

## Insights

# PFAS UPDATE: EPA ISSUES ADVANCE NOTICE OF PROPOSED RULEMAKING TO DESIGNATE SEVEN OR POTENTIALLY MANY MORE PFAS COMPOUNDS AS HAZARDOUS SUBSTANCES UNDER CERCLA

Apr 13, 2023

EPA has spent the last several years working on listing perfluorooctanoic acid (“PFOA”) and perfluorooctanesulfonic acid (“PFOS”) as Hazardous Substances under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (“CERCLA”), and those listings are expected to be complete in 2023. There has been an enormous amount of concern about how those listings will impact businesses and public agencies.

EPA appears to be undeterred, however, and on April 12, 2023, issued an advance notice of proposed rulemaking to designate a minimum of seven additional PFAS compounds as Hazardous Substances under CERCLA. In addition to the seven named compounds, EPA has also suggested listing precursors to PFOA, PFOS, and the seven listed PFAS compounds, as well as “Categories of PFAS,” either of which could bring hundreds, if not thousands, of other PFAS into the Hazardous Substances designation. If EPA’s proposal were to be adopted, it likely would have a material impact on business operations and transactions.

EPA is accepting public comments through **June 12, 2023**.

## I. New PFAS Substances

EPA’s justification for proposing the additional seven compounds is that these chemicals may present substantial danger to public health or welfare or the environment when released. The seven PFAS substances are as follows:

- Perfluorobutanesulfonic acid (“PFBS”);
- Perfluorohexanesulfonic acid (“PFHxS”);
- Perfluorononanoic acid (“PFNA”);
- Hexafluoropropylene oxide dimer acid (“HFPO-DA”), also known as GenX;

- Perfluorobutanoic acid (“PFBA”);
- Perfluorohexanoic acid (“PFHxA”); and
- Perfluorodecanoic acid (“PFDA”).

The list is not entirely surprising given that these compounds are already the subject of numerous state and federal regulations, and have been more extensively studied than some other PFAS compounds. What is important to note is that these compounds were generally introduced as replacements for PFOA and PFOS, so EPA’s proposed listing would add the next generation of PFAS compounds to the Hazardous Substances list, subjecting a broader group of industrial users, businesses, and property owners to potential CERCLA liability.

## II. Precursor or Regulation by Category

Perhaps even more impactful and likely challenging is EPA’s proposal to list chemical precursors to the PFAS compounds that have been proposed for listing as Hazardous Substances. If EPA does not provide a specific list of precursors for a specific chemical, then, as proposed, companies would need to conduct their own investigation to evaluate what constitutes a precursor for each of the listed PFAS substances. The absence of a defined list will create uncertainty about the scope of the listing; change the scope of what needs to be included in a Phase I Environmental Site Assessment and evaluated under EPA’s [All Appropriate Inquiry](#) regulations; and increase remediation costs and complicate cost recovery actions under CERCLA.

Similarly challenging is EPA’s proposal to regulate categories of non-specific PFAS compounds. Depending on the regulatory definition that is applied, there are currently estimated to be between 5,000 and 12,000 PFAS compounds. As with other broad groups of chemicals, there are various branches of the PFAS family tree that are similar or related in their form or function. These branches – or to use EPA’s term, categories – can be broadly or narrowly defined, but EPA’s proposal seems to be that it would add groups of PFAS compounds that share some characteristics as Hazardous Substances, rather than listing specific PFAS compounds. That approach could bring thousands of compounds under the purview of CERCLA and site diligence, without any clear understanding of what the impacts are of those compounds to human health and the environment.

## III. Public Comments

The [rulemaking document](#) lays out the information that EPA is requesting: “EPA is soliciting responses to the following questions and requests on the topics described below and requests that commentors provide supporting information and specific scientific literature citations regarding applicable information where appropriate:

- Please identify information in published scientific literature or data regarding the environmental degradation of substances to PFOA, PFOS, PFBS, PFHxS, PFNA, HFPO-DA,

PFBA, PFHxA, and/or PFDA.

- What factors, if any, regarding degradation time and environmental conditions (e.g., aqueous vs. arid, anaerobic vs. aerobic, available nutrients) should be considered in identifying the appropriate precursor compounds?
- Please provide relevant information or data in published scientific literature that characterizes the environmental prevalence of PFOA, PFOS, PFBS, PFHxS, PFNA, HFPO-DA, PFBA, PFHxA, and/or PFDA from the degradation of associated precursors
- With respect to the preceding questions, please identify names and Chemical Abstracts Service Registry Numbers (CASRNs) or Distributed Structure-Searchable Toxicity (DSSTox) substance identifier for substances that EPA should consider as precursor compounds.
- Available standard analytical methods, such as SW-846 Method 8327 or Method 533, may not include all precursors to PFOA, PFOS, PFBS, PFHxS, PFNA, HFPO-DA, PFBA, PFHxA, and/or PFDA.
  - Furthermore, the development of additional methods may be limited by the availability of chemicals standards. Given these limitations, please provide information regarding how precursors could be measured in environmental samples.
  - Additionally, please comment on whether and how EPA should consider the availability of analytical methods when determining whether to designate precursors as CERCLA hazardous substances.
- Please provide available information that EPA could consider in preparing an economic analysis of the potential direct and indirect costs and benefits, including impacts on small entities, associated with a potential rulemaking designating these precursors as CERCLA hazardous substances.
  - Although CERCLA section 102(a) precludes EPA from taking cost into account in the designation of a hazardous substance, the Agency is requesting this information to inform its understanding of the potential costs and benefits associated with any potential future regulatory action.”

EPA also requests information “concerning the characteristics of these compounds, such as mobility, persistence, prevalence, and other characteristics, that would supplement the existing toxicity data for these compounds.”

Public comments can be submitted [at this website](#) and should reference docket number EPAHQ-OLEM-2022-0922.

## IV. Conclusion

It comes as no surprise that EPA is continuing to work to expand the scope of PFAS compounds to be added to the CERCLA Hazardous Substances list. The listing of the seven specific PFAS compounds relates to EPA's ongoing health studies, and is consistent with EPA's overall approach to PFAS regulation laid out in the [PFAS Strategic Roadmap](#).

What is surprising is the potential shift from regulating specific PFAS compounds to instead proposing to list unspecified precursors, or even entire categories of PFAS compounds. While any expansion of the list of PFAS compounds designated as Hazardous Substances will present a challenge to industries that have a relationship with the chemistry, an expansion to include these open-ended lists of thousands of PFAS compounds would be both a departure from EPA's prior PFAS regulatory approach, and create an almost incalculable risk for facility operators and property owners. As a result, EPA's proposed listings would have significant impacts on the availability of financing and environmental insurance, would increase reporting obligations, and would result in heightened litigation risk for a wide range of industries and public agencies.

BCLP is actively monitoring changes in laws and regulations regarding PFAS compounds across the United States and around the world. We are routinely advising clients on regulatory compliance, transactional and financing matters, as well as representing clients in litigation. For more information on PFAS compounds and related matters, please visit our [PFAS webpage](#). If you have a question about EPA's rulemaking, contact Tom Lee, Bryan Keyt, John Kindschuh, Emma Cormier, or any other member of our PFAS team at Bryan Cave Leighton Paisner LLP.

## RELATED PRACTICE AREAS

- PFAS Team
- Environment

## MEET THE TEAM



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