

PFOA and PFAS Take Another Step Towards Becoming Full-Fledged Members of the CERCLA Family of Hazardous Substances

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On January 10, 2022, US EPA forwarded to the White House Office of Management and Budget (OMB) a proposed rule that seeks to designate perfluorooctanoic acid (PFOA) and perfluorooctanesulfonic acid (PFOS) as “hazardous substances” under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA). Although not unexpected since this was of the key elements of US EPA’s PFAS Strategic Roadmap, US EPA’s proposed rule is unique in that it represents one of the first times that US EPA has by rule sought to designate a chemical as a CERCLA hazardous substance. US EPA's actions in sending the proposed rule to OMB may also be foreshadowing for a similar effort to designate PFOA and PFOS as "hazardous wastes" under the Resource Conservation and Recovery Act (RCRA) which would subject these substances to RCRA's cradle to grave regulatory scheme.

The effect of listing PFOA and PFOS as CERCLA “hazardous substances” is significant for the following reasons:

- **New Sites:** By designating PFOA and PFOS as CERCLA “hazardous substances”, due to the ubiquitous nature of these contaminants in the environment, hundreds of sites could become CERCLA Superfund sites. For example, PFAS chemicals can be found in the soil and groundwater at sites that historically used firefighting foams, including airports, refineries, and military installations. It is also a contaminant of concern at manufacturing operations associated with cookware, stain-resistant clothing, and various packaging products. Finally, it may be a concern at municipal landfills and wastewater treatment facilities. There may also be trickle-down effects at the state level since many states automatically include federally-designated substances in the state definition of hazardous substances.
- **Existing/Closed Sites:** Moreover, at existing Superfund sites (including sites where a final remedy has been selected and is being implemented), US EPA can require that the sites be investigated for PFOA and PFOS. If found, US EPA can require that existing remedial strategies be modified to address these contaminants in the soil or groundwater. Similarly, even at sites where remedial

measures have been completed, US EPA could still seek to reopen the sites and require that these newly designated hazardous substances be remediated.

- **Cost-Recovery Claims:** Designation of PFOA and PFOS as CERCLA hazardous substances would open the door for both US EPA and private-party PRPs to bring CERCLA cost recovery and/or contribution claims to pay for the costs to investigate and remediate these chemicals. In light of the increased scrutiny of these compounds in drinking water supplies, one could expect numerous CERCLA cost-recovery lawsuits by drinking water providers to recover the costs to treat public drinking water system.
- **Reporting Requirements:** Designation as a CERCLA hazardous substance also triggers release reporting under CERCLA. CERCLA § 103 (42 U.S.C. § 9603) requires that releases of “reportable quantities” (RQ) of CERCLA hazardous substances be reported to the National Response Center. Until such time as US EPA promulgates a specific RQ for PFOA and PFOS, the default RQ for these chemicals will be one pound. Although many states are moving towards banning the use of fire-fighting foam that contains per- and polyfluoroalkyl substances, if PFOA and/or PFOS are designated as CERCLA "hazardous substances", it is likely that any use of fire-fighting foam containing these substances would trigger CERCLA release reporting.

Once US EPA receives the review back from OMB and publishes the proposed rule for comment in the Federal Register, US EPA can expect to receive robust comments both against and in favor of the designation. We will continue to follow US EPA’s efforts to designate PFOA and PFOS as CERCLA “hazardous substances” at the *Corporate Environmental Lawyer* blog.

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