



USEPA Announces Proposed Rule to Designate Two PFAS Compounds as Hazardous Substances Under CERCLA

Client Advisories

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On April 19, 2024, the United States Environmental Protection Agency (USEPA) designated two per- and polyfluoroalkyl substances (PFAS) compounds as “hazardous substances” under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA). USEPA’s announcement on the proposed rule can be found [here](#). The proposal applies to perfluorooctanoic acid (PFOA) and perfluorooctanesulfonic acid (PFOS), including their salts and structural isomers.

According to USEPA, PFOA and PFOS are two of the most widely-used PFAS substances and, when released into the environment, “may present a substantial danger to human health or welfare or the environment.”

The direct effects of the final designation on the regulated community include the following:

1. releases of PFOA and PFOS that meet or exceed the reportable quantity within a 24-hour period must be reported to the National Response Center, state or tribal emergency response commission, and the local or Tribal emergency planning committee for the areas affected by the release; and
2. owners or operators of any vessel or facility must provide reasonable notice to potential injured parties by publication in local newspapers serving the affected area of any release of these substances.

Although the designation of PFOA and PFOS as CERCLA hazardous substance does not automatically require any investigation or cleanup obligations, it makes CERCLA’s enforcement tools and cost recovery mechanism available to USEPA for PFOA and PFOS releases. It also enables USEPA to shift responsibility for cleaning up PFOA and PFOS contamination from the Superfund to those responsible for contamination.

This final designation comes more than a year-and-a-half after USEPA originally proposed to designate PFOA and PFOS as hazardous substances, and just over a week after USEPA established final Maximum Contaminant Levels (MCLs) in drinking water for several PFAS compounds. Archer's prior alert on USEPA's proposal to designate PFOA and PFOS as hazardous substances can be found [here](#), while its prior alert on USEPA's final MCLs for drinking water can be found [here](#).

USEPA is going to publish the final rule in the Federal Register in the coming weeks, and the rule will become effective 60 days after publication in the Federal Register.

In addition, USEPA simultaneously published a memorandum titled PFAS Enforcement Discretion and Settlement Policy Under CERCLA. The memorandum can be found [here](#). According to the memorandum, USEPA "will focus on holding responsible entities who significantly contributed to the release of PFAS into the environment, including parties that manufactured PFAS or used PFAS in the manufacturing process, federal facilities, and other industrial parties." Conversely, USEPA "does not intend to pursue entities where equitable factors do not support seeking response actions or costs under CERCLA, including, but not limited to, community water systems and publicly owned treatment works, municipal separate storm sewer systems, publicly owned/operated municipal solid waste landfills, publicly owned airports and local fire departments, and farms where biosolids are applied to the land."

The equitable factors referenced above that USEPA will consider in deciding whether to exercise enforcement discretion under CERCLA are as follows:

1. whether the entity is a state, local, or Tribal government, or works on behalf of or conducts a service that otherwise would be performed by a state, local, or Tribal government;
2. whether the entity performs a public service role in: providing safe drinking water; handling of municipal solid waste; treating or managing stormwater or wastewater; disposing of, arranging for the disposal of, or reactivating pollution control residuals (e.g., municipal biosolids and activated carbon filters); ensuring beneficial application of products from the wastewater treatment process as a fertilizer substitute or soil conditioner; or performing emergency fire suppression services;
3. whether the entity manufactured PFAS or used PFAS as part of an industrial process; and
4. whether, and to what degree, the entity is actively involved in the use, storage, treatment, transport, or disposal of PFAS.

PFAS are a class of synthetic, man-made chemicals that have been used since the 1940s to make products that are resistant to water, heat, and oil. These products include cookware, carpets, clothing, fabrics for furniture, paper packaging for food, and other materials that are resistant to water, grease, or stains. They are also used in



firefighting foams and in a number of industrial processes.

For questions about the final designation of PFOA and PFOS as CERCLA hazardous substances, PFAS Enforcement Discretion and Settlement Policy Under CERCLA, or forthcoming USEPA action related to PFAS, please contact **David Edelstein** at dedelstein@archerlaw.com or 856-354-3125, or **Charles Dennen** at cdennen@archerlaw.com or 856-673-3932.

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