

# PFOA/PFOS/CERCLA: U.S. Environmental Protection Agency Proposal to Designate as Hazardous Substances



**Walter Wright, Jr.**  
wwright@mwlaw.com  
(501) 688.8839

08/29/2022

The United States Environmental Protection Agency (“EPA”) issued a prepublication version of a proposed rule that would designate two of the per- and polyfluoroalkyl substances (“PFAS”) as Comprehensive Environmental Response, Compensation, and Liability Act (“CERCLA”) hazardous substances.

See EPA-HQ-OLEM-2019-0341; FRL-7204-02-OLEM.

EPA is proposing to designate perfluorooctanoic acid (“PFOA”) and perfluorooctanesulfonic acid (“PFOS”) (including their salts and structural isomers as hazardous substances).

CERCLA authorizes EPA to promulgate regulations designating as hazardous substances:

... elements, compounds, mixtures, solutions, and substances which, when released into the environment, may present substantial danger to the public health or welfare or the environment.

PFAS are a group of man-made chemicals that have been used in various industrial applications and consumer products for a number of years. Properties of these chemicals include resistance to heat, water, and oil. They have been described as persistent in the environment and resist degradation. Potential human exposure to PFAS includes pathways through drinking water, air, or food.

This designation as hazardous substances, if finalized, would trigger certain corresponding CERCLA requirements such as:

- Application of the potentially responsible liability categories (i.e., current owner or operator, former owner or operator [in certain circumstances], transporter [in certain circumstances], and generators)
- Hazardous substance release reporting requirements (if reportable quantities are released)

One pound released within 24 hours would be the reportable quantity (i.e., “RQ”).

The preamble of the proposed rule lists five categories of entities that EPA believes is potentially affected by the proposed rule:

1. PFOA and/or PFOS manufacturers
2. PFOA and/or PFOS processors
3. Manufacturers of products containing PFOA and/or PFOS
4. Downstream product manufacturers and users of PFOA and/or PFOS products

5. waste management
6. Wastewater treatment facilities

The water, wastewater, and solid waste management sectors have expressed concern about their potential liability despite their self-described status as passive receptors. For example, the National Waste & Recycling Association and Solid Waste Association of North America have stated that regulation under CERCLA would assign environmental cleanup liability to essential public services and their customers. They have asked Congress to provide municipal solid waste landfills and other passive receivers with a narrow exemption.

Similarly, wastewater and drinking water trade associations have argued that liability will be imposed upon them but not on the chemical manufacturing companies who placed the substances into commerce as products. They also argue that wastewater, stormwater, and water reuse systems passively receive PFAS from various sources.

In a partial response to the above concerns (i.e., passive recipients of PFAS) EPA stated that it will:

. . . use enforcement discretion and other approaches to ensure a fairness for minor parties who may have been inadvertently impacted by the contamination.

Nevertheless, this is clearly not an automatic exemption. Note that EPA states it will continue to consider listings of other related substances.

A link to the prepublication proposed rule can be found [here](#).