PFOA/PFOS/CERCLA: U.S. Environmental Protection Agency Announces Intent to Retain Designation



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09/19/2025

The United States Department of Justice submitted a court filing on September 17th on behalf of the U.S. Environmental Protection Agency ("EPA") as part of ongoing litigation related to the designation of PFOA and PFOS as Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA") Hazardous Substances.

The filing states that EPA has decided to retain the rule that became effective in July 2024. See 89 Fed. Reg. 39124.

A number of trade associations and organizations had challenged the designation of PFOA and PFOS as CERCLA Hazardous Substances.

Various organizations challenging the rule expressed concern about CERCLA liability because the designation of PFOA and PFOS triggers certain corresponding requirements such as:

- Application of the Potentially Responsible liability categories.
- Hazardous Substance release reporting requirements.

EPA had issued an Enforcement Discretion and Settlement Policy addressing these two substances which provided guidance as to how it will exercise enforcement discretion under CERCLA in matters involving them. The Policy stated 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.

A Declaration of John Evans (Senior Advisor for Implementation in the EPA Office of Land and Emergency Management) appended to the September 17th filing states:

…EPA will continue to engage with Congress and industry to establish a liability framework that ensures the polluter pays and passive receivers are protected.

A copy of the EPA filing along with the Declaration can be found here.