

# PFAS Superfund Hazard Designation Would Inflate Cos.' Costs

By **Cynthia Faur, Lauren Harpke and Michael Mostow** (September 6, 2022)

On Aug. 26, the U.S. Environmental Protection Agency proposed to designate two of the most commonly used per- and polyfluoroalkyl substances — perfluorooctanoic acid, or PFOA, and perfluorooctanesulfonic acid, or PFOS — as hazardous substances under Section 102 of the Comprehensive Environmental Response, Compensation, and Liability Act, or CERCLA.

If this proposal is finalized, the EPA will be able to order parties to clean up these substances and to recover cleanup costs the agency has spent. Private parties will also be able to recover their cleanup costs for these substances, and parties will be required to report certain PFOA and PFOS releases.

In other words, CERCLA, also known as the Superfund law, is on the cusp of adding two near-ubiquitous chemicals to the list of substances that have driven affected parties — manufacturers, developers, disposal facilities and military institutions — to spend millions of dollars on cleanup, litigation and property transactions.

## Understanding PFAS

Per- and polyfluoroalkyl substances, or PFAS, are synthetic compounds that have become prevalent in the environment due to their long-term use in the manufacture of many products.

PFOS and PFOA, in particular, were formerly used in common products like nonstick cookware, food packaging, stain repellents, water-resistant clothing, carpet and electronics. They have also long been used in firefighting foam, and are often present at military installations.

PFAS chemicals are frequently referred to as "forever chemicals" because they do not break down naturally. This means that they are found almost everywhere — including in the human body — and are very difficult to clean up.

## Key Elements of the Proposed Rule

In recent years, the EPA has begun to take steps toward broad regulation of PFAS. This has included the issuance of drinking water advisories for certain PFAS.

This current proposal is a significant move toward addressing the presence of the most common PFAS chemicals — PFOS and PFOA — in the environment. And this is only the first step: In the preamble to the proposed rule, the EPA states that it is also preparing an advance notice of proposed rulemaking toward the development of regulations designating other PFAS chemicals as hazardous substances under CERCLA.

The proposed designation of PFOA and PFOS is novel, in that these compounds are the first to be designated by the EPA as hazardous substances under Section 102(a) of CERCLA. All other hazardous substances are designated as such due to their regulation under other



Cynthia Faur



Lauren Harpke



Michael Mostow

environmental statutes.

Under Section 102(a), the EPA may issue rules designating elements, compounds and substances that "when released to the environment may present a substantial danger to the public health or welfare or the environment." While the agency has outlined its interpretation of Section 102(a), and the criteria it is using to designate PFOA and PFOS as hazardous substances, this first-time use of Section 102(a) authority will likely be a significant area for comments and challenges.

This is particularly true because, while the EPA believes it need not account for cost in designating hazardous substances under Section 102(a), the Office of Management and Budget has already determined that this is an economically significant rule — meaning that it is expected to result in costs of \$100 million or more annually, or adversely affect some aspect of the economy in a material way.

If this proposal is finalized, the EPA and delegated agencies could:

- Respond to PFOA and PFOS releases without making an imminent and substantial danger finding;
- Require potentially responsible parties to address PFOA and PFOS releases; and
- Recover PFOA and PFOS cleanup costs from potentially responsible parties.

Additionally, private parties could:

- Seek contribution from other entities associated with PFOA and PFOS releases;
- Conduct cleanups that are consistent with the National Oil and Hazardous Substances Contingency Plan; and
- Could recover PFOA and PFOS cleanup costs from potentially responsible parties.

Facility owners and operators would be required to immediately report releases of PFOA and PFOS of one pound or more within a 24-hour period to the National Response Center.

### **Implications of Designating PFOA and PFOS as Hazardous Substances**

Impacts from the proposed designation of PFOA and PFOS as hazardous substances will be significant and far-reaching.

Perhaps most notably, a hazardous substance designation will impose the full liability and cost recovery provisions of CERCLA on these two forever chemicals, thereby greatly increasing the scope of potential liability risk at remediation sites.

For current remediation sites, the designations will provide some clarity on obligations with respect to liability for PFOA and PFOS, although in many states the applicable numeric cleanup standards are still in flux.

Given the difficulty of effective PFAS cleanup technologies, and the potential for significant costs, we can also expect greater litigation on allocation of liability and cost recovery at significant PFAS remediation sites, in addition to increased scrutiny on PFAS-related matters in real property and commercial transactions.

Designation as a hazardous substance under CERCLA will also trigger obligations beyond the CERCLA context, including an obligation for the U.S. Department of Transportation to list and regulate the designated substances as hazardous materials.

Certain PFAS substances are already subject to Toxic Release Inventory requirements under the Emergency Planning and Community Right-to-Know Act. But the designation as a hazardous substance will also trigger additional release tracking and reporting obligations under the act.

As noted above, this proposed rule is only one step in the EPA's plan to more intentionally and broadly regulate PFAS. We can expect the agency to continue acting upon the specific goals it outlined in its October 2021 PFAS strategic road map. This being the case, the regulatory landscape and obligations pertaining to PFAS will continue to be a point to watch in the years to come.

After its publication in the Federal Register, which is expected to occur soon, this proposed rule will be subject to a 60-day comment period. The EPA expects to receive a large number of comments, due to the broad reach and significant impact of the proposed rule.

---

*Cynthia Faur is a partner, Lauren Harpke is senior counsel and Michael Mostow is a partner at Quarles & Brady LLP.*

*Quarles & Brady partner George Marek contributed to this article.*

*The opinions expressed are those of the author(s) and do not necessarily reflect the views of the firm, its clients or Portfolio Media Inc., or any of its or their respective affiliates. This article is for general information purposes and is not intended to be and should not be taken as legal advice.*