

EPA Proposes Designating PFAS as CERCLA Hazardous Substances

On the morning of August 26, 2022, the EPA released its [proposed rule](#) to designate two per- and polyfluoroalkyl substances (PFAS), perfluorooctanoic acid (PFOA) and perfluorooctanesulfonic acid (PFOS), as hazardous substances under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA).

Listing PFOA and PFOS as CERCLA hazardous substances will have broad impacts on current, future, and potentially past remediation sites. The proposed rule would require entities to immediately report releases of PFOA and PFOS that meet or exceed a reportable quantity of one pound in a 24-hour period to the appropriate regulatory agency, and it explains that the EPA may adjust the reportable quantity after collecting and analyzing more data on the substances.

But impacts of the rule go beyond the reporting requirements. It will also make entities deemed to be responsible parties for sites with PFAS contamination subject to CERCLA enforcement and cost-recovery provisions. These CERCLA liabilities are not limited to manufacturers of PFAS or PFAS-containing products. They extend to other entities, such as downstream users, waste management facilities, and owners of historic remediation sites or other property where PFAS is identified. Because of the ubiquity of PFAS, which has been used in a variety of consumer products manufactured since the 1940s, the proposed rule could broadly impact multiple business sectors.

The CERCLA designation could also impact sites regulated under Wisconsin's remediation and redevelopment laws by potentially broadening the Wisconsin Department of Natural Resources' (WDNR) authority to regulate PFAS under Wisconsin law. A Waukesha County Court recently held in *Wisconsin Manufacturers & Commerce, Inc. v. DNR*, No. 2021CV000342 (Wis. Cir. Ct. Waukesha Cnty. filed Feb. 23, 2021, currently pending appeal) that WDNR did not have authority to regulate PFAS compounds under its remediation and redevelopment laws, but a CERCLA designation may change that for specific compounds that are designated as hazardous substances.

Notably, the version of the proposed rule released on August 26, is a prepublication version and is not yet published in the federal register. Once published, the EPA will accept public comments on the proposal. In addition, the

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EPA plans to release another Advance Notice of Proposed Rulemaking to designate several other PFAS chemicals as CERCLA hazardous substances later in 2022.

About PFAS

PFAS chemicals include more than 4,000 different chemical compounds and are widely used in everyday products, including stain- and water-resistant fabrics and carpeting, cleaning products, cookware, paints and fire extinguishing foams. Two of the most concerning, PFOA and PFOS, are no longer manufactured in the United States. However, the compounds are slow to break down in the environment and may still be detectable in many locations.

For more information about EPA's work to address PFAS, click [here](#).

We will keep you updated on this proposal. If you have questions, please contact your Reinhart attorney.

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