



EPA Requests Information to Support Regulation of Additional PFAS Under CERCLA

On April 13, 2023, the U.S. Environmental Protection Agency (EPA) issued an [Advance Notice of Proposed Rulemaking](#) (ANPRM) requesting input on the potential designation of additional categories of per and poly-fluoroalkyl substances (PFAS) as hazardous substances under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), also known as Superfund. The ANPRM follows EPA's September 2022 Proposed Rule, which, if finalized, would designate two of the most common PFAS as CERCLA hazardous substances and represents another step under the "PFAS Strategic Roadmap: EPA's Commitments to Action 2021-2024," a plan for taking an agency-wide approach to address PFAS under EPA's various statutory and regulatory authorities. EPA will be accepting comments on the ANRPM until June 12, 2023.

What Are PFAS?

PFAS are a group of man-made chemicals identified by signature elemental bonds of fluorine and carbon, which are extremely strong and difficult to break down in the environment. As a result, PFAS are persistent and can withstand high temperatures and highly corrosive environments. While the PFAS family of chemicals includes the commonly known and used PFOA, PFOS, and GenX, there are more than 12,000 other compounds that are also classified as PFAS. PFAS can be present in water, soil, air, and food as well as materials found in homes and workplaces.

PFAS have been manufactured and used in a variety of industries around the globe, including in the United States since the 1940s. Because of their ability to repel water and oil, PFAS are used in many different types of products, including firefighting foam known as "AFFF," stain-resistant carpets, roofing materials, coatings, food packaging, water-resistant outdoor clothing and gear, nonstick cookware, and boots, among others.

What Is EPA Doing to Address PFAS?

EPA's [PFAS Strategic Roadmap](#) sets timelines by which EPA plans to take specific actions related to PFAS across regulatory programs. As previously [reported by Babst Calland](#) in September 2022, among numerous other actions, EPA proposed a rule to designate 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. EPA currently is reviewing comments received on this Proposed Rule and is expected to finalize these listings this summer.

The ANPRM seeks technical input from industry, environmental groups, Tribes, universities, and business groups that will inform EPA's decision whether to propose

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to designate as hazardous substances seven additional PFAS, as well as precursors to PFOA, PFOS and the seven additional PFAS.¹

EPA is soliciting information concerning mobility, persistence, prevalence, and other characteristics to supplement the existing toxicity data for these compounds. EPA is also requesting information regarding the degradation of these substances through environmental processes such as biodegradation, photolysis, and hydrolysis and whether and how EPA should consider the availability of analytical methods when determining whether to designate precursors as CERCLA hazardous substances. Finally, EPA is requesting information on whether categories of PFAS (*i.e.*, groups of PFAS that share similar characteristics such as chemical structure, physical or chemical properties, mode of toxicological action, precursors or degradants, or co-occurrence) could or could not be designated as hazardous substances. Although CERCLA precludes EPA from taking cost into account in designating hazardous substances, EPA is requesting information on potential direct and indirect costs and benefits of designating any of these compounds as hazardous substances, including, in particular, impacts on small entities.

What Are the Next Steps?

EPA states that it intends to carefully review all comments and information received in response to the ANPRM, after which it plans to supplement the collected information with information that the Agency has obtained independently, to determine whether to proceed with a future rulemaking addressing these additional substances.

With respect to CERCLA liability and enforcement, the ANPRM indicates that EPA is separately developing a CERCLA PFAS enforcement discretion and settlement policy. EPA held two [public listening sessions](#) in March and sought written comments on public concerns regarding CERCLA PFAS enforcement/liability. EPA will now review and consider those comments as it develops its policy.

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. For further information, please contact Sloane Wildman at 202-853-3457 or swildman@babstcalland.com, Amanda Brosey at 202-853-3465 or abrosy@babstcalland.com, or your client service attorney at Babst Calland.

¹The seven additional PFAS are Perfluorobutanesulfonic acid (PFBS), CASRN 375-73-5, Perfluorohexanesulfonic acid (PFHxS), CASRN 355-46-4, Perfluorononanoic acid (PFNA), CASRN 375-95-1, Hexafluoropropylene oxide dimer acid (HFPO-DA), CASRN 13252-13-6 (sometimes called GenX), Perfluorobutanoic acid (PFBA), CASRN 375-22-4, Perfluorohexanoic acid (PFHxA), CASRN 307-24-4, and Perfluorodecanoic acid (PFDA) CASRN 335-76-2.

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