

PFAS/CERCLA: U.S. Environmental Protection Agency Enforcement Discretion and Settlement Policy



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Simultaneously with the prepublication of a final rule designating two of the Per- and Polyfluoroalkyl substances (“PFAS”) as Comprehensive Environmental Response, Compensation and Liability Act (“CERCLA”) hazardous substances, EPA issued an April 19th memorandum titled:

PFAS Enforcement Discretion and Settlement Policy Under CERCLA (“Memorandum”)

The Memorandum is transmitted from EPA Assistant Administrator for Enforcement and Compliance Assurance, David M. Uhlmann to:

- EPA Regional Administrators and Deputy Regional Administrators
- Regional Counsels and Deputy Regional Counsels

The Memorandum is described by EPA as a guidance as to how it will exercise enforcement discretion under CERCLA in matters involving PFAS.

The Memorandum states how the agency will focus on holding responsible entities who:

. . . significantly contributed to the release of PFAS contamination in the environment, including parties that have manufactured PFAS or used PFAS in the manufacturing process, federal facilities, and other industrial parties.

The policy also states that EPA does not intend to:

. . . pursue entities where equitable factors do not support seeking response actions or costs under CERCLA, including farmers, municipal landfills, water utilities, municipal airports, and local fire departments.

Various groups and organizations have expressed concern about potential CERCLA liability despite their argument that they may be passive receivers of PFAS.

Designation of PFAS as a CERCLA hazardous substance triggers certain corresponding requirements such as:

- Application of the potentially responsible liability categories
- Hazardous substance release reporting requirements

For example, in the case of water utilities, PFAS must be disposed of once it has been removed from water. Water utilities have argued that when properly disposing of residuals containing PFAS (in a manner consistent with applicable laws) they should not be held liable under CERCLA for future costs associated with PFAS cleanup.

As to wastewater utilities, it is noted that they receive and treat water from a range of sources. Such water may contain PFAS compounds. Concern has been expressed that, despite the fact that the utility is not the source of PFAS, it could be held responsible for addressing these substances.

Likewise, the National Waste and Recycling Association and Solid Waste Association of North America have stated the CERCLA designation could assign environmental cleanup liability to essential public services and their customers. They have asked Congress to provide municipal solid waste landfills and other passive receivers with a narrow exemption.

EPA states it does not intend to pursue entities where equitable factors do not support seeking response actions or costs under CERCLA for the previously referenced activities. Nevertheless, the effect of the Memorandum could be limited by the following factors:

- Does not prohibit CERCLA contribution actions from other potentially responsible parties (i.e., manufacturers and primary users, etc.)
- Is not a binding law or regulation
- Is inapplicable to states

A copy of the EPA Memorandum can be downloaded [here](#).