

What Does EPA Designating PFOA and PFOS as “Hazardous Substances” Mean for Your Business?

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On August 26, 2022, the Environmental Protection Agency (EPA) announced its proposal to designate two of the most widely known per- and polyfluoroalkyl substances (PFAS)—PFOA and PFOS¹—as hazardous substances under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA, also known as the Superfund law). Listing PFOA and PFOS (along with their salts and structural isomers) as hazardous substances under CERCLA is one of the most significant actions identified in EPA’s October 2021 PFAS Strategic Roadmap.^[2] If officially listed as hazardous substances, EPA will have newfound authority to hold “potentially responsible parties” **liable** for the release of PFOA or PFOS to the environment responsible for the cleanup. Additionally, private parties would be able to bring cost recovery or contribution claims under CERCLA for PFOA and PFOS contamination cleanup.

What Designation as a Hazardous Substance Means

CERCLA is a “polluter pays” program that places responsibility on parties responsible for releases of “hazardous substances” to investigate and clean up the contamination, or otherwise to fund such investigation and cleanup. Where a responsible party does not act, CERCLA provides EPA with the authority to respond to releases of hazardous substances that may endanger public health or the environment. CERCLA also requires parties responsible for the contamination to reimburse EPA for the cleanup it conducts. CERCLA authorizes the EPA Administrator to promulgate regulations designating as hazardous substances any element, compound, mixture, solution, or substance that, when released into the environment, may present substantial danger to the public health or welfare or the environment.

U.S. manufacturers have voluntarily made the business decision to phase out the manufacture of PFOA and PFOS within the United States.³ However, these chemicals are still widespread, given they may be present in goods imported from outside the United States. Finalizing the proposed rulemaking designating PFOA, PFOS, and their salts and structural isomers as hazardous substances under CERCLA section 102(a) would not ban the chemicals altogether. However, it would mean that:

- Entities who release a reportable quantity PFOA or PFOS must report such release to the National Response Center, state, or Tribal emergency response commissions, and the local or Tribal emergency planning committees.^[4] The proposed reportable quantity for both PFOA and PFOS is 1 pound or more in a 24-hour period. However, in the Notice of Proposed Rulemaking (NPRM), EPA indicated that it may adjust the reportable quantities for these substances at a later date.⁵ If the rule is finalized as proposed, the new reporting requirements will allow governments to understand where releases of PFOA and PFOS occur and in what quantities these chemicals are typically released.

- The “polluter pays” model will kick in. In other words, EPA and delegated agencies are authorized to 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. Moreover, EPA can respond to PFOA and PFOS releases directly under certain circumstances, and then seek recovery of cleanup costs from the potentially responsible parties.
- Private parties that conduct cleanups that are consistent with the National Oil and Hazardous Substances Pollution Contingency Plan can also seek to recover PFOA and PFOS cleanup costs from potentially responsible parties.
- Any federal entity that transfers or sells real property will be required to provide a notice about the storage, release, or disposal of PFOA or PFOS on the property and a covenant warranting that it has cleaned up any resulting contamination or will do so in the future, if necessary, as required under CERCLA 120(h).
- The Department of Transportation (DOT) will be obligated to list and regulate PFOA and PFOS as hazardous materials under the Hazardous Materials Transportation Act, per CERCLA Section 306(a), which requires DOT to list and regulate as hazardous materials all CERCLA hazardous substances.

Does This Impact Your Business?

The types of businesses most likely to be impacted by the rulemaking are:

- PFOA and/or PFOS manufacturers (including importers and exporters of articles);
- PFOA and/or PFOS processors;
- Manufacturers of products containing PFOA and/or PFOS;
- Downstream product manufacturers and users of PFOA and/or PFOS products; and
- Waste management and wastewater treatment facilities.

More specifically, EPA identified the following entities as likely to be affected by the rulemaking: wastewater treatment plants; landfills; chemical manufacturers; carpet manufacturers; coating, paints and varnish manufacturers; textile and paper mills; businesses conducting chrome electroplating; printing facilities; aviation operations; car washes; entities conducting firefighting activities; and petroleum refineries, among others. EPA anticipates that designating PFOA and PFOS as hazardous substances will encourage better waste-management and treatment practices by all facilities handling PFOA or PFOS, or products containing PFOA or PFOS.

Even if your business does not fall into one of the general categories listed above, CERCLA casts a wide net in identifying “potentially responsible parties.” Potentially responsible parties include current owners and operators of a facility, past owners and operators of a facility, generators and parties that arranged for the disposal or transport of the hazardous substance, and transporters of hazardous waste that selected the site where hazardous substances were brought. Given CERCLA liability is strict, joint and several, regardless of fault, if you are an owner or operator of a facility that is found to be contaminated with PFOA or PFOS, you could be liable for investigation and cleanup of the impacts. Those who oppose the designations of PFOA and PFOS as hazardous substances argue that the proposal is unworkable, given that today there are no defined cleanup standards for PFOA and PFOS.

Businesses across sectors are also likely to see the impact of this rulemaking in their Phase I environmental site assessments (“Phase Is”). Under the currently applicable ASTM standard practice for Phase Is, ASTM 1527-13, auditors are not required to consider and discuss PFAS in the Phase I report, given no PFAS are currently listed as hazardous substances. Once listed, however, the Phase I report must consider PFOA and PFOS releases or contamination to fulfill the “all appropriate inquiries” requirement of certain defenses to liability under CERCLA.²⁷ Given the historical presence of PFOA and PFOS in a wide variety of products, it remains to be seen how environmental professionals will approach this issue in Phase I reports.

What Happens Next?

EPA has not yet published the NPRM in the Federal Register.²⁸ Once published, interested parties will have 60 days to submit comments on the proposed rule. PFOA and PFOS are only two of thousands of PFAS chemicals; thus, the proposed designation of PFOA and PFOS as hazardous substances does not mean that all PFAS chemicals will be considered hazardous substances under CERCLA. Nevertheless, EPA has indicated that it will consider listing other PFAS as hazardous substances in the future. Indeed, EPA’s NPRM states, “[i]n addition to this action, in 2022, the EPA will be developing an advance notice of proposed rulemaking seeking comments and data to assist in the

development of potential future regulations pertaining to other PFAS designation as hazardous substances under CERCLA.”

For further information or answers to questions on the proposed rulemaking, contact Jonathan D. Brightbill (partner, White Collar, Regulatory Defense, and Investigations, Environmental Litigation), Sam Trimbach (associate, Environmental), or Madalyn Brown (associate, Environmental).

^[1] The full chemical names are Perfluorooctanoic acid (PFOA) and Perfluorooctane sulfonic acid (PFOS).

^[2] Available at: <https://www.epa.gov/pfas/pfas-strategic-roadmap-epas-commitments-action-2021-2024>.

^[3] See, e.g., EPA, “EPA and 3M Announce Phase Out of PFOS,” press release, May 16, 2000,

https://archive.epa.gov/epapages/newsroom_archive/newsreleases/33aa946e6cb11f35852568e1005246b4.html#:~:text=FOR%20RELEASE%3A%20TUESDAY%2C%20MAY%2016,some%20of%20their%20Scotchgard%20

^[4] Per CERCLA Section 103(a) and the Emergency Planning and Community Right to Know Act Section 304.

^[5] See the pre-publication version of the Notice of Proposed Rulemaking here: [https://www.epa.gov/system/files/documents/2022-08/FRL%207204-02-](https://www.epa.gov/system/files/documents/2022-08/FRL%207204-02-OLEM%20-%20Designating%20PFOA%20and%20PFOS%20as%20Hs%20_NPRM_20220823.pdf)

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^[6] For more on Phase Is and the currently applicable ASTM standard, see our previous briefing here: [https://www.winston.com/en/winston-and-the-legal-environment/the-phase-](https://www.winston.com/en/winston-and-the-legal-environment/the-phase-one-standard-used-for-cercla-defenses-will-stay-the-same-for-now.html)

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^[7] See page 10 of the pre-publication version of the Notice of Proposed Rulemaking.

6 Min Read

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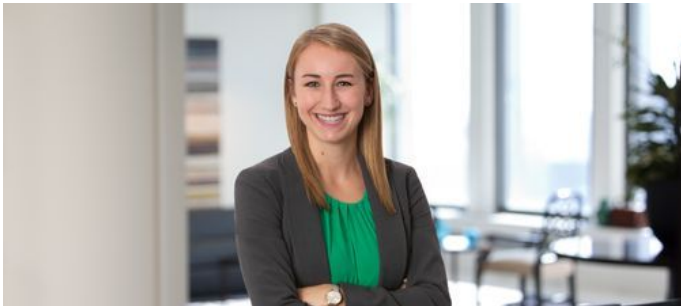
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