

# Recent Spate of EPA Action on PFAS Could Have Far-Reaching Implications

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The U.S. Environmental Protection Agency (EPA) has been busy recently. For years, per- and polyfluoroalkyl substances (PFAS) were considered “emerging contaminants” in the environmental world. As evidenced by recent EPA actions, it is safe to say that PFAS have fully emerged.

In this article, I will explore two of the most significant recent EPA actions in its continuing effort to regulate PFAS, as well as the likely effects of those actions. I will also discuss the possible implications of the Supreme Court’s widely anticipated repeal of the *Chevron* doctrine on the EPA’s recent PFAS actions.

## EPA Sets Drinking Water MCLs for PFAS

On April 10, the EPA announced the final national primary drinking water regulation (NPDWR) to establish legally enforceable maximum contaminant levels (MCLs) for certain PFAS in drinking water. The individual compounds covered by the proposed regulation are: perfluorooctanoic acid (PFOA), perfluorooctane sulfonic acid (PFOS), perfluorononanoic acid (PFNA), hexafluoropropylene oxide dimer acid (HFPO-DA, sometimes referred to as “GenX” compounds), and perfluorohexane sulfonic acid (PFHxS). Additionally, the final rule covers PFAS mixtures containing at least two or more of PFHxS, PFNA, HFPO-DA, and perfluorobutane sulfonic acid (PFBS) using a hazard index MCL to account for the combined and co-

occurring levels of these PFAS in drinking water.

The EPA simultaneously finalized health-based, nonenforceable maximum contaminant level goals (MCLGs). Unlike MCLs, MCLGs are not legally enforceable standards and are instead aspirational thresholds.

The final MCLs and MCLGs are as follows:

PFAS Compound	Final MCL	Final MCLG
PFOA	4 parts per trillion (ppt)	Zero
PFOS	4 ppt	Zero
PFHxS	10 ppt	10 ppt
PFNA	10 ppt	10 ppt
HFPO-DA (sometimes referred to as “GenX” compounds)	10 ppt	10 ppt
Mixtures containing two or more of PFHxS, PFNA, HFPO-DA, and PFBS	1.0 (unitless) Hazard Index	1.0 (unitless) Hazard Index

In addition to setting the final MCLs and MCLGs for the various PFAS compounds, the rule also requires public water systems to: monitor for these PFAS compounds and have three years to complete initial monitoring, followed by ongoing compliance monitoring; provide the public with information on the levels of these PFAS in their drinking water beginning in 2027; within five years, implement solutions that reduce these



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PFAS if monitoring shows that drinking water levels exceed the MCLs; and beginning in 2029, take action to reduce levels of these PFAS in their drinking water and must provide notification to the public of the violation in public water systems that have PFAS in drinking water which violates one or more of these MCLs.

Indeed, the EPA estimates that “6-10% of regulated drinking water systems will have to take action to reduce PFAS in their drinking water in accordance with the PFAS NPDWR.” All of these requirements are made more challenging due to the fact that technology used to measure the necessary PFAS thresholds can be unreliable and subject to error.

Moreover, states—such as Pennsylvania—that previously promulgated drinking water MCLs that are less stringent than those set by the EPA will now have to adhere to the stricter standards. Of course, states are free to set MCLs that are more stringent than those set by the EPA. But any state that does so will have to ensure that their environmental agency has the financial resources and infrastructure in place to avoid improper or ineffective implementation and enforcement.

With regard to industry, companies will likely be required to find ways to reduce the use or generation of PFAS or face costly consequences. Another potential implication could be the need to obtain national pollutant discharge elimination system (NPDES) permits for PFAS discharges, which are not currently required but may be in the near future. Whatever the implications end up being in the long run, one thing is for certain—changes are coming, likely at significant expense.

### **EPA Designates PFOA and PFOS as CERCLA ‘Hazardous Substances’**

Less than two weeks after the EPA finalized the MCLs, the EPA designated two PFAS compounds as “hazardous substances” under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA). The hazardous substance designation applies to PFOA and PFOS.

The direct effects of the final designation on the regulated community include the following:

- Releases of PFOA and PFOS that meet or exceed the reportable quantity within a 24-hour period must be reported to the National Response Center, state or tribal emergency response commission, and the local or Tribal emergency planning committee for the areas affected by the release; and
- Owners or operators of any vessel or facility must provide reasonable notice to potential injured parties by publication in local newspapers serving the affected area of any release of these substances.

Although the designation of PFOA and PFOS as CERCLA hazardous substance does not automatically require any investigation or cleanup obligations, it makes CERCLA’s enforcement tools and cost recovery mechanism available to the EPA for PFOA and PFOS releases. In particular, 42 U.S.C. Section 9604 (CERCLA Section 104) and 42 U.S.C. Section 9607 (CERCLA Section 107) allow the EPA to perform a response action to clean up hazardous substances using Superfund money and recover response costs from potentially responsible parties (PRPs). The designation also enables the EPA to shift responsibility for cleaning up PFOA and PFOS contamination from the Superfund to those responsible for contamination, see 42 U.S.C. Section 9606 (CERCLA Section 106), and to seek information involving sites containing hazardous substances, see CERCLA Section 104.

With respect to private parties, PRPs who incur response costs at sites contaminated with PFAS will now also be able to recover their costs under CERCLA by way of a cost recovery action under CERCLA Section 104 or a contribution action under CERCLA Section 107.

Yet another implication of the hazardous substance designation is the potential for closed-site reopeners. In this scenario, sites that have been closed because they were deemed remediated could be reopened due to the presence of PFOA and PFOS. This could result in significant, previously unanticipated expense to PRPs and the regulated community.

In addition to formally designating PFOA and PFOS as CERCLA hazardous substance, the EPA simultaneously published a memorandum titled PFAS enforcement discretion and settlement policy Under CERCLA. According to the memorandum, the EPA “will focus on holding responsible entities who significantly contributed to the release of PFAS into the environment, including parties that manufactured PFAS or used PFAS in the manufacturing process, federal facilities, and other industrial parties.” Conversely, the EPA “does not intend to pursue entities where equitable factors do not support seeking response actions or costs under CERCLA, including, but not limited to, community water systems and publicly owned treatment works, municipal separate storm sewer systems, publicly owned/operated municipal solid waste landfills, publicly owned airports and local fire departments, and farms where biosolids are applied to the land.”

With the PFAS enforcement discretion and settlement policy, the EPA is signaling a clear intent to focus its pursuit on major PRPs. In order to halt so-called major PRPs from seeking contribution from less significant PRPs, the EPA has stated its intention to seek settlement terms with major PRPs that require them to waive their rights to sue other PRPs.

Conversely, the EPA has indicated it will exercise its discretion in settling with less significant PRPs. As a means of incentivizing such less significant PRPs, the EPA may offer contribution protection by way of two primary methods: contribution protection from settling major PRPs; and contribution protection from non-settling major PRPs.

### **Implications of Supreme Court’s Anticipated Repeal of ‘Chevron’ Deference**

In January 2024, the U.S. Supreme Court heard oral argument on two cases that take direct aim at the *Chevron* doctrine, which is an administrative law principle that gives deference to a federal agency’s interpretation of statutes and other administrative

actions so long as the interpretation/agency action is reasonable. However, if the Supreme Court further pulls back or completely nullifies the *Chevron* doctrine, as many court observers anticipate, there is likely to be to a significant uptick in challenges to agency action.

One such area potentially susceptible to challenge is the EPA’s recently promulgated drinking water MCLs for PFAS. The technology for measuring and remediating to the applicable thresholds has not advanced to a place of sufficiently reliability. Thus, with deference to the agency potentially no longer being afforded, the EPA’s decision to set the MCLs so low could be more susceptible to challenge than it would have been previously.

The EPA’s attempts to reopen closed Superfund Sites due to the presence of PFOA or PFOS—which are now hazardous substances under CERCLA—could similarly be ripe for challenge. Having previously deemed the condition of the site to be adequately protective of human health and the environment, the EPA will have to demonstrate that that is no longer the case now that PFOA and PFOS are classified as hazardous substances under CERCLA. If the *Chevron* doctrine is repealed, the EPA may find efforts to reopen Superfund Sites more difficult.

It has been almost three years since the EPA announced its PFAS strategic roadmap, which laid out an agenda identifying the EPA’s intentions to address PFAS. In the last couple months, those agenda items have come to fruition with the drinking water MCLs and the designation of PFOA and PFOS as CERCLA hazardous substances. These EPA actions will have far-reaction consequences, but could also be impacted by how the Supreme Court chooses to treat *Chevron* deference going forward.

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