFAS Action Plan Update](#) identified the potential listing of PFOA and PFOS as CERCLA “hazardous substances.” On January 14, 2021, the former EPA Administrator, Andrew Wheeler, signed a pre-publication version of an [Advanced Notice of Proposed Rulemaking](#) (ANPRM) seeking comment on potentially regulating PFOA and PFOS as “hazardous substances” under CERCLA and “hazardous waste” under RCRA. <sup>[3]</sup> However, this ANPRM has been stalled by the January 20, 2021 regulatory freeze issued immediately following President Biden’s inauguration and the ANPRM was not published in the Federal Register.

Despite the regulatory freeze, the potential designation of PFAS as CERCLA hazardous substances remains active. From his early days on the campaign trail, President Biden [pledged](#) to tackle PFAS, including by designating as CERCLA hazardous substances. Subsequent to the election, the Biden Administration has repeatedly asserted its interest in increasing regulation of PFAS chemicals and has accelerated such regulation under a number of regulatory programs including the Clean Water Act, the Safe Drinking Water Act, and the Toxic Substances Control Act. With regard to potential regulation under CERCLA, President Biden’s [Spring 2021 Unified Agenda of Regulatory and Deregulatory Actions](#) identifies designation of PFAS as CERCLA hazardous substances as a continuing ["Long Term Action"](#).<sup>[4]</sup>

Congress’s recent efforts to pass comprehensive PFAS legislation may place additional pressure on EPA to hasten the speed of its efforts to regulate PFAS, including potential designation as CERCLA hazardous

substances. The [PFAS Action Act of 2021](#), a bipartisan bill that was advanced by the House Energy and Commerce Committee on June 23, 2021, will put regulation of PFAS on a fast track, taking a “whole of government approach,” to impose accelerated schedules to regulate PFAS chemicals under the Clean Water Act, the Toxic Substances Control Act, the Safe Drinking Water Act and the Clean Air Act.<sup>[5]</sup> The PFAS Act focuses mainly on the two most studied PFAS compounds –PFOA and PFOS - but presents the opportunity to address a much broader range of PFAS chemicals.

The PFAS Action Act of 2021 has the potential to greatly expand the scope of investigation and remediation under CERCLA by imposing an aggressive one-year schedule to designate PFOA and PFOS as CERCLA “hazardous substances” and a five-year schedule to review all PFAS chemicals for potential designation. Further, this one-year time line may be further accelerated as the PFAS Action Act of 2021 imposes a six-month schedule for EPA to issue a final rule designating PFOA and PFOS as Clean Air Act “hazardous air pollutants.” As CERCLA “hazardous substances” include all CAA 112(b) “hazardous air pollutants,” the CERCLA designation timeline could in essence be moved to six months.

Whether such a designation comes earlier or later, it is clear that such designation could bring on an array of EPA actions and additional costs. Such designation would greatly expand EPA’s authority to investigate and remediate these chemicals. Potential actions could include:

*Reopening of Closed Sites/Update of Current Remedial Actions.* Designation of PFAS chemicals as CERCLA hazardous substances could impact all sites where PFAS may be present, including those with final remedies.<sup>[6]</sup> EPA could seek to “reopen” closed sites at which cleanup is complete; reopen Records of Decision and impose new investigation and remediation requirements at sites where a final remedy has not been selected.

*Designation of New Sites.* PFAS chemicals can be found at a variety of sites, with particular concerns regarding the widespread use of fire-fighting foam at refineries, airports and military bases.<sup>[7]</sup> Further, it is believed that PFAS fire-fighting foams could be located at numerous municipal fire departments throughout the country. PFAS is a concern at any manufacturing location where PFAS chemicals were manufactured or incorporated into products ranging from cookware to fire-retardant fabrics to stain resistant carpets. In addition, PFAS may be a concern at wastewater treatment plants and landfills. The beneficial characteristics of PFAS increase the wide range and distribution of the chemicals, potentially turning up PFAS in unexpected locations.

*New Potentially Responsible Parties.* All of these actions could also result in bringing new parties to the table to help pay for cleanup of new or existing sites both through direct actions and contribution actions. Designation of PFAS chemicals as “hazardous substances” opens the door for EPA to bring cost recovery actions against Potentially Responsible Parties (PRP) and for existing PRPs to seek contribution to pay for increased costs related to PFAS investigation and remediation.

*Environmental Justice.* Although PFAS might not automatically come to mind in the context of environmental justice, a number of studies have shown an increase in low-income and people of color located in proximity to PFAS contaminated sites, adding another cumulative environmental burden on these communities and thus another incentive to increase regulation.<sup>[8]</sup>

*Drinking Water Standards.* Although not exactly a “CERCLA” development, the promulgation of maximum contaminant limits for PFAS will necessarily impact CERCLA remediation as drinking water standards are often the driver of remediation standards. The Biden Administration has placed a priority on development of such standards. In February, the EPA re-issued final regulatory determinations for PFOA and PFOS under the Safe Drinking Water Act, which will trigger promulgation of a national drinking water standard. Further, many states have become impatient with the pace of federal regulation and have taken the lead on addressing PFAS. At least 18 states have taken actions to address PFAS in drinking water or groundwater. These actions range from guidance to notification requirements or, in Michigan and New Jersey, adoption of drinking water standards for PFAS chemicals.<sup>[9]</sup>

The urge for federal action and leadership on the PFAS issue has been palpable and led by both states and environmental groups for the past four years. CERCLA offers one pathway to address PFAS contamination but CERCLA is not known for prompting quick remediation and, in fact, presenting a “new consideration” at an existing site may actual hinder the progress of existing cleanup CERCLA brings high transaction costs that revolve around the identification and organization of responsible parties; given the numerous potential generators of PFAS and PFAS waste residuals, reaching an agreement on respective shares of liability will be challenging. This is made even more complicated by the fact that the complete family of PFAS chemicals is still evolving. Further, liability may be further complicated at those sites that are impacted through the use of PFAS firefighting foam, whether the use was mandated by the federal government or was utilized by municipal fire departments. On the former, the question is who should be strictly, jointly and severally liable. On the second, the primary responsible party may be the one with the smallest pockets to pay for a cleanup. Finally, the technology for fully investigating and remediating PFAS contamination of groundwater is uncertain at best at the current time; CERCLA consent decrees mandating such remediation outcomes may seek to impose uncertain and unlikely outcomes that will be resisted by both private parties and local governments while costs for Department of Defense entities may drain away resources for other military cleanups. The PFAS problem may require its own remediation statute the recognizes its unique challenges.

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<sup>[1]</sup>[‘Forever chemicals,’ other pollutants found around the summit of Everest - The Washington Post](#) .

<sup>[2]</sup> EPA’s interim policy published on December 19, 2019, provides for a “risk-based” approach at sites where PFOA and PFOS groundwater contamination is being evaluated and addressed under CERCLA and RCRA, providing a groundwater screening level of 40 ppt where groundwater is a current or potential source of drinking

water.

[3] The ANPRM did question whether designating PFAS as “hazardous substances” made regulatory sense, noting that there may be “alternative regulatory steps” that could be “more appropriately tailored to address PFAS contamination” and requested comment on these potential alternative methods.

[4] This biannual plan, formerly known as the “Unified Agenda,” identifies the Administration’s priorities and potential timing of regulatory action. This regulatory plan also seeks to address PFAS under the Safe Drinking Water Act through drinking water standards, effluent limitation guidelines on manufacturers of PFAS under the CWA and various regulatory actions under TSCA.

[5] This legislation mostly mirrors the PFAS Action Act of 2020, which was approved by the House but failed to advance in the Senate.

[6] The January 14, 2021 ANPRM noted that there are 233 NPL sites with confirmed PFAS detections in groundwater.

[7] Interestingly, the PFAS Action Act excludes certain airports from CERCLA liability for response costs related to the FAA-mandated use of fire-fighting foam.

[8] [PFAS Contamination Is an Equity Issue, and President Trump’s EPA Is Failing to Fix It - Union of Concerned Scientists \(ucsusa.org\).](#)

[9] See [PFAS | The Environmental Council of the States \(ECOS\); U.S. State Resources about PFAS | Per- and Polyfluoroalkyl Substances \(PFAS\) | US EPA](#)