

# A Risky Dance: When Emerging Contaminants Comingle With CERCLA Hazardous Substances

## Publications

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Contaminants of Emerging Concern (CECs), chemicals that may be harmful to human health or the environment but that are not yet regulated, are capturing the public's attention. For example, EPA just proposed to list perfluorooctanoic acid (PFOA) and perfluorooctane sulfonate (PFOS), two chemicals in the per- and polyfluoroalkyl substances (PFAS) group that are pervasive in the environment and may be harmful to human health, as Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) hazardous substances. EPA will be accepting comments on the proposed rule until November 7, 2022, and, according to the PFAS Strategic Roadmap, a final rule is expected in Summer 2023.

To fill the federal void, some states have been addressing PFAS in their own cleanup programs. For example, in 2016, the New York Department of Environmental Conservation added PFOA and PFOS to New York's list of hazardous substances. More recently, Washington's Department of Ecology concluded that PFAS are hazardous substances under Washington's Model Toxics Control Act.

PFOA and PFOS may just be the beginning. According to the PFAS Strategic Roadmap, EPA is developing an Advance Notice of Proposed Rulemaking to seek input on whether to designate other PFAS as CERCLA hazardous substances. Ultimately, as our understanding of CECs advances, new chemicals may become designated as "hazardous" under CERCLA or state cleanup programs.

But before CECs become CERCLA hazardous substances, if they ever do, where do they fit into the CERCLA liability framework?

CERCLA uses the term "hazardous substance" and the term "pollutant or contaminant." A chemical is a CERCLA "hazardous substance" if it falls within the purview of CERCLA §101(14), 42 U.S.C. §9601(14). That section provides that "hazardous substance" means, *inter alia*, any substance designated as hazardous under or pursuant to various identified federal environmental law provisions. *See* 42 U.S.C. §9601(14). The CERCLA list of hazardous substances can be found at 40 C.F.R. §302.4. The term "pollutant or contaminant" is broader. It includes, but is not limited to:

any substance . . . which, after release . . . and upon exposure, ingestion, inhalation, or assimilation into any organism, either directly . . . or indirectly . . . will or may reasonably be anticipated to cause death, disease, behavioral abnormalities, cancer, genetic mutation, physiological malfunctions (including malfunctions in reproduction) or physical deformations, in such organisms or their offspring.

See 42 U.S.C. §9601(33). CECs, if and until they become CERCLA hazardous substances, may become pollutants or contaminants. Indeed, in EPA's PFAS Action Plan, the Agency noted that PFOA and PFOS are considered pollutants or contaminants, giving the Agency the authority to investigate releases or threats of releases of PFOA and/or PFOS at sites pursuant to CERCLA §104(e), 42 U.S.C. §9604(e).

The distinction between CERCLA hazardous substances and all else, including pollutants or contaminants, is important because CERCLA liability is triggered by the existence of a "hazardous substance" at a site, nothing else. See 42 U.S.C. §9607(a)(1)-(4); *Colorado v. United States*, 867 F. Supp. 948, 951 (D. Colo. 1994); *Jastram v. Phillips Petroleum Co.*, 844 F. Supp. 1139, 1141 (E.D. La. 1994); *United States v. United Nuclear Corp.*, 814 F. Supp. 1552, 1557 (D.N.M. 1992); *Eagle-Picher Indus. v. United States*, 759 F.2d 922, 932 (D.C. Cir. 1985).

Though once a hazardous substance is present, potentially responsible parties (PRPs) are liable for "all costs of removal or remedial action" incurred by the US government, states, and Indian tribes not inconsistent with the national contingency plan (NCP) and "any other necessary costs of response" incurred by any other person consistent with the NCP. 42 U.S.C. §9607(a)(4)(A)-(B). Removal and remedial actions are meant to be directed at hazardous substances. See *id.* §§9601(23), (24); *Colorado*, 867 F. Supp. at 951-52 (explaining that "[t]he definitions clearly focus on actions taken in relation to hazardous substances"). However, their statutory definitions suggest that they may, in limited circumstances, include actions targeted at "associated" materials, including pollutants or contaminants, too. See *id.* at 952.

For example, "removal" is defined to include "such actions *as may be necessary taken* in the event of the threat of release of hazardous substances into the environment." 42 U.S.C. §9601(23) (emphasis added). It is also defined to include "other actions *as may be necessary* to prevent, minimize, or mitigate damage to the public health or welfare or to the environment" from a release or threat of release of a hazardous substance. *Id.* (emphasis added). Moreover, "remedial action" is defined to include the "cleanup of released hazardous substances *and associated contaminated materials*" and the "offsite transport and offsite storage, treatment, destruction, or secure disposition of hazardous substances *and associated contaminated materials.*" *Id.* §9601(24) (emphasis added).

So, the question then becomes: When can "all costs of removal or remedial action" or "any other necessary costs of response" include within it the costs associated with addressing CECs at a site, thus making PRPs liable under CERCLA for their cleanup?

Let us consider three different scenarios.

First, there may be a site where only CECs (no CERCLA hazardous substances) are present. In this scenario, there is no CERCLA liability. In fact, a major implication of designating a chemical as a CERCLA hazardous substance is that the presence of the chemical, on its own, will trigger CERCLA liability. However, it is important to note that liability may be imposed by a state cleanup program if the CECs are hazardous substances under state law.

Second, there may be a site where there are CECs and hazardous substances in geographically distinct areas. Here, there will be no CERCLA liability for the geographic area containing the CECs, but there will be CERCLA liability for the geographic area containing the hazardous substances. For example, in *Colorado v. United States*, Colorado sought to recover response costs incurred in connection with the Rocky Mountain Arsenal cleanup and litigation, including costs incurred in responding to the release of diisopropyl methylphosphonate (DIMP). 867 F. Supp. at 951. Colorado and the United States stipulated that DIMP is a pollutant or contaminant, not a hazardous substance. *Id.* Nonetheless, Colorado argued that it could recover its DIMP response costs because, as a PRP, the United States was liable for “all costs.” *Id.* The United States argued back that a PRP is not liable for response costs associated with “a discrete action that does not purposefully address hazardous substances . . . simply because it is part of a larger cleanup program” at a site. *Id.* The court agreed, concluding that the language in §9607(a)(4)(A), when interpreted in accordance with the definitions in §§9601(23) and (24), dictates that response costs are available only when the associated response actions are directed at hazardous substances. *Id.* at 952. But as mentioned above, for the geographic area containing the CECs, liability may be imposed by a state cleanup program if the CECs are hazardous substances under state law.

Third, there may be a site where CECs and hazardous substances are comingled. Here, due to the comingling, response actions directed at the hazardous substances will necessarily require addressing the “associated” CECs and therefore be considered part of “all costs of removal or remedial action” or “any other necessary costs of response.” Thus, in this third scenario, PRPs will likely be liable for the cleanup of the CECs, too. *Cf. United Nuclear Corp.*, 814 F. Supp. at 1558 (treating mine tailings that contained some hazardous substances in trace amounts as hazardous substances rather than pollutants or contaminants). If the CECs remain onsite, and if they are considered pollutants or contaminants, absent waiver, the CECs will have to be cleaned up pursuant to federal standards and more stringent promulgated state standards that are “legally applicable” to them or “relevant and appropriate under the circumstances” of their release or threatened release, known as ARARs. 42 U.S.C. §9621(d)(2)(A). If there are no ARARs, advisories, criteria, or guidance may be “considered” when selecting the remedy. 40 C.F.R. §300.400(g)(3).

In summary, PRPs should pay close attention to the presence of CECs at sites and their spatial relationship with hazardous substances, if any, as this will affect their CERCLA liability and potential courses of action. We will continue tracking CEC and federal and state cleanup developments in the Corporate Environmental Law Blog.

## Related Attorneys



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