



# “FOREVER CHEMICALS” & THE CONSTRUCTION INDUSTRY – IS LIABILITY HEADED YOUR WAY?

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**A** recent regulatory development by the United States Environmental Protection Agency (“EPA”) has created some potential liability questions for the construction industry. On April 17, 2024, EPA finalized a regulation that added two new chemicals to its Superfund list. The chemicals, with unduly long names (perfluorooctanoic acid and perfluorooctanesulfonic acid) are commonly known as PFOA and PFOS, and are two examples of a fairly large group of organic chemicals known as “Forever Chemicals.” These substances have been used in a host of manufacturing processes for several decades or longer, in everything from Teflon coating to fire suppressing chemicals, and from toiletry products to food packaging.

They are known as “forever chemicals” because they do not degrade, and remain in the systems of individuals exposed to them long term. While they can be removed from groundwater fairly easily with a carbon filter or other technologies, encountering them in soil or other materials presents a bigger challenge as technologies to manage or destroy the chemicals in these resources are still being researched. Since the 2016 discovery of the first community-wide groundwater plume in Hoosick Falls, New York, New York has been studying the impacts of PFOS and PFOA on human health and has been evaluating how widespread these materials are. This includes establishing a New York regulatory limit of 10 parts per trillion of PFOS, PFOA, and a few other similar substances, requiring widespread sampling for these substances at existing brownfield and superfund sites, and designating several of these chemicals as hazardous substances.

EPA followed suit in April, 2024. Designating PFOS and PFOA as Superfund Chemicals – more formally known as the Comprehensive Environmental Response, Compensation, and Liability Act (“CERCLA”), and under the New York equivalent, the New York Inactive Hazardous Disposal Site Program, gives both EPA and the New York State Department of Environmental Conservation (“DEC”) significant authority to require a cleanup or reimbursement for a cleanup from any of a host of “potentially responsible parties.” Superfund liability generally casts a broad net amongst these PRPs to require private parties to clean up

properties contaminated with hazardous waste, and to avoid government resources being expended for these cleanups.

There are several types of interactions with hazardous materials that can trigger Superfund liability. A party who generates the material is responsible – whether that party is the owner or operator of a site, or a party who later purchases or leases that property, regardless of whether any owner or operator actually spilled the hazardous material themselves or it was already there. A party who transports hazardous material similarly can have Superfund Liability, as can an “arranger,” a party who is involved with handling the material in a number of ways, including improperly disposing of it. Any of these parties are “strictly liable” for remediating the substance, if even a small fraction of the hazardous substance present was handled by that PRP.

This means that it doesn’t matter if the PRP spilled it, or encountered it unknowingly. If the material was in the possession of an owner, operator, transporter or arranger, EPA and DEC can formally designate that party as a PRP. They will notify the PRP(s) that a cleanup is required and the PRP can perform it, or if they fail to do so, EPA or DEC will do so. Superfund laws give EPA and DEC the right to require a cleanup, or to pursue reimbursement if EPA or DEC clean up the site, with interest. This liability scheme has been in place for over forty years, covering dozens of VOCs, SVOCs, metals, and other substances. However, now, EPA has added PFOA and PFOS to the list, which creates a new layer of liability for many industries, including construction.

One of the more direct pathways to exposure to PFOA and PFOS for the construction industry are projects at airports and military fields. These facilities have used PFOA & PFAS-laden firefighting foam for many years. These substances are essentially the only effective substance to manage airplane fires, and the FAA requires airports to have firefighting foam at the airport. If a contractor is repaving, or engaging in work involving excavation of concrete at an airport or military airfield, the asphalt or concrete could

have remnant PFOA and/or PFOS on it, as these substances do not degrade. A contractor milling these surfaces or generating concrete for RCA could generate materials that contain hazardous levels of these substances, and unknowingly bring them back to an asphalt or concrete production area or other facility.

In so doing, the equipment used by the contractor could come into contact with these substances. The receiving facility's RAP or RCA piles could be intermixed with these materials. The PFOA or PFOS could come into contact with asphalt or concrete manufacturing equipment, and potentially, form a part of new asphalt or concrete. There remain many unknowns about the transport pathways of Forever Chemicals once subjected to processing, and if part of recycled construction materials, however, generating, transporting and handling these materials could subject a contractor to Superfund Liability. Critically, EPA and DEC would have the ability to seek a cleanup of millings or RCA piles, equipment, or even new asphalt or concrete containing levels of PFOA or PFOS above the very low minimum level of one pound per 24 hour period.

When EPA listed PFOA and PFOS, it also issued an Enforcement Discretion memorandum, noting that for a variety of publicly-owned entities, including municipally owned-airports, would not be pursued for PFOA-related liability. "EPA will focus on holding accountable those parties that have played a significant role in releasing or exacerbating the spread of PFAS onto the environment."

While the construction industry is not generating Forever Chemicals in the first instance, they could encounter them and then "exacerbate the spread," in the eyes of EPA and DEC simply by engaging in routine RAP and RCA reuse and recycling activities.

At this early stage, there is much uncertainty, as construction activities could encounter these materials at airports, military bases, or other locations where excavation and management of C&D materials occurs and PFOA or PFOS is present. With this newfound exposure to strict liability under Superfund, the construction industry should be proactive in avoiding liability, particularly in locations such as airports or military facilities that are more likely to have high concentrations of PFOA or PFOS. Liability protections can include pre-excavation sampling (some of this may be required per New York's Part 360 regulations), contractual indemnification, and segregating any materials returning with the contractor from other materials managed onsite. Additionally, the contractor could require the airport to retain or manage any millings or concrete generated during construction.

Pursuing one or more of these options, particularly for higher risk sites, will allow the construction industry to minimize exposure to these Forever Chemicals on the job site. However, EPA and DEC are aggressively pursuing additional regulation of Forever Chemicals, so this is likely not the end of intense focus on addressing these materials.



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