

Insights

PFAS UPDATE: EPA PROPOSES LISTING PFOS AND PFOA AS CERCLA HAZARDOUS SUBSTANCES

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SUMMARY

On August 26, 2022, the Environmental Protection Agency (“EPA”) announced that it is proposing to designate perfluorooctanoic acid (“PFOA”) and perfluorooctanesulfonic acid (“PFOS”) as Hazardous Substances under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (“CERCLA”). This designation will affect remediation efforts, notification requirements, and due diligence activities, and will have ripple effects across many state regulations that reference CERCLA Hazardous Substances.

The rule, published in the [Federal Register](#), and the [press release](#) provide additional information.

Timeline

The designation of these two compounds as Hazardous Substances under CERCLA has been in the works for years, so the timeline is still subject to change, but the following is the current estimated timeline for rule approval and application:

- November 7, 2022: The public comment period will close. EPA must consider all of the comments that are submitted before it issues a final rule.
- November or December 2022: EPA will issue an [Advanced Notice of Proposed Rulemaking](#) seeking public comments and data regarding the potential listing of additional PFAS compounds (e.g. GenX, PFBS, PFNA, PFDA, PFHxS, etc.) as Hazardous Substances.
- July or August 2023: The Hazardous Substance designation will go into effect. As expressed in the [PFAS Strategic Roadmap](#), EPA anticipates issuing a final rule by the summer of 2023. This action is consistent with that timeline, but there could be delays, especially based on the volume of comments EPA is expected to receive.

Public Comment Period

A public comment period will last until November 7, 2022. If your business or industry is interested, you can [submit comments at regulations.gov](https://www.regulations.gov), and reference docket number EPA-HQ-OLEM-2019-0341.

Specifically, EPA is requesting comments regarding [its approach to the consideration of costs](#), including the following issues:

- Whether CERCLA section 102(a) precludes, allows, or requires consideration of costs in designation decisions;
- If so, which costs and benefits should be considered;
- Whether additional benefits and costs should be assessed;
- How both direct and indirect benefits and costs should be considered; and
- Whether the designation would be justified if costs were to be considered in EPA's decision.

Certain organizations are already concerned about the costs of this proposed rule, especially for businesses. For example, the U.S. Chamber of Commerce recently asserted the following: “[p]rivate sector cleanup costs at Superfund sites alone resulting from the proposed Hazardous Substance designation of PFOA and PFOS are estimated to cost between \$700 million and \$800 million in annualized costs ...”

What Businesses Are Affected?

According to [EPA](#), there are five categories of businesses that are potentially affected by this action:

1. PFOA and/or PFOS manufacturers (including importers);
2. PFOA and/or PFOS processors;
3. Manufacturers of products containing PFOA and/or PFOS;
4. Downstream product manufacturers and users of PFOA and/or PFOS; and
5. Waste management and wastewater treatment facilities.

[EPA](#) also lists the following industries that may be affected by this rule:

- Carpet manufacturers;
- Car washes;
- Chemical manufacturing;

- Chrome electroplating, anodizing, and etching services;
- Coatings, paints, and varnish manufacturers;
- Firefighting foam manufacturers;
- Landfills;
- Medical Devices;
- Municipal fire departments and firefighting training centers;
- Paper mills;
- Pesticides and Insecticides;
- Petroleum and coal product manufacturing;
- Petroleum refineries and terminals;
- Photographic film manufacturers;
- Polish, wax, and cleaning product manufacturers;
- Polymer manufacturers;
- Printing facilities;
- Textile mills;
- Waste management and remediation services; and
- Wastewater treatment plants.

How Does This Impact My Business?

If the rule is accepted as it is proposed, there are many ways this designation may affect your business, including:

- Phase I Environmental Site Assessments (“Phase I ESAs”): The current ASTM standard does not require an evaluation of PFAS in order to satisfy all appropriate inquiries, but that will change if PFOA and PFOS are designated as Hazardous Substances. Including these substances in Phase I ESA reports will change the way that PFAS risk is understood and addressed in real estate transactions, and will impact environmental insurance coverage.

- **Potentially Responsible Parties (“PRPs”):** Current or former owners or operators of a facility may be liable for contamination of CERCLA Hazardous Substances, so EPA could require your business to address historic or ongoing PFOA or PFOS releases as a PRP. Even if your business is not named as a PRP, you may face contribution claims, and you should consider bringing your own contribution claims in the event that you are named as a PRP.
- **Reporting Requirements:** Under the Emergency Planning and Community Right-to-Know Act, any person in charge of a vessel or a facility must immediately report releases of PFOA and PFOS to various entities, including the National Response Center, if they exceed the reportable quantity threshold. The reportable quantity for each of the PFAS compounds is one pound within a 24-hour period, which is significantly lower than the typical range of 100-5,000 pounds. Notably, some reporting exemptions are allowed, including federally permitted releases and *de minimis* classifications.
- **Transfer Requirements:** Federal entities that transfer or sell their property will be required to provide information about the storage, release, or disposal of PFOA or PFOS. If deemed appropriate, an entity will issue a covenant verifying that it has cleaned up any existing contamination or will take the necessary actions to do so in the future.
- **PFAS Audit and Insurance Coverage:** If your business has not done so yet, you may want to consider evaluating your potential liabilities. For example, a business can perform an audit of PFAS supply chain issues. Additionally, a business can evaluate its existing insurance coverage to determine whether the current policies provide adequate protection for any possible litigation claims or remedial activities.
- **Site Reopeners or Modifications:** Sites that have been remediated and closed through the regulatory process may be reopened to address PFOA and PFOS contamination. In addition, sites that are undergoing an investigation or remediation process may be required to consider and address PFOA and PFOS impacts.
- **Hazardous Materials Transportation Act (“HMTA”):** The Department of Transportation must list and regulate PFOA and PFOS as Hazardous Materials under the HMTA. This could impact how these substances are transported by your business.

Conclusion

While this proposed designation comes as no surprise, it is quite impactful to businesses in many different ways. As a result, you may choose to submit a public comment to EPA by November 7, 2022.

For more information on PFAS chemicals, and the regulatory and litigation risks that they pose, please visit our [PFAS webpage](#). If you have a question about how to manage PFAS risk in any

jurisdiction, contact Tom Lee, John Kindschuh, Emma Cormier, or any other member of our PFAS team at Bryan Cave Leighton Paisner LLP.

RELATED CAPABILITIES

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