
Taking the “Forever” Out of “Forever Chemicals”: How the EPA’s Proposed Rule to Label Two Additional PFAS Chemicals as “Hazardous Substances” Under CERCLA Will Increase the Success of Plaintiffs

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**TAKING THE “FOREVER” OUT OF “FOREVER
CHEMICALS”:
HOW THE EPA’S PROPOSED RULE
TO LABEL TWO ADDITIONAL PFAS CHEMICALS AS
“HAZARDOUS SUBSTANCES” UNDER CERCLA WILL
INCREASE THE SUCCESS OF PLAINTIFFS**

I. INTRODUCTION

“The system is rigged. They want us to believe that it’ll protect us, but that’s a lie. We protect us. We do. Nobody else. Not the companies, not the scientists, not the government. Us.”¹ Actor Mark Ruffalo spoke these words—no, seriously. Well, to provide some context, he was starring in a Hollywood film production, *Dark Waters*, playing world-renowned environmental litigator, Robert Bilott.

This quote refers to the unfulfilled promises to keep humans safe from harm in the form of toxic chemical exposures. For centuries, American citizens have put their faith in environmental experts, well-equipped corporations, and legislatures with big dreams. What is left for American citizens to put their faith in is the legal system, hopefully fueled by convincing evidence and devoted attorneys. However, most important to this “last resort” are passionate individuals serving as plaintiffs. *Dark Waters* does not tell a fictional tale. This is reality.

Due to the nature of the lack of legal authority experts maintain, historically ignored “self-reporting” requirements of corporations, and slow legislative decisions, it is time for individuals who have experienced environmental harms to put their faith in attorneys and the legal system now for vindication of environmental rights. Thankfully, the Environmental Protection Agency (EPA) is working to increase the tools of attorneys and success of plaintiffs in environmental litigation.

This Comment will argue that the EPA’s proposed rule to designate the two most widely used per- and polyfluorinated substances (PFAS), perfluorooctanoic acid (PFOA) and perfluorooctanesulfonic acid (PFOS), as “hazardous substances” under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) will increase the success of plaintiffs in PFAS litigation by (1) positively impacting access to legal representation and resources for litigation and (2) alleviating issues of causation in class action lawsuits and multidistrict litigations (MDLs).

1. DARK WATERS (Participant & Killer Films 2019).

II. BACKGROUND

This Part will begin by explaining what PFAS are and how they operate within the environment and human bodies, as well as the most common areas contaminated with PFAS and known distributors. Next, this Part will outline the history of PFAS litigation in the United States, including both successful and unsuccessful lawsuits and settlements. Then, this Part will analyze how the EPA has handled the issue of PFAS contamination and spread thus far, including failed programs and the overall regulatory framework. Finally, this Part will examine the EPA's proposed rule to label the two most widely used PFAS as "hazardous substances" under CERCLA, effective in August 2023.

A. *What are "Forever Chemicals?"*

PFAS are man-made chemicals that have been used in industry and consumer products globally since the 1940s.² PFAS are commonly referred to as "forever chemicals" because they are unable to break down and, therefore, remain in the environment and human bodies forever.³ Currently, three PFAS treatment options are being developed: granular activated carbon, ion exchange resins, and high-pressure membrane systems.⁴ However, removing PFAS from drinking water is an expensive task.

PFAS are also known as "everywhere chemicals" because they are prevalent in common household products used by humans every day both in the United States and internationally.⁵ More than 15,000 PFAS have been identified, and that number continues to grow.⁶

PFAS exposure has been linked to kidney and testicular cancer, liver and thyroid problems, reproductive problems, pregnancy-induced high blood pressure, low birthweight, increased risk of birth defects, changes in cholesterol levels, puberty timing, impacts on immune function, and lower vaccine effectiveness.⁷

2. *Per- and Polyfluoroalkyl Substances (PFAS) and Your Health*, AGENCY FOR TOXIC SUBSTANCES AND DISEASE REGISTRY, <https://www.atsdr.cdc.gov/pfas/index.html> [<https://perma.cc/2F5V-DYZ6>].

3. *Id.*

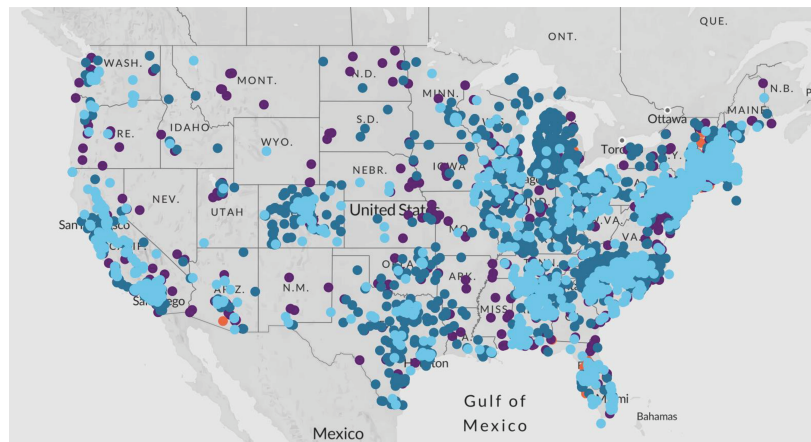
4. *PFAS Treatment in Drinking Water and Wastewater—State of the Science*, U.S. ENV'T PROT. AGENCY, <https://www.epa.gov/research-states/pfas-treatment-drinking-water-and-wastewater-state-science> [<https://perma.cc/3VY8-9YP2>].

5. Autumn Spanne, *What are PFAS?*, ENV'T HEALTH NEWS (Feb. 15, 2022), <https://www.ehn.org/what-are-pfas-2656619391.html> [<https://perma.cc/5RA5-F7UX>].

6. *Perfluoroalkyl and Polyfluoroalkyl Substances (PFAS)*, NAT'L INST. OF ENV'T HEALTH SCIS., <https://www.niehs.nih.gov/health/topics/agents/pfc/index.cfm> [<https://perma.cc/SB5D-NY2W>].

7. Spanne, *supra* note 5.

PFAS are in the blood of almost all Americans.⁸ Testing of umbilical cord blood and breast milk has indicated that exposure to PFAS begins pre-birth.⁹ Humans are most commonly exposed to PFAS through consumer products, food, and drinking water.¹⁰ As of February 2024, 5,021 areas in fifty states, the District of Columbia, and two territories were recorded as contaminated with PFAS.¹¹ Many of these locations include military sites and typical sources for drinking water.¹² As shown in Table 1, contamination sites are most prevalent in the upper East Coast, the lower West Coast, the Carolinas, Colorado, and the Midwest.¹³ These areas in particular contain increased PFAS contamination because sources of contamination include not only industrial and manufacturing facilities, but also landfills where PFAS have leaked into groundwater.¹⁴ Sources also include places where PFAS-based firefighting foam has been used such as airports, military sites, chemical plants, and petroleum storage facilities.¹⁵

TABLE 1¹⁶

8. *Id.*

9. *Id.*

10. *SUEZ Water N.Y. Inc. v. E.I. du Pont de Nemours & Co.*, 578 F. Supp. 3d 511, 522 (S.D.N.Y. 2022).

11. *Mapping the PFAS Contamination Crisis: New Data Shows 3,186 Sites in 50 States, the District of Columbia and Two Territories*, ENV'T WORKING GRP. (Feb. 5, 2024), https://www.ewg.org/interactive-maps/pfas_contamination/ [<https://perma.cc/3EBE-7DAJ>] [hereinafter *Mapping the PFAS Contamination Crisis*, ENV'T WORKING GRP.].

12. *Id.*

13. *Id.*

14. *Per- and Polyfluoroalkyl Substances (PFAS) in Drinking Water*, AM. ASS'N FOR THE ADVANCEMENT OF SCI., <https://www.aaas.org/epi-center/pfas> [<https://perma.cc/7ZX8-ZFD9>].

15. *Id.*

16. *Mapping the PFAS Contamination Crisis*, ENV'T WORKING GRP., *supra* note 11.

PFAS are likely present in every major public drinking water system in the United States and affect the drinking water of 200 million Americans.¹⁷ A 2022 analysis of 114 waterways across the country found that 83% of waterways contained PFAS, sometimes in concentrations thousands of times higher than the EPA's drinking water guidelines.¹⁸ On March 14, 2023, the EPA released a proposed national primary drinking water regulation for PFOA and PFOS, in addition to four other PFAS.¹⁹

PFAS have famously been used in chemical additives including Teflon and Tyvek, initially spread by DuPont and subsequently utilized by a myriad of other corporations and manufacturers.²⁰ PFAS are released during the manufacture, use, disposal, and biodegradation of PFAS-containing products.²¹ Other notable spreaders of PFAS chemicals include 3M and Chemours.²²

Perfluorooctanoic acid (PFOA) and perfluorooctanesulfonic acid (PFOS) are the two most widely used PFAS in wastewater.²³ They have historically been found in various consumer products including carpets, clothing, furniture fabrics, and food and cookware that are resistant to water, grease, or stains.²⁴ These chemicals are also used for firefighting at airfields and in numerous industrial processes, therefore, explaining their prevalence in military sites around the country.²⁵

A cross-sectional study conducted in Washington in 2019 revealed that PFOA and PFOS could be detected in 86% and 100% of breast milk samples collected from breastfeeding women.²⁶ In a different study, PFOS exposure was associated with approximately 382,000 adult deaths in the United States annually from 1999 to 2015.²⁷

17. Melanie Benesh, *Federal Regulatory Status and Outlook for Per- and Polyfluoroalkyl Substances (PFAS)*, 38 PRAC. REAL EST. LAW. 37 (2022).

18. Brittany Trang, *Why EPA's Long-Awaited Proposal on Two 'Forever Chemicals' is Bound to be Controversial*, STAT (Dec. 21, 2022), <https://www.statnews.com/2022/12/21/forever-chemicals-pfas-epa-drinking-water/> [<https://perma.cc/L4M6-GYZJ>].

19. *Drinking Water Health Advisories for PFOA and PFOS*, U.S. ENV'T PROT. AGENCY, <https://www.epa.gov/sdwa/drinking-water-health-advisories-pfoa-and-pfos> [<https://perma.cc/NU5R-4RZR>] [hereinafter *Drinking Water Health Advisories*, U.S. ENV'T PROT. AGENCY].

20. *SUEZ Water N.Y. Inc. v. E.I. du Pont de Nemours & Co.*, 578 F. Supp. 3d 511, 522 (S.D.N.Y. 2022).

21. *Id.*

22. *Breaking Down Toxic PFAS*, EARTH JUST. (Oct. 19, 2021), <https://earthjustice.org/features/breaking-down-toxic-pfas> [<https://perma.cc/58X4-YXT2>].

23. *Designation of Perfluorooctanoic Acid (PFOA) and Perfluorooctanesulfonic Acid (PFOS) as CERCLA Hazardous Substances*, 87 Fed. Reg. 54415, 54417 (proposed Sept. 6, 2022) (to be codified at 40 C.F.R. pt. 302).

24. *Id.*

25. *Id.*

26. Guomao Zheng et al., *Per- and Polyfluoroalkyl Substances (PFAS) in Breast Milk: Concerning Trends for Current-Use PFAS*, 55 ENV. SCI. & TECH. 7510, 7513 (2021).

27. Xue Wen, Mei Wang, Xuewen Xu & Tao Li, *Exposure to Per- and Polyfluoroalkyl Substances and Mortality in U.S. Adults: A Population-Based Cohort Study*, 130 ENV. HEALTH PERSPS. 067007-1,

The environmental persistence of PFAS, continued production and use by international manufacturers and domestic production, and the legacy of PFAS-containing products in the United States lead to anticipated environmental contamination and resulted human exposure to PFAS for the foreseeable future.

B. History of PFAS Litigation

Most of what Americans know about PFAS and their dangers stem from common law tort litigation that occurred well before the plaintiffs involved in that litigation even knew what PFAS were.²⁸

Robert Bilott’s legal battle against DuPont initiated the modern wave of PFAS litigation. Bilott has been referred to by the *New York Times* as “The Lawyer Who Became DuPont’s Worst Nightmare.”²⁹ Bilott, who spent his summers growing up on his grandmother’s farm in West Virginia, is a now Cincinnati-based attorney and environmental crusader, who has squared off large corporations by representing PFAS plaintiffs for almost three decades.³⁰ Bilott’s success and nuanced approach to environmental litigation led to the film adaptation, *Dark Waters*, about his work, where he was played by world-known actor, Mark Ruffalo.³¹

As *Dark Waters* realistically depicts, Wilbur Tennant, a West Virginia farmer, sought legal representation in 1998 because the cattle on his farm were dying at unprecedented rates.³² Upon investigation, the cattle were found to have been dying from PFAS-contaminated drinking water, directly due to DuPont’s conduct.³³ DuPont had pumped thousands of PFAS into the Ohio River, which adversely impacted various local water tables and contaminated at least 70,000 people.³⁴

067007-9 (2022).

28. Mark P. Nevitt & Robert V. Percival, *Can Environmental Law Solve The “Forever Chemical” Problem?*, 57 WAKE FOREST L. REV. 239, 242 (2022).

29. Nathaniel Rich, *The Lawyer Who Became DuPont’s Worst Nightmare*, N.Y. TIMES (Jan. 6, 2016), <https://www.nytimes.com/2016/01/10/magazine/the-lawyer-who-became-duponts-worst-nightmare.html>.

30. *Id.*

31. Alejandro De La Garza, *Dark Waters Tells the True Story of the Lawyer Who Took DuPont to Court and Won. But Rob Bilott’s Fight Is Far From Over*, TIME (Nov. 25, 2019, 12:03 PM), <https://time.com/5737451/dark-waters-true-story-rob-bilott/>.

32. Ryan S. Anderson, Comment, *PFAS Pollution, the Precautionary Principle, and a Path Forward: Potential Regulatory Regimes for PFAS Under the Safe Drinking Water Act*, 35 TUL. ENV’T L.J. 143, 144 (2022).

33. *Id.*

34. Michelle G. Scanlon, Comment, *Will ‘Forever Chemicals’ Be Around Forever? An Analysis and a Proposal Concerning PFAS Contamination and Public Health*, 34 HEALTH LAW. 52, 57 (2022); *DuPont Made Billions Polluting Tap Water With PFAS; Will Now Make More Cleaning It Up*, ENV’T WORKING GRP. (Dec. 12, 2019), <https://www.ewg.org/news-insights/news-release/>

At the time, DuPont was a prominent corporation and growing throughout American manufacturing and production. In 2000, DuPont's revenue increased from \$6.3 billion one year prior to \$7.9 billion; profit increased from \$663 million to \$803 million.³⁵ Despite legal turmoil, DuPont continued to profit; between 2018 and 2019, DuPont posted more than \$84 billion in revenues, more than any other United States chemical company.³⁶ In 2024, Forbes ranked the DuPont family 22nd of America's wealthiest families.³⁷

Tennant drove from West Virginia to Cincinnati, Ohio, to request assistance from Bilott, a then "big law" defense attorney.³⁸ After immense persistence and begging for legal representation, Tennant persuaded Bilott to represent him against chemical giant, DuPont, in *Tennant v. E.I. du Pont de Nemours & Co.*³⁹

Court-ordered discovery is to thank for what the United States now knows about the harm that PFAS present to both humans and animals.⁴⁰ This discovery from Tennant's case revealed evidence of the dangers posed by thousands of PFAS that were and remain out of reach of environmental law and regulation.⁴¹

DuPont eventually settled this claim discretely and for an unknown amount.⁴² However, this was only the beginning of a wave of PFAS litigation to come. Bilott went on to represent tens of thousands of plaintiffs in their respective PFAS claims, including a close-to-home Ohio-based MDL⁴³ with more than 80,000 class members.⁴⁴

The first PFAS-related class action filed against DuPont was a group of plaintiffs out of Parkersburg, West Virginia in 2002.⁴⁵ This suit, *Leach v. E.I. du Pont de Nemours & Co.*, involved 80,000 class members and

dupont-made-billions-polluting-tap-water-pfas-will-now-make-more [https://perma.cc/TAM9-MQTV] [hereinafter *DuPont Made Billions Polluting Tap Water With PFAS*, ENV'T WORKING GRP.].

35. *DuPont's Earnings Jump, But Stock Falls*, N.Y. TIMES (Apr. 26, 2000), https://www.nytimes.com/2000/04/26/business/dupont-s-earnings-jump-but-stock-falls.html.

36. *DuPont Made Billions Polluting Tap Water With PFAS*, ENV'T WORKING GRP., *supra* note 34.

37. *Du Pont Family*, FORBES (Dec. 16, 2020), https://www.forbes.com/profile/dupont/?sh=285a722d253b [perma.cc/Q5X5-QMP4].

38. Rich, *supra* note 29.

39. *Id.*

40. Nevitt & Percival, *supra* note 28, at 242.

41. *Id.*

42. Anderson, *supra* note 32, at 144; Kyle P. Konwinski & Olayinka Ope, *PFAS: The Impact of Forever Chemicals*, 51 THE BRIEF 33, 34 (2022).

43. Multidistrict litigation (MDL) is "federal-court litigation in which civil actions pending in different districts and involving common fact questions are transferred to a single district for coordinated pretrial proceedings, after which the actions are returned to their original districts for trial." *Multidistrict Litigation*, BLACK'S LAW DICTIONARY (11th ed. 2019).

44. Anderson, *supra* note 32, at 145.

45. Konwinski & Ope, *supra* note 42, at 34.

settled for \$70 million three years later.⁴⁶ Part of Bilott’s role in that case was arguing for the disqualification of an expert, a common aspect of complex litigation, particularly important in the environmental law field because environmental experts are often relied upon by plaintiffs to prove causation, arguably the most difficult burden in an environmental harm lawsuit.⁴⁷

The injury requirement often poses a barrier for recovery in tort actions as well because even experts struggle to establish a causal link between exposure and specific diseases.⁴⁸ Claims that surpass initial dispositive motions still have the burden of proving a prima facie case of whatever tort action the plaintiffs pursue at trial.⁴⁹ “Despite these difficulties, as regulators implement more PFAS regulation and lawmakers introduce more PFAS legislation, more PFAS-related lawsuits will be filed.”⁵⁰

Lawsuits against DuPont continued to progress; however, many settled before litigation was ever initiated, likely because settlements provided polluters, “the avoidance of precedent—preventing the creation of persuasive authority.”⁵¹ Further, plaintiffs may have accepted lackluster settlements for a quicker response and lowered expenses.⁵² Eventually, approximately 3,500 personal injury claims were consolidated into the first MDL against DuPont in 2013.⁵³ In 2017, DuPont settled over 3,000 of the cases involved in the MDL for \$670.7 million.⁵⁴ Before this settlement, DuPont attempted to refute these claims through litigation; the three cases tried before a jury all resulted in overwhelming verdicts in favor of the plaintiffs.⁵⁵ After DuPont’s first PFAS MDL was settled, 3M settled a case that had been lingering for eight years with the State of Minnesota for \$850 million.⁵⁶

46. *Id.*

47. *Rhodes v. E.I. Du Pont De Nemours & Co.*, 657 F. Supp. 2d 751, 763 (S.D.W. Va. 2008).

48. Craig T. Liljestrand, *PFAS Exposure: A Comprehensive Look at Emerging Facts and Studies, Risk and Liability Assessment, Litigation History, Evolving Regulations and Future Predictions*, 89 DEF. COUNS. J. 1, 23 (2022).

49. *Id.*

50. *Id.*

51. Carly Johnson, *How the Safe Drinking Water Act & the Comprehensive Environmental Response, Compensation, and Liability Act Fail Emerging Contaminants: A Per- and Polyfluoroalkyl Substances (PFAS) Case Study*, 42 MITCHELL HAMLINE L.J. PUB. POL’Y & PRAC. 91, 121 (2020).

52. *Id.*

53. Konwinski & Ope, *supra* note 42, at 35.

54. *Id.*

55. *Id.*

56. *Id.* at 36.

Later, in June 2023, 3M reached a \$10.3 billion settlement regarding PFAS contamination.⁵⁷ Moreover, Chemours, DuPont, and Corteva announced in June 2023 that they agreed to set up a \$1.19 billion fund to remove PFAS from drinking water systems.⁵⁸

Other state lawsuits remain pending, including numerous Michigan suits involving DowDuPont and Dyneon.⁵⁹ In April 2021, the State of Alaska filed suit against DuPont, 3M, and other companies for their alleged release of PFAS into soil.⁶⁰ Similarly, in May 2021, the Commonwealth of Pennsylvania filed suit against 3M, DuPont, and twenty-two other companies for alleged PFAS contaminations of firefighting facilities.⁶¹

California serves as an example of state leaders serving as plaintiffs in PFAS lawsuits. In one lawsuit, Attorney General Rob Bonta alleges that the defendant manufacturers knew or should have known about the dangers of PFAS when they made “and/or” sold products containing them.⁶² The attorney general further claims that the manufacturers failed to warn about the dangers of PFAS and also concealed them in numerous cases.⁶³ “The lawsuit seeks injunctive relief, damages, penalties, restitution, and abatement.”⁶⁴ Damages sought include, but are not limited to, statewide treatment and destruction of PFAS via drinking water treatment by regulated water systems.⁶⁵ “The lawsuit also seeks payment of funds necessary to mitigate the impacts to human health and the environment through environmental testing, medical monitoring, public noticing, replacement water . . . and safe disposal and destruction.”⁶⁶

57. John Flesher, *3M Reaches \$10.3 Billion Settlement Over Contamination of Water Systems with ‘Forever Chemicals’*, ASSOCIATED PRESS (June 22, 2023), <https://apnews.com/article/pfas-forever-chemicals-3m-drinking-water-81775af23d6ae63533796b1a1d2cdb> [<https://perma.cc/PF76-X954>].

58. Ben Casselman, Ivan Penn & Matthew Goldstein, *Three ‘Forever Chemicals’ Makers Settle Public Water Lawsuits*, N.Y. TIMES (June 22, 2023), <https://www.nytimes.com/2023/06/02/business/pfas-pollution-settlement.html>.

59. Konwinski & Ope, *supra* note 42, at 36.

60. *Id.*

61. *Id.*

62. Press Release, Rob Bonta, Attorney General of California, *Attorney General Bonta Sues Manufacturers of Toxic Forever Chemicals* (Nov. 10, 2022), <https://oag.ca.gov/news/press-releases/attorney-general-bonta-sues-manufacturers-toxic-forever-chemicals> [<https://perma.cc/6TMD-MK5V>].

63. *Id.*

64. *Id.*

65. *Id.*

66. *Id.*

Another example of state-initiated PFAS litigation was started in Illinois in March 2022.⁶⁷ This lawsuit highlights that PFAS were detected in the water supplies of 152 Illinois communities.⁶⁸ Attorney General Kwame Raoul alleges harm to Illinois citizens by fourteen chemical companies—including DuPont—and that the respective PFAS manufacturers have known for decades that PFAS are toxic, posing substantial risks to human health and the environment, yet they continue to actively promote the chemicals as safe to manufacture and use.⁶⁹ The plaintiff “seeks to recover natural resource damages and other monetary damages necessary for state officials to continue identifying, monitoring and remediating PFAS contamination of Illinois’ environment, as well as restoration of natural resources.”⁷⁰ On April 6, 2023, Attorney General Kwame Raoul also initiated a similar PFAS lawsuit against multiple companies that manufacture PFOA and PFOS for use in fire suppressing foam.⁷¹

Notably, in June 2023, in response to Attorney General Kathleen Jennings’s allegations the Monsanto Company polluted the environment with forever chemicals, the Delaware Supreme Court held that a company can be, “held liable after a product it manufactures is sold to third parties whose activities release the product into the environment and cause a public nuisance[.]”⁷²

In 2019, Attorney Bilott spoke before the 116th Congress, painting a picture of the evidence of PFAS’s danger to human health collected over decades and calling for EPA response.⁷³

[B]y the 1960’s and 1970’s, DuPont had data in its files from animal studies showing toxic effects in multiple species: rats, dogs, rabbits, monkeys. Multiple different types of organ systems: the liver, the testes, the adrenals. By the end of the 1970’s, DuPont knew that PFOS was building up in the blood of humans and staying there for long periods of time. By the 1980’s, DuPont was concerned about liver

67. Press Release, Kwame Raoul, Illinois Attorney General, *Attorney General Raoul Files Lawsuit Against Multiple Manufacturers Over Contamination By Toxic “Forever Chemicals”* (Feb. 1, 2023), <https://illinoisattorneygeneral.gov/news/story/attorney-general-raoul-files-lawsuit-against-multiple-manufacturers-over-contamination-by-toxic-forever-chemicals> [https://perma.cc/3H6F-P2AU].

68. *Id.*

69. *Id.*

70. *Id.*

71. Press Release, Kwame Raoul, Illinois Attorney General, *Attorney General Raoul Files Latest Lawsuit Over Contamination By Toxic “Forever Chemicals”* (Apr. 6, 2023), <https://illinoisattorneygeneral.gov/news/story/attorney-general-raoul-files-latest-lawsuit-over-contamination-by-toxic-forever-chemicals> [https://perma.cc/H4GQ-X4RU].

72. *State ex rel. Jennings v. Monsanto Co.*, 299 A.3d 372, 383 (Del. 2023).

73. *The Devil They Knew PFAS Contamination and The Need For Corporate Accountability, Part II: Hearing Before the S. Comm. on Env. and Comm. on Oversight and Reform*, 116th Cong. 116–58 (2019) (statement of Robert A. Bilott, Partner, Taft Stettinius & Hollister LLP).

damage and birth defects among its own PFOS-exposed workers. DuPont even classified PFOA as a confirmed animal carcinogen, possible human carcinogen, by 1988 after a rat study showed that the chemical caused testicular tumors. . . . During the 1980's and 1990's, the company also monitored and was concerned about increased cancer rates among its own workers. During the 1980's and 1990's, DuPont even found the chemical in the local public drinking water supply as early as 1984 and at levels above its own internal safety guideline, but did not alert local officials or any of the members of the public drinking that water.⁷⁴

When making these statements before Congress in 2019, Bilott pleaded for the EPA to take action by asserting that, despite all of the data collected over decades and years of initial PFAS litigation, the EPA had still not acted.⁷⁵ “I first warned EPA 18 years ago, and we are still here. We have more than enough evidence. It’s time to move forward and act to protect the American public.”⁷⁶

C. *How the EPA Has Addressed PFAS Thus Far*

In 1974, the Safe Drinking Water Act (SDWA) was passed and required the EPA to create public drinking water standards for the states to administer.⁷⁷ The EPA took until 2009 to truly begin enforcing this Act in regulating PFAS, presumably because of the increased attention to PFAS litigation because of the DuPont and 3M cases.⁷⁸ However, on March 14, 2023, the EPA furthered this work by “releasing a proposed national primary drinking water regulation for PFOA and PFOS,” in addition to four other PFAS.⁷⁹

The Toxic Substances Control Act (TSCA), enacted in 1976, broadly charged the EPA with evaluating environmental and public health risks associated with chemical substances that were new at the time.⁸⁰ In 2006, the EPA initiated a voluntary “phase-out” process, the PFOA Stewardship Program, with the goal of eliminating PFOA manufacture by eight major companies.⁸¹ The companies agreed to reduce their PFOA usage by 95% by 2010.⁸² In the 2014 final annual report for the program, all

74. *Id.*

75. *Id.*

76. *Id.*

77. Nevitt & Percival, *supra* note 28, at 256.

78. *Id.*

79. *Drinking Water Health Advisories*, U.S. ENV'T PROT. AGENCY, *supra* note 19.

80. Erin E. O'Brien, *Reform Needs To Happen PFAST: The Importance of Federal Per-and Poly-fluoroalkyl Substance Regulation*, 123 W. VA. L. REV. 233, 242 (2020).

81. *Id.* at 244.

82. *Id.* at 245.

eight companies had almost completely eliminated their use of PFOA.⁸³ The EPA asserted:

EPA launched the PFOA Stewardship Program in January 2006 because of concerns about the impact of PFOA and long-chain PFASs on human health and the environment, including concerns about their persistence, presence in the environment and in the blood of the general U.S. population, long half-life in people, and developmental and other adverse effects in laboratory animals.⁸⁴

However, this program did not address other PFAS.⁸⁵

Bilott’s work made clear in the early 2000s that the United States’s approach to regulating PFAS was in essence a “toxicity honor system,” in which private companies, not the EPA or other regulatory agencies, were responsible for self-reporting and self-policing their use of chemicals.⁸⁶ “This is contrary to the ‘precautionary approach,’ a core environmental principle that seeks to prevent harm from occurring in the face of scientific uncertainty.”⁸⁷ Today, the “toxicity honor system” has resulted in thousands of PFAS of unknown toxicity entering our streams of commerce unabated, untested, and unregulated.⁸⁸ Individuals and their impacted communities, as well as plaintiffs’ attorneys, have spearheaded the shift away from the “toxicity honor system” and call for a more proactive approach to PFAS regulation.⁸⁹

In 2016, the EPA issued a health advisory for PFOA and PFOS, including the chemicals on its short list of contaminants.⁹⁰ In 2019, the EPA issued a PFAS Act Plan to take “concrete steps to address PFAS and to protect the public health.”⁹¹ In 2020, EPA Administrator Andrew Wheeler signed a preliminary determination, which proposed to regulate both PFOS and PFOA.⁹²

In the spring of 2018, the EPA, in response to media and political pressure, announced that a “national plan” was in the works to manage PFAS pollution, which would entail examining “everything we know

83. *Id.*

84. *Fact Sheet: 2010/2015 PFOA Stewardship Program*, U.S. ENV’T PROT. AGENCY, <https://www.epa.gov/assessing-and-managing-chemicals-under-tsca/fact-sheet-20102015-pfoa-stewardship-program> [<https://perma.cc/UY6K-TWAQ>].

85. *Id.*

86. Nevitt & Percival, *supra* note 28, at 242.

87. *Id.*

88. *Id.*

89. *Id.*

90. *Id.* at 256.

91. *Id.* at 257 (quoting *EPA’s PFAS Action Plan: A Summary of Key Actions*, ENV’T PROT. AGENCY, https://www.epa.gov/sites/default/files/2019-02/documents/pfasaction_factsheet_021319_final_508compliant.pdf (last visited Feb. 2, 2022)).

92. Nevitt & Percival, *supra* note 28, at 257.

about PFOA and PFOS in drinking water.”⁹³ The plan encompassed developing groundwater clean-up recommendations for PFOA and PFOS.⁹⁴ After no further progress by the EPA by the end of 2018, in February 2019, the EPA announced it had “begun the process” of listing PFOA and PFOS as hazardous substances under the Superfund Law.⁹⁵

D. EPA’s Proposed Rule to Label Two PFAS as “Hazardous Substances” Under CERCLA

The Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), also known as the Superfund, was enacted in 1980 and amended in 1986.⁹⁶ The Act “provide[s] broad Federal authority to respond directly to releases or threatened releases of hazardous substances” listed in the Act which “may endanger the environmental or public health.”⁹⁷ “CERCLA section 101(22) defines ‘release’ as any ‘spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping, or disposing into the environment (including the abandonment or discarding of barrels, containers, and other closed receptacles containing any hazardous substance or pollutant or contaminant).”⁹⁸ Under CERCLA, hazardous waste sites must adhere to certain prohibitions and requirements; those responsible for releasing hazardous wastes will be liable for their releases.⁹⁹ Moreover, a trust fund may be utilized for clean-ups when no responsible party can be identified and held accountable.¹⁰⁰

On August 26, 2022, the EPA posted a Notice of Proposed Rulemaking (NPRM) on its website regarding a proposed rule to designate PFOA and PFOS as “hazardous substances” under CERCLA.¹⁰¹ On September 6, 2022, the proposed rule was published in the Federal

93. ROBERT BILOTT, EXPOSURE 368 (2019) (quoting the EPA).

94. *Id.* at 369.

95. *Id.*

96. *Superfund: CERCLA Overview*, U.S. ENV’T PROT. AGENCY, <https://www.epa.gov/superfund/superfund-cercla-overview> [<https://perma.cc/854P-2L3K>] [hereinafter *CERCLA Overview*, U.S. ENV’T PROT. AGENCY].

97. *Id.*

98. *Hazardous Substance Designations and Release Notifications*, U.S. ENV’T PROT. AGENCY, <https://www.epa.gov/epcra/hazardous-substance-designations-and-release-notifications> [<https://perma.cc/WY26-P6FY>] [hereinafter *Hazardous Substance Designations and Release Notifications*, U.S. ENV’T PROT. AGENCY].

99. *CERCLA Overview*, U.S. ENV’T PROT. AGENCY, *supra* note 96.

100. *Id.*

101. Press Release, Env’t Prot. Agency, EPA Proposes Designating Certain PFAS Chemicals as Hazardous Substances Under Superfund to Protect People’s Health (Aug. 26, 2022), <https://www.epa.gov/newsreleases/epa-proposes-designating-certain-pfas-chemicals-hazardous-substances-under-superfund> [<https://perma.cc/7YB9-GBWR>] [hereinafter Press Release, Env’t Prot. Agency].

Register; upon publication, the public had sixty days to comment on the proposed rule.¹⁰² The EPA proposed this rule in response to evidence that these chemicals may present substantial danger to public health and the environment.¹⁰³

The adverse human health effects, mobility, persistence, prevalence, and other factors related to these PFAS combine to support EPA’s proposed finding that PFOA and PFOS, when released into the environment may present substantial danger to the public health or welfare or the environment and, as a result, warrant designation as CERCLA hazardous substances.¹⁰⁴

A CERCLA hazardous substance listing does necessarily prevent responsible corporations from continuing to use PFAS; instead, it governs the clean-up of contaminated sites and, importantly for PFAS litigation, allows the EPA to recover costs from responsible polluters.¹⁰⁵

In the winter of 2022, the EPA issued an Advance Notice of Proposed Rulemaking to seek public comment on designating other PFAS as hazardous substances under CERCLA.¹⁰⁶ Many are concerned that the focus on just PFOA and PFOS may allow other equally toxic PFAS to evade increased regulation.¹⁰⁷ “There is a real risk that this focus on just two ‘slices’ of the massive PFAS ‘pie’ will allow large swaths of other, equally toxic PFAS to slip through the regulatory cracks.”¹⁰⁸ The final rule was scheduled to be published in August 2023.¹⁰⁹

This proposed CERCLA designation requires that any person in charge of a vessel or facility report releases of PFOA and PFOS of one pound or more within a 24-hour period.¹¹⁰ Further, these designations would provide additional tools for the government and agencies to address PFOA and PFOS contamination by increasing the pace of cleaning up sites.¹¹¹ Plaintiffs remain at the heart of PFAS litigation before, during, and after the finalization of this proposed rule by the EPA.

102. Designation of Perfluorooctanoic Acid (PFOA) and Perfluorooctanesulfonic Acid (PFOS) as CERCLA Hazardous Substances, 87 Fed. Reg. 54415, 54440 (Sept. 6, 2022) (to be codified at 40 C.F.R. § 302.4).

103. *Id.* at 54417.

104. *Id.*

105. Benesh, *supra* note 17.

106. U.S. ENV’T PROT. AGENCY, NOTICE OF PROPOSED RULEMAKING: DESIGNATING PFOA AND PFOS AS CERCLA HAZARDOUS SUBSTANCES (2022) [hereinafter U.S. ENV’T PROT. AGENCY, NOTICE OF PROPOSED RULEMAKING].

107. Nevitt & Percival, *supra* note 28, at 255.

108. *Id.*

109. U.S. ENV’T PROT. AGENCY, NOTICE OF PROPOSED RULEMAKING, *supra* note 106.

110. Designation of Perfluorooctanoic Acid (PFOA) and Perfluorooctanesulfonic Acid (PFOS) as CERCLA Hazardous Substances, 87 Fed. Reg. 54415, 54418 (Sept. 6, 2022) (to be codified at 40 C.F.R. § 302.4).

111. *Id.*

III. ANALYSIS

The EPA's proposed rule to designate two widely used PFAS, PFOA and PFOS, as "hazardous substances" under CERCLA will trigger increased PFAS lawsuits, increase the success of plaintiffs in PFAS litigation, and positively impact access to legal representation. For the purposes of this Comment and respective analysis, the EPA's proposed rule is analyzed as effective August 2023.

This Part will analyze how the proposed rule will operate and the effects on individuals, corporations, and the legal system as a whole. First, this Part will explain the anticipated effects of the proposed rule and the purpose of the rule: to reduce the negative impact of forever chemicals and improve clean-up responses and liability. Next, this Part will predict that the proposed rule will result in the filing of more PFAS-related lawsuits around the country. Then, this Part will argue that the success of plaintiffs in PFAS litigation will increase as a result of increased knowledge and the lesser burden on plaintiffs to establish causation as a result of the proposed rule. Finally, this Part will claim that the issue of access for legal representation, specifically for plaintiffs claiming PFAS injuries, will be improved in response to the federal, standardized scheme and widespread application of the proposed rule.

The EPA is now taking action, but only after years of PFAS victims pleading for action by the government and multiple administrations.¹¹² Many appreciate the proposed rule because it encourages transparency and disclosure of PFOA and PFOS polluters and parties involved in PFAS litigation.¹¹³ The EPA's proposed rule will prove beneficial in taking the "forever" out of "forever chemicals" by positively impacting potential plaintiffs and society at large with regard to PFOA and PFOS contamination.

A. *Effects of the EPA's Proposed Rule*

1. *Anticipated Direct Effects*

The EPA clearly indicated the direct effects of the proposed rule in the text of the rule itself.¹¹⁴ The direct effects of the CERCLA designation include requiring that any person in charge of a vessel or facility report releases of PFOA and PFOS of one pound or more within a

112. Dino Grandoni, *EPA Finally Moves to Label Some 'Forever Chemicals' as Hazardous*, WASH. POST (Aug. 26, 2022), <https://www.washingtonpost.com/climate-environment/2022/08/26/forever-chemicals-epa-cleanup-rule/> [https://perma.cc/K9CG-RMCX].

113. *Id.*

114. Designation of Perfluorooctanoic Acid (PFOA) and Perfluorooctanesulfonic Acid (PFOS) as CERCLA Hazardous Substances, 87 Fed. Reg. 54415, 54418 (Sept. 6, 2022) (to be codified at 40 C.F.R. § 302.4).

twenty-four hour period.¹¹⁵ The purpose of the proposed rule is to give the EPA, state, Tribal and local governments, and the general public a better understanding of where PFOA and PFOS releases occur, as well as the quantities involved.¹¹⁶ This, in turn, will impact reactions of various groups affected by and the legal results of the toxic releases.

Federal agencies will also be required to meet all of the property transfer requirements in CERCLA § 120(h) when selling or transferring federally-owned real property.¹¹⁷ Some of these obligations include providing notice when any hazardous substance “was stored for one year or more, known to have been released, or disposed of” and providing a covenant warranting that:

[A]ll remedial action necessary to protect human health and the environment with respect to any [hazardous substances] remaining on the property has been taken before the date of such transfer, and any additional remedial action found to be necessary after the date of such transfer shall be conducted by the United States.¹¹⁸

The reasoning behind this section of the rule is to ensure that any entity receiving land from the federal government is informed of the presence of PFOA or PFOS; these toxic substances then must be addressed as required under CERCLA.¹¹⁹

Importantly, as a result of the proposed rule, the EPA and other agencies exercising delegated CERCLA authority gain power in various ways to hold polluters responsible. They can now respond to PFOA and PFOS releases, including *threatened* releases, without making an “imminent and substantial danger” finding that was required prior to PFOA and PFOS’s label as “hazardous substances.”¹²⁰ The EPA and delegated agencies may also *require* potentially responsible parties to address PFOA or PFOS releases that pose an imminent and substantial endangerment to public health or welfare or the environment.¹²¹ Further, the EPA and plaintiffs may recover PFOA and PFOS costs for clean-ups from potentially responsible parties, to facilitate having polluters, rather than American taxpayers, pay for toxic PFOA and PFOS clean-ups that they had nothing to do with.¹²² Moreover, under the appropriate circumstances, even unrelated private parties that conduct

115. *Id.*

116. *Id.*

117. *Id.*

118. *Id.*

119. *Id.*

120. Designation of Perfluorooctanoic Acid (PFOA) and Perfluorooctanesulfonic Acid (PFOS) as CERCLA Hazardous Substances, 87 Fed. Reg. 54415, 54418 (Sept. 6, 2022) (to be codified at 40 C.F.R. § 302.4).

121. *Id.*

122. *Id.*

PFOA and PFOS clean-ups may recover clean-up costs from potentially responsible parties.¹²³

As a result of the finalization of the EPA's proposed rule, releases of PFOA and PFOS that meet or exceed the reportable quantity would be required to be reported to the National Response Center, state or Tribal emergency response commissions, and the local or Tribal emergency planning committees.¹²⁴ However, release of PFOA and PFOS, or any other hazardous substances, will not always result in a forced clean-up or site addition to the National Priorities List (NPL), which dictates liability and enforcement actions.¹²⁵ Despite the non-automatic addition of sites that release PFOA and PFOS to the NPL, the EPA anticipates the proposed rule will encourage better waste management strategies and treatment practices by facilities handling PFOA or PFOS.¹²⁶ The reporting of a release may accelerate privately financed clean-ups and mitigate potential adverse impacts to human health and the environment.¹²⁷

2. *Reactions to the Proposed Rule, Both Positive and Negative*

Various stakeholders, including polluters, have reacted differently to the proposed rule. Before the period available for public comments closed on November 7, 2022, the EPA's proposed rule received 64,073 public comments as of March of 2024.¹²⁸

For example, one comment from an individual supporter declared, "As companies have been producing and using these chemicals throughout the 20th century, it is imperative these chemicals are designated as hazardous so we can begin the clean-up process and hold industries and federal agencies accountable for the damage that has been done."¹²⁹

On the other hand, a county water resources department, which could potentially be deemed a responsible party under the rule, opposed the proposal by pleading:

A hazardous declaration under CERCLA allows EPA to recover clean-up costs from responsible parties . . . If the proposed rules are adopted, industrial waste pretreatment regulations will need to reflect the designation of PFOA and PFOS as hazardous materials.

123. *Id.*

124. Press Release, Env't Prot. Agency, *supra* note 101.

125. *Id.*

126. *Id.*

127. *Id.*

128. Designation of Perfluorooctanoic Acid (PFOA) and Perfluorooctanesulfonic Acid (PFOS) as CERCLA Hazardous Substances, 87 Fed. Reg. 54415 (proposed Sept. 6, 2022) (to be codified at 40 C.F.R. § 302.4).

129. Sebastian Valverde, Comment Letter on Designation of Perfluorooctanoic Acid (PFOA) and Perfluorooctanesulfonic Acid (PFOS) as CERCLA Hazardous Substances (Oct. 2, 2022), <https://www.regulations.gov/comment/EPA-HQ-OLEM-2019-0341-0272>.

Additional sampling and pretreatment may be required by our industrial customers. These costs will be passed on to our industrial customers, but administrative burden will also be increased.¹³⁰

Other industry representatives argue that listing PFOA and PFAS as hazardous substances and involving the federal government in more clean-ups could complicate the clean-ups in reality.¹³¹ The EPA’s proposed rule is “an expensive, ineffective and unworkable means to achieve remediation for these chemicals,” argued the American Chemistry Council, a trade group representing chemical makers.¹³²

In opposition to these arguments, part of the EPA’s proposal encompasses the idea that the EPA need not consider the immense costs that could be associated with requiring PFAS clean-ups of corporations and requiring PFAS polluters to compensate successful plaintiffs in PFAS litigation.¹³³ As the EPA explains, given the standard Congress established for determining whether a substance is “hazardous” (i.e., whether it “may present substantial danger to the public health or welfare or the environment”), the EPA proposed to interpret the language of CERCLA § 102(a) as precluding the Agency from taking cost into account in designating hazardous substances.¹³⁴ This proposal is consistent with relevant Supreme Court precedent on cost consideration in rulemaking decisions.¹³⁵ For example, CERCLA § 102(a) is similar to Clean Air Act § 109(b)(1), governing the EPA’s setting of national ambient air quality standards (NAAQS), which the Supreme Court held precludes consideration of costs.¹³⁶ “Nowhere are the costs of achieving such a standard made part of that initial calculation.”¹³⁷

From the words of the EPA itself:

[The CERCLA designation] will likely increase the pace at which cleanups occur because it will allow the Federal government to require responsible private parties to address releases of PFOS and PFOA at sites without other ongoing cleanup activities, and allow the government and private parties to seek to recover cleanup costs from potentially responsible parties assuming relevant statutory criteria are met. As a result, risks from releases of PFOA and PFOS may be mitigated.¹³⁸

130. Clermont Cnty. Water Res. Dep’t, Comment Letter on Designation of Perfluorooctanoic Acid (PFOA) and Perfluorooctanesulfonic Acid (PFOS) as CERCLA Hazardous Substances (Oct. 19, 2022), <https://www.regulations.gov/comment/EPA-HQ-OLEM-2019-0341-0303>.

131. Grandoni, *supra* note 112.

132. *Id.*

133. Designation of Perfluorooctanoic Acid (PFOA) and Perfluorooctanesulfonic Acid (PFOS) as CERCLA Hazardous Substances, 87 Fed. Reg. 54415, 54419 (Sept. 6, 2022) (to be codified at 40 C.F.R. § 302.4).

134. *Id.*

135. *See Util. Solid Waste Activities Grp. v. EPA*, 901 F.3d 414 (D.C. Cir. 2018).

136. *Whitman v. Am. Trucking*, 531 U.S. 457 (2001).

137. *Id.* at 465.

138. Designation of Perfluorooctanoic Acid (PFOA) and Perfluorooctanesulfonic Acid (PFOS) as CERCLA Hazardous Substances, 87 Fed. Reg. 54415, 54420 (Sept. 6, 2022) (to be codified at 40 C.F.R. § 302.4).

The EPA claims that the CERCLA designation will ultimately facilitate clean-ups of contaminate sites and reduce human exposure to forever chemicals.¹³⁹ For example, in certain circumstances, CERCLA 120(h) requires federal agencies to warrant that:

[A]ll remedial action necessary to protect human health and the environment with respect to any [hazardous substances] remaining on the property has been taken before the date of such transfer, and any additional remedial action found to be necessary after the date of such transfer shall be conducted by the United States.¹⁴⁰

Designating PFOA and PFAS as “hazardous substances” adopts this requirement among these particular PFAS, as well.

B. The EPA’s Proposed Rule Will Trigger More PFAS Litigation

1. Typical PFAS Plaintiffs

Federal regulatory initiatives may encourage both enhanced legal liability and private litigation.¹⁴¹ “Plaintiffs in PFAS lawsuits are generally divided into two categories: (1) government plaintiffs, which includes states and local municipalities, and (2) individuals.”¹⁴² Individuals involved in PFAS litigation are likely filing personal injury claims alleging injuries suffered resulting from toxic PFAS exposures.¹⁴³ The number of potential plaintiffs in PFAS litigation is incalculable due to the widespread impact and possibility of PFAS contamination in drinking water and soil used to grow food.¹⁴⁴

Common plaintiffs in PFAS litigation include workers in industries that manufacture PFAS or PFAS-containing products, workers in occupations that regularly use PFAS-containing materials (e.g., firefighters and military personnel), unintentional drinkers of PFAS-contaminated water, people who ingest PFAS-contaminated food, and people who experience hand-to-mouth transfer from surfaces treated with PFAS (e.g., toddlers and infants).¹⁴⁵ For the past several decades, PFAS litiga-

139. Press Release, Env’t Prot. Agency, *supra* note 101.

140. Designation of Perfluorooctanoic Acid (PFOA) and Perfluorooctanesulfonic Acid (PFOS) as CERCLA Hazardous Substances, 87 Fed. Reg. 54415, 54419 (Sept. 6, 2022) (to be codified at 40 C.F.R. § 302.4).

141. William Flynn, Kelly Jones Howell, Gene Kelly & John McManus, *As PFAS Litigation Swells, More Companies Must Consider Strategies for Class Defense; U.S. EPA Issues Health Advisory for PFAS*, JD SUPRA (June 21, 2022), <https://www.jdsupra.com/legalnews/as-pfas-litigation-swells-more-3327111/> [<https://perma.cc/U7N6-587V>].

142. 4 LAWRENCE G. CETRULO, TORTS LITIGATION GUIDE § 48:19 (2022 ed.).

143. *Id.*

144. *Id.*

145. *Id.*

tion has primarily entailed class action lawsuits.¹⁴⁶ However, due to public concerns regarding the health risks of PFAS exposures, the number of cases to be filed by individual plaintiffs is likely to increase.¹⁴⁷ The addition of PFOA and PFOS as official “hazardous substances” under CERCLA has raised public awareness of PFAS dangers, so the number of cases to be filed by individual plaintiffs is likely to increase as a result of the EPA’s proposed rule as well.

PFAS litigation is already trending upward in state and federal courts in the United States.¹⁴⁸ Additionally, injuries for which damages are sought have grown, expanding from an initial focus on only water contamination to more recent cases that allege violations of consumer protection laws for failure to warn or mislabeling certain consumer goods.¹⁴⁹

Further, there is an expected new wave in PFAS litigation that includes personal injury claims from consumers using *products* that contain PFAS.¹⁵⁰ This new wave is a result of developing scientific toxicity assessments and an increasing number of lawsuits from local municipal entities.¹⁵¹ These lawsuits include a \$113 million settlement of a lawsuit filed by municipalities in Michigan, alleging a company’s contamination of private water wells, and a \$2 million lawsuit by a local water authority for a plant’s contamination of the water authority’s water treatment system.¹⁵² As a result of the EPA’s proposed rule, this new wave will likely grow as more awareness is brought to PFAS exposure in general and toxicity assessments continue to develop as a result of the EPA’s regulatory power over polluters. Over a half dozen states have promulgated laws and regulations banning PFAS in food packaging, firefighting foam, and personal care products; these rules went into effect throughout 2023.¹⁵³

The range of plaintiffs that will be able to file suit will also expand as a result of the proposed rule. For example, lawsuits in the past ten years have focused on liability for contamination of soil and groundwater from airport operations in their use of firefighting foam and federal

146. *Id.*

147. *Id.*

148. Shannon E. McClure, Jennifer A. Smokelin & Casey J. Snyder, *Litigation Over ‘Forever Chemicals’ is Growing: Is Your Company the Next Defendant?*, THOMSON REUTERS (Dec. 7, 2022), <https://www.reuters.com/legal/legalindustry/litigation-over-forever-chemicals-is-growing-is-your-company-next-defendant-2022-12-07/> [<https://perma.cc/D5RM-4GJD>].

149. *Id.*

150. *Id.* (emphasis added).

151. See Mich. Dep’t of Env’t Quality v. Wolverine World Wide Inc., No. 1:18-cv-00039 (W.D. Mich. 2018); see City of Lake Elmo v. 3M Co., 237 F. Supp. 3d 877 (D. Minn. 2017); McClure et al., *supra* note 148.

152. *Id.*

153. Zach Bright, *PFAS Bans, Restrictions Go Into Effect in States in 2023*, BLOOMBERG L. (Jan. 4, 2023), <https://news.bloomberglaw.com/environment-and-energy/pfas-bans-restrictions-go-into-effect-in-states-as-year-begins> [<https://perma.cc/7RDU-N7G9>].

military bases.¹⁵⁴ As more information regarding PFAS becomes available to the general public, plaintiffs are notably pushing into new frontiers.¹⁵⁵ Plaintiffs in recent years have filed lawsuits relating to alleged use of PFAS in consumer products including cosmetics,¹⁵⁶ fast food packaging,¹⁵⁷ feminine products,¹⁵⁸ and personal hygiene products.¹⁵⁹

2. *The Scope of PFAS Litigation*

The ultimate scope of PFAS litigation is yet to be determined.¹⁶⁰ Some refer to the incoming surge of PFAS litigation as “the next asbestos.”¹⁶¹ Litigation involving PFAS has escalated in recent years, suggesting that PFAS-related litigation could be akin to asbestos litigation in the 1980s.¹⁶²

However, what is certain is that PFAS-related litigation is essentially guaranteed to increase because thousands of PFAS are currently known to exist and federal regulatory schemes, such as CERCLA, are raising awareness to previously untouched plaintiffs and victims of PFOA and PFOS contamination.¹⁶³

A comparison can be drawn to the regulation of Polychlorinated Biphenyls (PCBs) in the 1970s.¹⁶⁴ PCBs, like PFOA and PFOS, are man-made chemicals with detrimental effects on human health.¹⁶⁵ Before 1976, when federal regulation of PCBs began, landfills, waterways, and the air contained high amounts of PCBs.¹⁶⁶ Because PCB is now listed as a “hazardous substance” under CERCLA, a polluter must conduct a clean-up project under CERCLA when the EPA makes a determination regarding PCB contamination.¹⁶⁷ Now that PFOA and PFOS will

154. See *Jackson Hole Airport Bd. v. 3M Company*, No. 2:21-cv-3182 (D.S.C. 2021); see *Giovanni v. U.S. Dep’t of the Navy*, No. 16-04873 and 17-00765 (E.D. Pa. 2016); McClure et al., *supra*, note 148.

155. McClure et al., *supra*, note 148.

156. *Id.*; see *Onaka v. Shiseido Am. Corp.*, No. 21-cv-10665-PAC, 2023 U.S. Dist. LEXIS 53220 (S.D.N.Y. Mar. 28, 2023).

157. McClure et al., *supra*, note 148; see *Clark v. McDonald’s Corp.*, No. 3:22-CV-00628-NJR, 2023 U.S. Dist. LEXIS 51973 (S.D. Ill. Mar. 27, 2023).

158. McClure et al., *supra*, note 148; see *Kanan v. Thinx Inc.*, No. 2:20-cv-10341 JVS, 2021 U.S. Dist. LEXIS 191225 (C.D. Cal. June 23, 2021).

159. McClure et al., *supra*, note 148; see *Andrews v. Procter & Gamble*, No. 5:19-cv-00075 (C.D. Cal. 2019).

160. *Id.*

161. *Id.*

162. Konwinski & Ope, *supra*, note 42, at 33.

163. McClure et al., *supra*, note 148.

164. O’Brien, *supra*, note 80, at 242.

165. *What are PCBs?*, NAT’L OCEAN SERV., <https://oceanservice.noaa.gov/facts/pcb.html> [<https://perma.cc/Z5KN-YBY8>].

166. O’Brien, *supra*, note 80, at 242.

167. *Id.* at 244–46.

be listed as “hazardous substances” under CERCLA, polluters must also adhere to the regulatory power of the EPA, and lawsuits will result in response to non-compliance with federal law.

The designation of PFOA and PFOS as “hazardous substances” is long overdue. Regulation of chemicals that pose threats to human health began in the 1970s, but PFAS were not included in those regulations because the companies that originally made PFAS were supposed to report whether PFAS had negative health effects.¹⁶⁸ However, for decades, companies did not report their findings.¹⁶⁹ So, the PFAS issue was stuck with the safety nets of the Clean Air Act and the Clean Water Act.¹⁷⁰ In the past, no one knew how detrimental PFAS were when released into waters and the atmosphere, so laws could not regulate them.¹⁷¹ However, the CERCLA designation of PFOA and PFOS confirms the detrimental nature of PFAS on human health, so an opportunity now exists for laws to regulate them and for individuals to sue in response to violations of pertinent regulations.

The EPA’s proposed rule will trigger required reporting of PFOA and PFOS releases, providing the EPA with improved scientific data and the ability to require clean-ups.¹⁷² The rule will also permit the EPA to recover clean-up costs to preemptively protect public health and encourage better waste management.¹⁷³ Those new PFOA and PFOS-specific abilities will effectively facilitate making the *polluter* pay. With every new regulatory ability of the EPA as a result of the proposed rule comes a new opportunity and potential cause of action for plaintiffs in PFAS litigation.

Listing PFOA and PFOS as “hazardous substances” will “trigger CERCLA liability for persons to pay for response costs, natural resource damages, and public health studies at release sites.”¹⁷⁴ Increased liability means increased opportunities for plaintiffs to hold liable polluters accountable for their CERCLA obligations through PFAS litigation.

168. Trang, *supra* note 18.

169. *Id.*

170. *Id.*

171. *Id.*

172. *Hazardous Substance Designations and Release Notifications*, U.S. ENV’T PROT. AGENCY, *supra* note 98.

173. *Id.*

174. Nevitt & Percival, *supra* note 28, at 263; 42 U.S.C. §§ 9601(14), 9607.

C. *The EPA's Proposed Rule Will Increase the Success of Plaintiffs in PFAS Litigation*

I. *Learning from History*

They wanna try and keep everything hushed up. Like it's some king of big secret . . . They won't tell us what it is. They don't wanna talk to me. Because I'm an old dumb farmer. I'm not supposed to know anything. But it's not gonna be covered up. Because I'm gunna bring it out in the open for people to see.¹⁷⁵

Those words of Wilbur Tenant, the West Virginia plaintiff in the lawsuit that started the surge of PFAS litigation in the early 2000s,¹⁷⁶ likely encompass what many people harmed by PFAS have felt: helplessness. However, plaintiffs can and will succeed in PFAS-related lawsuits, especially with the help of the EPA's proposed CERCLA designation of PFOA and PFOS.

As Robert Bilott ferociously fought for plaintiffs in PFAS lawsuits post-*Leach*, he dove into them with what he thought was a reasonable expectation: that the same evidence, science, and logic that had been successful in the original class action would be successful in these cases.¹⁷⁷ He was wrong, but it was not because the lawsuits lacked merit.¹⁷⁸ It was because of nuances, changing federal laws, and different jurisdictions with different interpretations, among other issues.¹⁷⁹

For example, in one of Robert Bilott's cases, the judge determined that the plaintiffs could not show, under federal case law precedent, how a medical doctor's recommendation for medical monitoring would be necessarily applied for everyone in the class.¹⁸⁰ The judge reasoned that every plaintiff in the class had different medical histories; in other words, the impact of PFAS on each human was too individual.¹⁸¹

Universally labeling PFOA and PFOS as "hazardous substances" under CERCLA will help balance these inconsistencies, so the success rate of plaintiffs can improve. With regard to evidential proof, the CERCLA designation already shows the PFAS is hazardous in humans across the board.¹⁸² While individuals may experience different injuries as a result of PFAS contamination, not as much data or evidence of

175. BILOTT, *supra* note 93, at vii.

176. Anderson, *supra* note 32, at 144.

177. BILOTT, *supra* note 93, at 288–89.

178. *Id.*

179. *Id.*

180. BILOTT, *supra* note 93, at 289.

181. *Id.*

182. *What Does CERCLA Identify as a Hazardous Substance?*, DANIELS TRAINING (Nov. 14, 2014), <https://danielstraining.com/what-does-cercla-identify-as-a-hazardous-substance/> [<https://perma.cc/774G-K3ED>].

individual harm will be necessary because of the assurance that the substances are hazardous to human health.¹⁸³ The entire point of the EPA’s proposed rule to label PFOA and PFOS as “hazardous” is to protect humans as a class and solidify PFAS as dangerous to human health.¹⁸⁴ The rule will apply the same way in every jurisdiction because CERCLA is a standardized federal act.¹⁸⁵

2. *The Logistics of a PFAS Lawsuit*

“Lawsuits, whether filed by individuals, organizations, or states, are an effective way to get PFAS polluters to pay.”¹⁸⁶ Labeling PFOA and PFOS as “hazardous substances” will give the EPA pathways to hold polluters accountable for the clean-up via successful lawsuits.¹⁸⁷ The EPA itself explains, “[t]his rulemaking would increase transparency around releases of these harmful chemicals and help to hold polluters accountable for cleaning up their contamination.”¹⁸⁸

Most commonly, PFAS litigation plaintiffs’ theories of liability include legal claims of negligence, public nuisance, trespass, strict products liability, and failure to warn.¹⁸⁹ Plaintiffs have traditionally argued that defendants knew or should have known of the dangers associated with PFAS and failed to warn others of these dangers.¹⁹⁰

Past PFAS litigation has revealed internal documents containing proof that manufacturers had knowledge of the dangers associated with PFAS as far back as the 1950s.¹⁹¹ These documents detailed “health concerns . . . buildup of PFAS compounds in employees’ blood streams, and evidence of PFAS degradation resistance.”¹⁹² Now that PFOA and PFOS will be labeled as “hazardous substances” under CERCLA, PFAS plaintiffs will no longer have to argue that defendants knew or should have known of the dangers associated with PFAS; it will be proven by the CERCLA designation as “hazardous” itself. Instead,

183. *Id.*

184. Designation of Perfluorooctanoic Acid (PFOA) and Perfluorooctanesulfonic Acid (PFOS) as CERCLA Hazardous Substances, 87 Fed. Reg. 54415, 54418 (Sept. 6, 2022) (to be codified at 40 C.F.R. § 302.4).

185. *Summary of the Comprehensive Environmental Response, Compensation, and Liability Act (Superfund)*, U.S. ENV’T PROT. AGENCY, <https://www.epa.gov/laws-regulations/summary-comprehensive-environmental-response-compensation-and-liability-act> [<https://perma.cc/8NUU-W927>].

186. Trang, *supra* note 18.

187. *Id.*

188. *Key EPA Actions to Address PFAS*, U.S. ENV’T PROT. AGENCY, <https://www.epa.gov/pfas/key-epa-actions-address-pfas> [perma.cc/T2YN-NDBF].

189. 4 CETRULO, *supra* note 142, § 48:20.

190. *Id.*

191. *Id.*

192. *Id.*

plaintiffs can focus on failure to warn arguments and will not need to spend judicial time and resources discovering documents with evidence used in the past to merely establish that companies knew PFAS were hazardous.

Establishing causation has traditionally been, and remains to be, one of the most difficult elements for plaintiffs to prove in PFAS litigation, or any personal injury litigation for that matter.¹⁹³ A plaintiff must be able to demonstrate that PFAS exposure is generally capable of causing the injury at issue.¹⁹⁴ This task will be less burdensome on plaintiffs with the EPA's proposed rule because a "hazardous substance" designation under CERCLA indicates the substance at issue presents a danger to public health.¹⁹⁵ Therefore, it will likely be easier to prove the PFOA and PFOS exposure was "generally capable" of causing the injury at issue (e.g., cancer or birth defects).

In cases initiated by the government, plaintiffs are ordinarily seeking damages for the cost of clean-ups and remediation of PFAS-contaminated sites.¹⁹⁶ In some government-initiated cases, damages include monetary damages associated with restoring the natural resources affected by PFAS contamination.¹⁹⁷

On the other hand, individual lawsuits normally seek compensatory damages including pain and suffering, past and future medical expenses, lost wages, and loss of consortium.¹⁹⁸ Plaintiffs may also seek damages for the cost-of medical monitoring to detect future development of PFAS-related diseases.¹⁹⁹ Damages related to PFOA and PFOS exposures have resulted in millions of dollars in damages in PFAS litigation.²⁰⁰

As one Pennsylvania law firm involved in PFAS litigation from the plaintiff's side framed the matter:

Many believe that the EPA's proposal to label PFOA and PFOS as hazardous substances demonstrates that government is accepting the tremendous evidence that these chemicals are dangerous to public health. If this proposal is confirmed, the rule will result in a colossal increase in cost recovery claims under CERCLA. Plaintiffs' lawyers . . . will seek to link the chain of causation between forever chemicals and health hazards such as a cancer, liver damage, and immune system impacts. These firms will seek to demonstrate that defendants to

193. *Id.* § 48:21.

194. *Id.*

195. *Hazardous Substance Designations and Release Notifications*, U.S. ENV'T PROT. AGENCY, *supra* note 98.

196. 4 CETRULO, *supra* note 142, § 48:22.

197. *Id.*

198. *Id.*

199. *Id.*

200. *Id.*

these lawsuits, such as DuPont and 3M, understood that their products would release toxins, but chose to sell them to customers knowing that the toxins would contaminate the environment.²⁰¹

Over \$1 billion in settlements have already been paid to date related to the allegedly detrimental environmental and health effects caused by PFAS.²⁰²

3. *Proving Liability in PFAS Lawsuits*

One approach to increasing liability in PFAS lawsuits includes focusing on three emerging risk factors of toxic chemical such as PFOA and PFOS: (1) evident harm; (2) cultural relevance; and (3) substitution.²⁰³

Evident harm is necessary to establish causation between the injury and the PFAS at issue.²⁰⁴ Evident harm will likely be more arguable and provable after the EPA’s proposed rule because PFOA and PFOS will be automatically deemed “hazardous substances.” Harm arguably does not get more evident than when the federal government agrees that it is and requires regulation of it.

The cultural relevance element shows that, “[w]hen a risk or harm emerges as a widespread public issue, litigation, legislation, and regulatory action that could translate into significant settlements and damage awards may follow.”²⁰⁵ Regulatory scrutiny, such as the CERCLA designation at issue, may increase attention on potential hazards.²⁰⁶ Many argue that cultural relevance and plaintiff sympathy drive more PFAS liability lawsuits.²⁰⁷

When an issue of cultural relevance, such as PFAS contamination, is the subject of a film, book, or other works of art, mere public awareness can trigger lawsuits.²⁰⁸ For example, following the release of *Spotlight* in 2015, at least fifteen states extended or suspended their related statute of limitations for bringing sexual abuse cases.²⁰⁹ This legislation enabled the filing of more than 5,000 new cases, resulting in over \$4 billion in damages.²¹⁰

201. *Forever Chemical Litigation Intensifies*, WIEAND L. FIRM (Sept. 9, 2022), <https://www.wieandlaw.com/forever-chemical-litigation-intensifies/> [https://perma.cc/7X7E-VPGE].

202. *Are PFAS Forever Chemicals” Becoming A Significant Liability Event?*, VERISK (Nov. 02, 2021), <https://core.verisk.com/Insights/Emerging-Issues/Articles/2021/November/week1/pfas-chemicals-becoming-significant-liability-event> [perma.cc/BKS4-M5W5].

203. *Id.*

204. *Id.*

205. *Id.*

206. *Id.*

207. *Id.*

208. VERISK, *supra* note 202.

209. *Id.*

210. *Id.*

There are many films, books, and podcasts about PFAS that have already instigated increased public awareness and contaminated victim sympathy.²¹¹ This form of publicity has the power to prompt other individuals to file their own lawsuits or join existing class action lawsuits or MDLs.²¹² Moreover, celebrity involvement, such as Mark Ruffalo and Anne Hathaway in the film *Dark Waters*, can increase the likelihood that the general population becomes aware of an issue such as PFAS.²¹³

With regard to the third element, substitution, sometimes, the substitute provided to replace hazardous substances is actually more detrimental than the previous harmful substance.²¹⁴ For example, after a PFOA substitute was found in the Cape Fear River watershed in North Carolina, a class action lawsuit was filed against two leading manufacturers of this PFOA substitute.²¹⁵ Therefore, as a result of the CERCLA designation as “hazardous,” polluters will need to find adequate substitutions if they hope to prevail against potential plaintiffs.

When a substance is only classified a “pollutant” or “contaminant” and not a “hazardous substance” under CERCLA, it must be proven an “imminent and substantial danger” to public health before a site can be investigated by the EPA.²¹⁶ Even when the EPA could meet that high standard, there were previously not many options for action the EPA could take against the polluter.²¹⁷ Notably, the EPA had no way to make the polluters of “pollutants” or “contaminants” pay for the clean-ups.²¹⁸ On the other hand, for any substance labeled as a “hazardous substance” under CERCLA, releases above a certain threshold trigger reporting requirements, investigation, and potential payment for clean-up.²¹⁹ This is yet another way potential plaintiffs in PFAS litigation, including the EPA, can hold polluters more accountable as a result of the proposed rule. Importantly, because CERCLA is universal, the EPA will be able to use this power to address thousands of communities across the country for years of PFAS pollution.²²⁰

Significantly, with the CERCLA designation, plaintiffs do not have to rely only on experts to establish causation and liability; they may

211. *Id.*

212. *Id.*

213. *Id.*

214. VERISK, *supra* note 202.

215. *Nix v. Chemours Co.* FC, No. 7:17-CV-189-D, 2023 WL 6471690 (E.D.N.C. Oct. 4, 2023); VERISK, *supra* note 202.

216. Benesh, *supra* note 17.

217. *Id.*

218. *Id.*

219. *Id.*

220. *Id.*

merely rely on the regulatory standard and indication as “hazardous.” Increased litigation means more court-ordered discovery, which will, in turn, result in the exploration of more harms of PFAS, thereby contributing to increased plaintiff success.

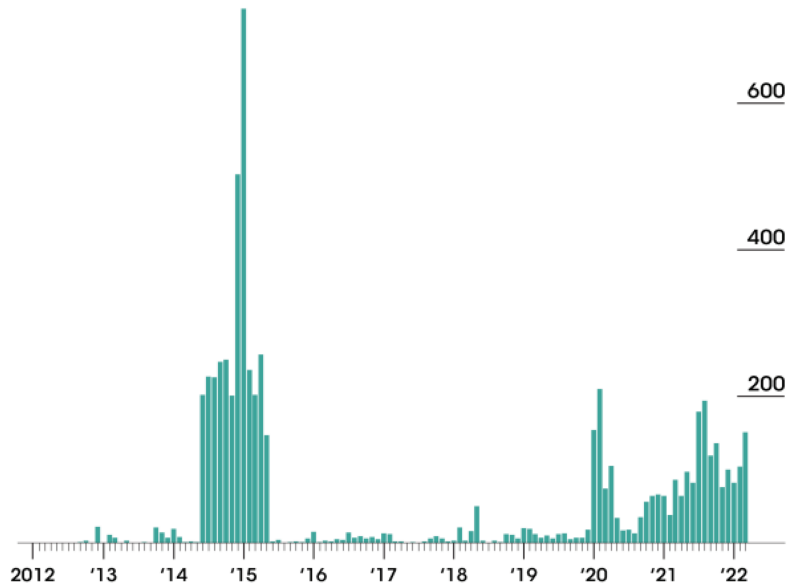
4. Increased Attention to PFAS

Over the past two years, awareness of PFAS has significantly expanded, as exemplified in Table 2.²²¹ As one New York insurance coverage dispute lawyer described, “Plaintiff lawyers tend to piggyback, so the more attention, the more potential liability.”²²²

TABLE 2²²³

A Decade of ‘Forever Chemical’ Litigation

Monthly PFAS Lawsuits Filed (January 2012 – March 2022)



Note: This graphic shows lawsuits filed beginning in 2012. There were 41 cases filed between 2005 and 2011.

Source: Bloomberg Law analysis of PFAS-related lawsuits filed in federal courts between July 2005 and March 2022.

Bloomberg Law

221. Andrew Wallender, *Companies Face Billions in Damages as PFAS Lawsuits Flood Courts*, BLOOMBERG L. (May 23, 2022), <https://news.bloomberglaw.com/pfas-project/companies-face-billions-in-damages-as-pfas-lawsuits-flood-courts> [<https://perma.cc/ZRG6-LBSA>].

222. *Id.* (quoting Matthew G. Jeweler, an attorney at Pillsbury Winthrop Shaw Pittman LLP).

223. Wallender, *supra* note 221.

Corporations including 3M Co., Chemguard Inc., Kidde-Fenwal Inc., National Foam Inc., and Dynax Corp. are currently being sued at approximately the same rate as DuPont, based on an analysis of more than 6,400 PFAS-related lawsuits filed in federal courts between 2005 and 2022.²²⁴ The EPA's proposed rule has, as evidenced by thousands of comments and responses, and will continue to increase awareness surrounding PFAS and the potential for successful PFAS litigation by injured plaintiffs.

As a federal judge overseeing thousands of PFAS cases described the involvement of PFAS litigation, “[i]t does not take a genius to figure out that if certain motions don’t go their way, the defendants are in an existential threat to their survival.”²²⁵

D. Disparity in Access to Justice/Legal System to Combat PFAS Will Decrease as a Result of EPA's Proposed Rule

Robert Bilott described meeting his first potential PFAS plaintiff in this way: “[A colleague] and I straightened our ties, cleared our throats, and prepared to meet the clients. I swung open the car door and set my left wingtip into the mud.”²²⁶ Wilbur Tennant, the infamous early PFAS plaintiff, had to drive from West Virginia to Cincinnati and practically beg an attorney for legal representation.²²⁷ These are PFAS victims. Wilbur Tennant did not have access to “big city” lawyers; no one nearby would help him.²²⁸ With more standardization and recognition nationwide about the dangers of PFAS and the hazards they pose to humans, plaintiffs will find it easier to access legal representation.

“A clear pattern has emerged in successful city-led toxic tort litigation.”²²⁹ Because CERCLA applies at the federal level, and the EPA has to opportunity to regulate PFOA and PFOS around the country as a “hazardous substance” as a result of the proposed rule, plaintiffs’ respective cities will likely be better suited to instigate PFAS litigation after the proposed rule.

After the EPA’s proposed rule, PFAS plaintiffs, like Wilbur Tennant, should not have to travel to large cities such as Cincinnati to beg for representation or attention at the least. This CERCLA designation establishes attention to and raises awareness of PFAS regulation and

224. *Id.*

225. *Id.* (quoting Judge Richard Gergel in a July 2019 proceeding).

226. BILOTT, *supra* note 93, at 28.

227. Anderson, *supra* note 32, at 145.

228. Rich, *supra* note 29; DARK WATERS, *supra* note 1.

229. Kate Fritz, *Public Pollution/Public Solution: A Framework for City-Led Toxic Tort Litigation*, 28 N.Y.U. ENV'T. L.J. 319, 344 (2020).

litigation.²³⁰ This is a result of all areas in the United States with PFAS contamination being federally regulated and scrutinized by the EPA.

The “toxicity honor system” in place before for PFAS “regulation” did not work because corporations could not be trusted to report the effects of hazardous chemicals.²³¹ Voluntary systems do not work; PFAS polluters need incentives or threats of punishment, and the EPA’s proposed rule provides both.

Later regulatory schemes also did not work. “The 2006 PFOA Stewardship Program was not resolving any of the issues of PFOA blood levels or water contamination. Emissions and production were being allowed to continue, albeit at diminishing levels, under the 2015 deadline.”²³² This system was voluntary and only focused on one chemical.²³³

What is left is the legal system. A federal regulatory scheme, such as the EPA’s proposed rule provides more potential remedies for plaintiffs and EPA-ordered site clean-ups around the country, therefore increasing access to representation.²³⁴

Until now, large cities around the United States have had an incentive to instigate toxic tort litigation and compile cases into MDLs, such that small cities in marginalized areas, such as Wilbur Tenant’s small West Virginia town, have traditionally been disadvantaged.²³⁵

City-initiated litigation is more likely to result in settlement if it is consolidated with other city-led cases and then taken up by state attorneys general . . . In the end, state attorneys general are much better positioned to follow through on the expense and long timeline of toxic tort litigation to settle these cases and secure abatement funds. Additionally, states can make arguments based on theories, like *parens patriae* and natural resource damages, that cities simply may not because of their legal status as subsidiaries of states.²³⁶

However, the EPA’s classification of PFOA and PFOS as “hazardous substances” under CERCLA provides enough of its own incentives to instigate requisite litigation in even small towns; they are able to more clearly indicate harm done to them by PFAS without needing many resources to prove causation and impact.

230. Designation of Perfluorooctanoic Acid (PFOA) and Perfluorooctanesulfonic Acid (PFOS) as CERCLA Hazardous Substances, 87 Fed. Reg. 54415, 54417 (proposed Sept. 6, 2022) (to be codified at 40 C.F.R. § 302.4).

231. Nevitt & Percival, *supra* note 28, at 242.

232. BILOTT, *supra* note 93, at 283.

233. *Id.*

234. Designation of Perfluorooctanoic Acid (PFOA) and Perfluorooctanesulfonic Acid (PFOS) as CERCLA Hazardous Substances, 87 Fed. Reg. 54415, 54418 (Sept. 6, 2022) (to be codified at 40 C.F.R. § 302.4).

235. Fritz, *supra* note 229, at 345.

236. *Id.*

In many states, leaders want *polluters*, rather than *taxpayers* to pay for clean-ups.²³⁷ According to the Government Accountability Office, the Department of Defense spent \$1.1 billion on PFAS clean-up in 2020 and estimated spending \$2.1 billion more in 2021.²³⁸

3M told the Star Tribune that it has paid “more than \$1.2 billion” to treat PFAS pollution. That is a fraction of the \$10 billion in taxpayer funds the country’s new bipartisan infrastructure bill allocates for PFAS cleanup. Other proposed PFAS pollution bills in Congress allocate billions more to clean up a mess 3M and other corporations made.²³⁹

“These chemicals are very difficult to clean-up, and it’s very expensive,” said Minnesota State Representative Ami Wazlawik, who sponsored a bill that banned PFAS in food packaging. “The taxpayers of Minnesota are not responsible for putting these chemicals there.”²⁴⁰

The numerous PFAS uses, already increasing PFAS litigation, and plaintiffs’ successful settlements in multiple high-profile cases indicate that more litigation can be expected against an increasing array of downstream users of PFOA and PFOS.²⁴¹ Litigation will cover questions of what knowledge polluters had at various points and times in the manufacturing supply chain process, no matter where that process is based.²⁴²

Fifteen state attorneys general have separately sued companies alleged to be responsible for PFAS contamination.²⁴³ Many small-town PFAS activists, combatting the state-by-state model, want federal action, such as the EPA’s proposed rule, to hold companies accountable for PFAS contamination.²⁴⁴ As one clean water activist declares, “[t]he progress you have shouldn’t be determined by your Zip code.”²⁴⁵

237. Alex Brown, *States Take on PFAS ‘Forever Chemicals’ With Bans and Lawsuits*, WASH. POST (Nov. 5, 2022), <https://www.washingtonpost.com/health/2022/11/05/plastic-pfas-chemical-health-dangers/> [https://perma.cc/YY8Q-8KKE].

238. Jim Spencer, *3M’s Support for PFAS Could Cost Taxpayers Billions of Dollars*, STAR TRIB. (Sept. 11, 2021), <https://www.startribune.com/3m-s-support-for-pfas-could-cost-taxpayers-billions-of-dollars/600096094/> [https://perma.cc/NTC4-TCBC].

239. *Id.*

240. Brown, *supra* note 237.

241. Jane C. Luxton & William J. Walsh, *The 2020 Outlook For “PFAS” Chemical Litigation: An Expanding Target Zone*, WASH. LEGAL FOUND. (Jan. 31, 2020), <https://www.wlf.org/2020/01/31/publishing/the-2020-outlook-for-pfas-chemical-litigation-an-expanding-target-zone/> [https://perma.cc/S87Y-BKVT].

242. *Id.*

243. Brown, *supra* note 237.

244. *Id.*

245. *Id.* (quoting Laurene Allen, co-founder of Merrimack Citizens for Clean Water, a New Hampshire group that has pushed the state to act on PFAS).

IV. IMPACT

Robert Bilott, like many, concluded that the way to get meaningful action for the millions of Americans impacted by PFAS is the judicial system.²⁴⁶ “[G]ood ol’ common-law tort concepts” work here because lawsuits can now focus on a single, unnerving fact: that PFAS are in everybody’s blood; the victims are not isolated in a single community or region.²⁴⁷ Everyone is a victim.²⁴⁸ “After all, why should the taxpayers be paying to understand what these companies did to them?”²⁴⁹

Currently, the most effective defense to a PFAS personal injury action is a challenge to the plaintiff’s ability to prove causation. As discussed above, the EPA’s proposed rule significantly decreases this causation hurdle for plaintiffs, resulting in less judicial resources, costs, and evidentiary proof necessary.

Defendants may also utilize the government contractor defense, which protects government contractors from liability when the contractors were engaging in the manufacture of military products to government specifications.²⁵⁰ However, even if the government contractor defense were applied to PFAS lawsuits, the defense would likely not apply to the many cases that do not involve military bases.²⁵¹

Defendants may also assert a “state of the art” defense in PFAS cases, claiming that the current state of scientific knowledge has not definitively established a causal link between PFAS exposure and harm to human health. The EPA’s proposed rule directly refutes this assertion, declaring PFOA and PFOS are “hazardous substances” that harm human health. Defendants may further argue that in light of the lack of existing federal regulatory framework, their conduct was consistent with the law.²⁵² However, the EPA’s proposed rule creates a more robust, standardized regulatory framework for PFAS polluters to adhere to; if they do not, they may be legally punished.

As a result of the proposed rule, liability for clean-up of sites that have released PFOA or PFOS becomes more straightforward, and thus, litigation issues may be clarified.²⁵³ Parties that owned, operated, arranged, or transported PFOA or PFOS will be as responsible as the facility that initially released the PFAS.²⁵⁴ This change is significant because PFOA

246. BILOTT, *supra* note 93, at 369.

247. *Id.*

248. *Id.*

249. *Id.* at 370.

250. Wallender, *supra* note 221.

251. *Id.*

252. *Id.*

253. Luxton & Walsh, *supra* note 241.

254. *Id.*

and PFOS have been so common in use that they are detectable in sampling data even from sites with no obvious, large source.²⁵⁵ This framework enables a broader reach of PFAS litigation, spatially and legally.

PFAS litigation works. In 2018, 3M settled a lawsuit over their pollution dumping of toxic PFAS for decades,²⁵⁶ agreeing to pay \$850 million for the clean-up.²⁵⁷ Even though the company still maintains that its chemicals had no harmful effects on human health, 3M announced it would stop manufacturing PFAS by the end of 2025.²⁵⁸ Setting federal regulations may help prevent future PFAS contamination and save human lives.²⁵⁹

The CERCLA designation will allow the EPA to use its CERCLA enforcement authorities to transfer the cost of PFAS clean-ups from the taxpayers to the responsible parties, via responsive PFAS litigation.²⁶⁰

Labeling PFOA and PFOS as “hazardous substances” under CERCLA is a step in the right direction for taking the “forever” out of “forever chemicals.”

V. CONCLUSION

It is time for American citizens to put their faith back in the legal system when serving as plaintiffs in PFAS litigation. The EPA’s proposed rule to designate the two most widely used PFAS, PFOA and PFOS, as “hazardous substances” under CERCLA will increase the success of plaintiffs in PFAS litigation by (1) positively impacting access to legal representation and resources for litigation, and (2) alleviating issues of causation in class action lawsuits and MDLs. This proposed rule will ensure that the success and impact of the real-life plaintiff depicted in *Dark Waters* can become a reality for more PFAS litigation plaintiffs.

Benjamin Franklin famously remarked, “[j]ustice will not be served until those who are unaffected are as outraged as those who are.”²⁶¹ Fortunately, for PFAS plaintiffs, no one is unaffected by forever chemicals.

Rachel K. Strieber

255. *Id.*

256. Trang, *supra* note 18.

257. *Id.*

258. *Id.*

259. *Id.*

260. Designation of Perfluorooctanoic Acid (PFOA) and Perfluorooctanesulfonic Acid (PFOS) as CERCLA Hazardous Substances, 87 Fed. Reg. 54415, 54437 (Sept. 6, 2022) (to be codified at 40 C.F.R. § 302.4).

261. June 1 Message to Franklin College Students, Dean Andrew B. Jones, Franklin Coll., <https://franklincollege.edu/about-fc/diversity-equity-inclusion/june-1-message-to-franklin-college-students/> [<https://perma.cc/K2NR-B3PC>] (quoting Benjamin Franklin).