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REPRINTED FROM:
CORPORATE DISPUTES MAGAZINE
JAN-MAR 2025 ISSUE


www.corporatedisputesmagazine.com

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Published by Financier Worldwide Ltd
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www.corporatedisputesmagazine.com

PERSPECTIVES

# THE COST OF CLEANUP: PREPARING FOR PFAS REMEDIATION BATTLES

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In April 2024, the US Environmental Protection Agency (EPA) opened an enormous can of worms for entities even remotely associated with the generation, transport, use or disposal of two legacy per- and polyfluoroalkyl substances (PFAS): perfluorooctanoic acid (PFOA) and perfluorooctanesulfonic acid (PFOS).

In designating these PFAS as "hazardous substances" under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), the EPA greenlit the initiation of government-ordered cleanups of PFOA and PFOS-contaminated sites and effectively fingered thousands of "potentially responsible parties (PRP)" for CERCLA cost reimbursement and private cost recovery actions.

The final rule has enormous legal and staggering financial implications for private entities in a diverse range of industries. This article explores these implications and how to prepare for them.

## Background

Businesspeople are likely generally aware of the growing PFAS liability crisis, but perhaps not as much as they should be. The PFAS issue is a hot button one in the US and elsewhere. The European Chemicals Agency has proposed aggressive restrictions on

PFAS manufacture and use in the European Union (EU).

Importantly, under EU law, PFAS is defined to include an even larger number of substances. Canada similarly has taken action to restrict PFAS, as have many other nations. While the focus in this article is on CERCLA and related business liability, laws in other jurisdictions will undoubtedly pose considerable liability concerns for businesses globally.

CERCLA liability is showcased here because it will have the most immediate, public and provocative impact on real estate, litigation, lending and financing and related matters.

PFAS are a chemically diverse and large class of synthetic organic chemical substances. PFAS have been manufactured and widely used since the 1940s. The impressive functionality of these versatile chemicals early on assured their enormous commercial popularity and inclusion in everyday products, serving such varied uses as keeping food from sticking to cookware or packaging, helping carpeting be resistant to stain and making firefighting foam more effective. The extraordinary chemical stability of these chemicals is why they are persistent and, of course, why PFAS contamination today poses formidable cleanup challenges.

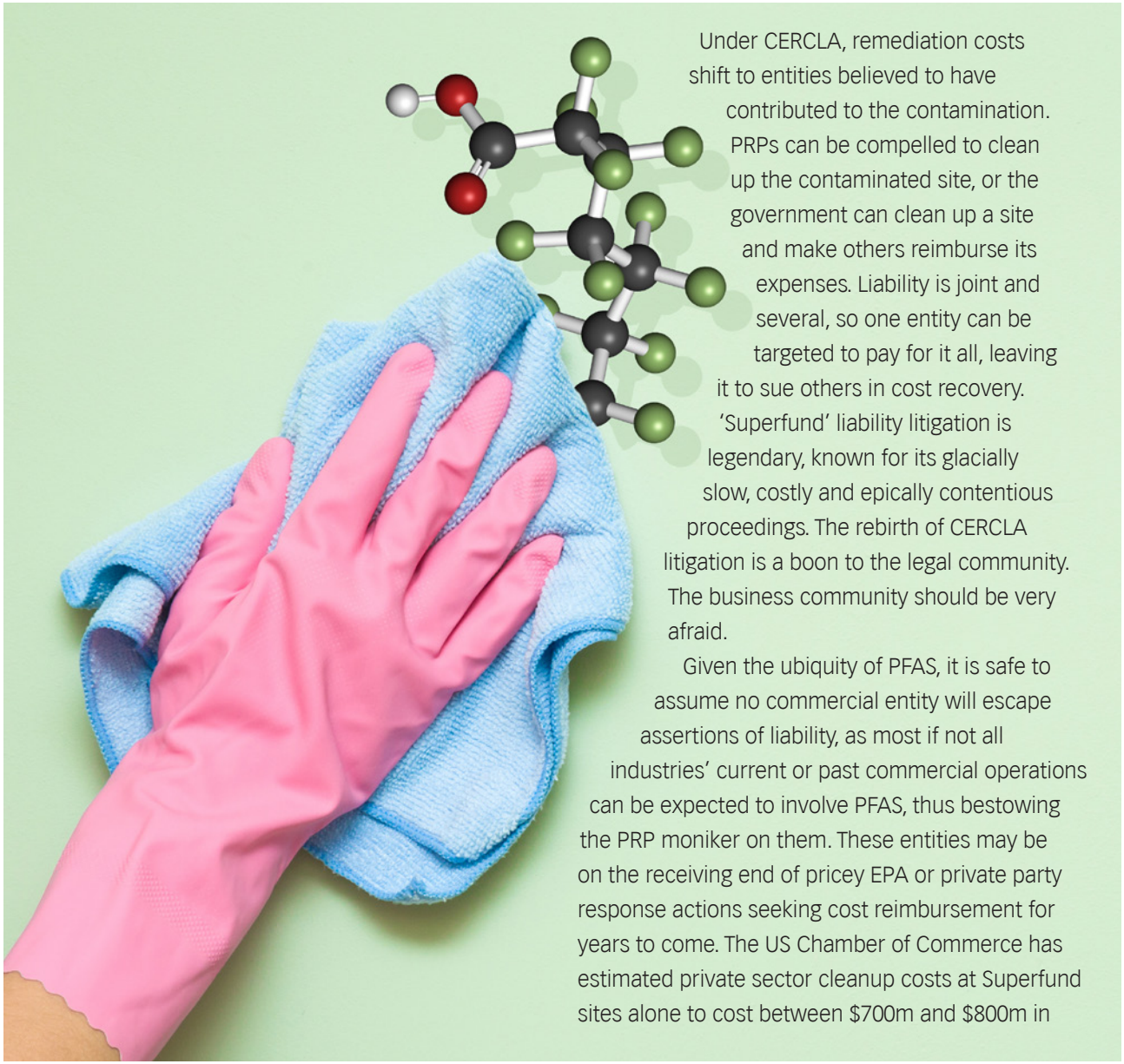
The global trend to regulate aggressively and eliminate PFAS, regardless of hazard or risk profile and societal benefit, has accelerated in the US with astonishing speed. The fact that blood levels of PFOS and PFOA have dropped dramatically since the majority of both were phased out between 2005 and 2010 has not diminished the goal of complete eradication.

The 'whole of government' federal initiative to regulate and eliminate PFAS has spawned dozens of federal regulatory initiatives. Most states are also regulating PFAS, with many preparing to prohibit the marketing of products that contain PFAS to prevent environmental and human health risk and future ongoing exposure and contamination.

## CERCLA liability

Why is the classification of PFOA and PFOS as hazardous substances such a big deal? CERCLA is the US federal law intended to ensure the federal government has the financial resources and authority to clean up contaminated sites.

The legal designation of PFOA and PFOS as "hazardous substances" empowers the federal government to issue PFAS remediation orders to any entity that has made, processed, used or disposed of these PFAS at contaminated sites, including previously "closed" (meaning cleaned up) CERCLA sites that now must be reopened to remediate PFOA and PFOS contamination. Liability is strict (regardless of fault), and any amount, however trivial, of PFOA or PFOS in the soil or ground water will trigger liability.



Under CERCLA, remediation costs shift to entities believed to have contributed to the contamination. PRPs can be compelled to clean up the contaminated site, or the government can clean up a site and make others reimburse its expenses. Liability is joint and several, so one entity can be targeted to pay for it all, leaving it to sue others in cost recovery. 'Superfund' liability litigation is legendary, known for its glacially slow, costly and epically contentious proceedings. The rebirth of CERCLA litigation is a boon to the legal community. The business community should be very afraid.

Given the ubiquity of PFAS, it is safe to assume no commercial entity will escape assertions of liability, as most if not all industries' current or past commercial operations can be expected to involve PFAS, thus bestowing the PRP moniker on them. These entities may be on the receiving end of pricey EPA or private party response actions seeking cost reimbursement for years to come. The US Chamber of Commerce has estimated private sector cleanup costs at Superfund sites alone to cost between $700m and $800m in

annualised costs, or $11.1bn and $22bn present value costs.

But wait, there is more. The EPA intends to add other PFAS to the list of hazardous substances, expanding the risk of PFAS liability to include even more industry stakeholders. In March 2023, the EPA issued an advance notice of proposed rulemaking seeking comment on the EPA's interest in adding seven additional PFAS to the CERCLA list of hazardous substances. These include: PFHxS, PFBS, PFNA, HFPO-DA, PFBA, PFHxA and PFDA, all selected based on toxicity. It is unclear when and if a proposed rule will be forthcoming. Much depends on the November election results.

As costly as remediations can be, this is hardly the private sector's only concern. There has been an explosion of private litigation brought by, among others, community residents and other definable 'classes' of aggrieved entities who claim to have sustained injury or are fearful of being injured because of exposure to PFAS, whether from contaminated drinking water or soil, kitchen appliances or outdoor apparel.

CERCLA cleanup actions are catalysts for private litigation involving many of the same entities on the hook for cleanup costs, and many more entities regardless of whether the government targeted them for cleanup costs.

**"The PFAS crisis has metastasised aggressively, geographically, and much more quickly than other 'emerging' contaminant issues."**

## Limiting liability

The PFAS crisis has metastasised aggressively, geographically, and much more quickly than other 'emerging' contaminant issues. PFAS' historic commercial utility, ubiquity and now profound stigma have propelled PFAS to the front of a long line of chemical components, exposure to which inspire significant regulatory and legal liability.

What makes PFAS so unique is the seeming indifference to PFAS chemical speciation: the 15,000 or so PFAS on the planet reflect enormous physical, chemical and toxicological variation. They are not fungible, many are without substitute, many support applications unlikely to pose risk, and many offer enormous societal benefit. None of this seems to

matter. The court of public opinion has spoken, and all PFAS have been condemned. Some will be spared for a time based on their status as a commercially unavoidable use (CUU), but make no mistake, their days are numbered.

This inconvenient fact poses enormous challenges for businesses, senior management, officers and directors, risk managers and the many others whose bottom line is compromised by the spectre of PFAS liability. Below are strategies for entities to undertake now to control damage.

*Know your company's potential PFAS usage.* This is best accomplished by conducting a PFAS investigation. This investigation should be conducted at the request of legal counsel to assert the attorney-client privilege and protect the results of the investigation from disclosure and litigation discovery requests. The review should include the history and potential usage of PFAS, assess firefighting systems and fire history, analyse infrastructure (equipment and machinery), and review product composition for PFAS.

*Define PFAS broadly to be as inclusive as possible and determine whether PFAS were intentionally added or present as an incidental contaminant.* This audit is not easily or quickly undertaken. It is essential to define an entity's potential liability and discharge an entity's duty to report the presence of PFAS mandated by a growing number of regulatory provisions. Regulatory liability is the tip of the iceberg, however, and the real legal vulnerability to reveal is operational dependence on PFAS and legacy uses that will likely be the source of liability prospectively.

*Develop a plan to eliminate PFAS in products and operations.* If elimination is not a viable option, develop a plan to limit liability and a legal basis for continuing to use PFAS. This might include conducting a risk or exposure assessment to confirm continued use is unlikely to pose risk, modifying use patterns, labelling products and warning operations, seeking to qualify for CUU status, developing test data to document product safety, and reviewing and enhancing contracts and supply agreements to shift the liability to others.

None of these steps is quick or easy and must be conducted with legal counsel and under the attorney-client privilege. Clear and thoughtful communication among key business units is essential. Senior management, environmental health and safety, operations, marketing, logistics, procurement, research and development and others need to be engaged. The approach needs to be top-down, and buy-in from the board and senior management is critical.

*Assess insurance options and impacts on lending.* Careful review of insurance coverage is essential. Insurers can be expected to revise policies to exclude PFAS-related claims or increase premiums for risks that include PFAS. Lenders can be expected

to assess PFAS contamination and demand higher reserves to cover potential cleanup costs adversely impacting loan terms and availability.

*Lawyer up.* Find gifted CERCLA counsel now. Legal conflicts will be a nightmare to manage and the demand for top tier legal counsel will be fierce.

Agreeing to undertake these measures and then undertaking them will invite spirited debate in C-suite circles. How, when and by which service providers are all hard questions to answer, but worth the struggle to address quickly. Whether to proceed along these lines is a non-starter. CD

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