



U.S. Environmental Protection Agency Proposes Designating Certain PFAS as Hazardous Substances Under Superfund

On August 26, 2022, the U.S. Environmental Protection Agency (EPA) issued a pre-publication version of its [Proposed Rule](#) which would designate two PFAS chemicals as “hazardous substances” under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), commonly known as Superfund (Proposed Rule). Specifically, the Proposed Rule would list perfluorooctanoic acid (PFOA) and perfluorooctanesulfonic acid (PFOS) – the two most common and well-studied PFAS – and their salts and isomers as hazardous substances under CERCLA. This is the first time EPA is making such designations by exercising its authority under CERCLA Section 102, 42 U.S.C. § 9602. Until now, CERCLA has always defined hazardous substances by reference to other statutes (e.g., the Clean Water Act and the Resource Conservation and Recovery Act).

In the Proposed Rule, EPA identified five broad categories of potentially affected entities: (1) PFOA/PFOS manufacturers (including importers and importers of articles); (2) PFOA/PFOS processors; (3) manufacturers of products containing PFOA/PFOS; (4) downstream product manufacturers and users of PFOA/PFOS products; and (5) waste management and wastewater treatment facilities. Potentially affected industries include aviation operations, chemical manufacturing, firefighting foam manufacturers, fire departments and training facilities, polymer manufacturers, and waste management and remediation services.

In the lead-up to issuance of the Proposed Rule, certain entities, such as drinking water utilities, wastewater utilities, and landfill operators, expressed concerns that they could face significant new liabilities for contamination originating from others. In its accompanying [announcement](#), EPA said, without identifying specific industries, that it is “focused on holding responsible those who have manufactured and released significant amounts of PFOA and PFOS into the environment” and intends to use its “enforcement discretion” to “ensure fairness for minor parties who may have been inadvertently impacted by the contamination.” EPA further said that it will continue to engage with impacted communities, wastewater utilities, businesses, farmers, and other parties throughout the consideration of the Proposed Rule.

If finalized, the Proposed Rule will immediately require parties to report to federal, state, tribal, and local authorities, as applicable, releases of PFOA and/or PFOS of one pound or more within a 24-hour period. The Proposed Rule also requires federal agencies to meet the property transfer requirements enumerated in CERCLA § 120(h), 42 U.S.C. § 9620(h), when selling and transferring federally-owned real property. This includes providing notice if PFOA/PFOS (or any other hazardous substance) was stored on-site for a year or more and/or was released or disposed of on-site, in addition to warranting in the property’s deed that remediation has been completed prior to the transfer (and any further necessary remediation will be completed by the United States). Finally, the Department of Transportation will have to list and regulate PFOA and PFOS as hazardous materials under the Hazardous Materials Transportation Act.

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More broadly, the federal government is currently limited in how it can respond to PFOA/PFOS contamination in the environment. That is, it may be authorized to clean up PFOA/PFOS when it finds an imminent and substantial danger to public health or welfare. If the Proposed Rule is finalized as written, however, EPA and other agencies with delegated CERCLA authority could have additional remedial options, including to: (1) respond to PFOA/PFOS releases without making an imminent and substantial danger finding; (2) require potentially responsible parties (PRPs) to clean up PFOA/PFOS contamination; and (3) recover cleanup costs from PRPs. Private parties who conduct cleanups consistent with the National Contingency Plan could also recover cleanup costs from other PRPs. Among other things, EPA believes that the Proposed Rule will increase transparency with respect to the scope of PFOA/PFOS releases and allow the government to conduct faster cleanups.

The Proposed Rule's costs have been targeted by industry stakeholders and for further analysis by the Office of Management and Budget (OMB). Earlier this year, OMB designated the rule as "other significant," meaning the direct costs of the rule – the reporting requirements – were not expected to exceed more than \$100 million. On August 12, 2022, OMB redesignated the rule as "economically significant," i.e., the rule is expected to impose costs of \$100 million or more annually, which requires EPA to conduct a more robust cost-benefit analysis of the indirect and direct costs of the Proposed Rule and issue a regulatory impact analysis (RIA). EPA has not yet issued the RIA, but stakeholders concerned about the Proposed Rule's costs have conducted their own analyses. For example, a [study](#) by the U.S. Chamber of Commerce found that private sector cleanup costs at Superfund sites could cost between \$700-800 million a year.

Announcement of the Proposed Rule comes on the heels of EPA's June 2022 release of interim updated drinking water health advisories for PFOA and PFOS, which are non-regulatory thresholds below which adverse health effects are not expected to occur. EPA lowered the health advisories from 70 parts per trillion (ppt) combined for PFOA and PFOS to 0.004 ppt for PFOA and 0.02 ppt for PFOS. EPA also issued final health advisories for Hexafluoropropylene Oxide (HFPO) Dimer Acid and its Ammonium Salt (GenX chemicals; 10 ppt) and Perfluorobutane Sulfonic Acid and its Potassium Salt (PFBS; 2,000 ppt).

The Proposed Rule will be published in the *Federal Register* within the next several weeks, which will start the 60-day public comment period. At the close of the public comment period, EPA also anticipates issuing an Advance Notice of Proposed Rulemaking seeking input on designating other PFAS chemicals as CERCLA hazardous substances.

The Proposed Rule is one of many goals EPA set for addressing all stages of the PFAS lifecycle, as further detailed in the agency's "PFAS Strategic Roadmap: EPA's Commitments to Action 2021-2024," available [here](#). As the federal and state governments take action to address PFAS, Babst Calland attorneys will continue to track these developments and are available to assist you with PFAS-related matters (including preparing and submitting comments on the Proposed Rule). For more information on this development and other remediation matters, please contact Matthew C. Wood at (412) 394-6583 or mwood@babstcalland.com, Mackenzie M. Moyer at (412) 394-6578 or mmoyer@babstcalland.com, or any of our other [environmental attorneys](#).

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