

PUBLICATION

PFOA and PFOS Are Now Hazardous Substances Under CERCLA

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The EPA has designated two per- and polyfluoroalkyl substances (PFAS) – perfluorooctanoic acid (PFOA) and perfluorooctanesulfonic acid (PFOS), including their salts and structural isomers – as hazardous substances under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), which is effective starting July 8, 2024. Also known as the Superfund statute, CERCLA provides EPA with the authority to investigate and clean up releases of hazardous substances in the air, water, groundwater, and soil. CERCLA also allows EPA to compel potentially responsible parties (PRPs) to conduct the cleanup or reimburse the government for EPA-led cleanup of listed hazardous substances¹. See CERCLA § 107(a).

EPA's listing of PFOA and PFOS as hazardous substances under CERCLA means that the notification requirements for a release of a Reportable Quantity (RQ) over a 24-hour period now extend to releases of PFOA or PFOS. See CERCLA § 103(a). It also means that the EPA can compel cleanup or reimbursement for cleanup from PRPs at sites with legacy contamination that includes PFOA or PFOS. In addition, the Department of Transportation (DOT) will now be required to regulate PFOA and PFOS as hazardous materials in accordance with the Hazardous Materials Transportation Act (HMTA). See CERCLA § 306.

Reporting New Releases of PFOA or PFOS of One Pound of More Within a 24-Hour Period

Beginning July 8, 2024, any person in charge of a vessel or facility is required, as soon as they have knowledge of any release (other than a federally permitted release) of PFOA, PFOS, or their salts or structural isomers from such vessel or facility of one pound or more within a 24-hour period, to immediately notify the National Response Center (NRC) in accordance with 40 CFR 302.6.² CERCLA § 103(a). Any releases that are federally permitted pursuant to CERCLA § 101(10), including NPDES permits issued under the Clean Water Act,³ are exempt from CERCLA § 103 and EPCRA § 304 notification requirements as well as CERCLA liability.

The owner or operator of the vessel or facility must also "provide reasonable notice to potential injured parties by publication in local newspapers serving the affected area" of the release of a hazardous substance. CERCLA § 111(g).

In addition, pursuant to EPCRA's reporting requirements, the facility owner or operator must immediately notify any community emergency coordinator for local or Tribal emergency planning committee (LEPC or TEPC) for any area likely to be affected by the release and to notify the State or Tribal Emergency Response Commission (SERC or TERC) of any state or Tribal region likely to be affected by the release in accordance with 40 CFR Part 355, Subpart C. EPCRA § 304.

Potential Liability for Legacy Releases of PFOA or PFOS

EPA's listing of PFOA and PFOS as hazardous substances under CERCLA does not automatically require investigation or cleanup of PFOA or PFOS at sites with legacy contamination. It also will not automatically reopen National Priorities List (NPL) sites that have been deleted or closed.

However, EPA can now add PFOA and PFOS to the list of hazardous substances to be cleaned up at open NPL sites, in addition to the list of hazardous substances to be investigated at any new Superfund site

assessments. EPA can also recommend an investigation of PFOA and PFOS at NPLs that are subject to five-year reviews pursuant to CERCLA Section 121(c).

The EPA has issued a [PFAS Enforcement Discretion and Settlement Policy Under CERCLA](#) in tandem with the new rule. This policy states that "EPA 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." On the other hand, "EPA 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."⁴

Farmers, municipal landfills, water utilities, municipal airports, and local fire departments are still subject to the CERCLA and EPCRA release reporting requirements for PFOA and PFOS, but they are less likely to be required to clean up or contribute to the cleanup of legacy PFOA or PFOS contamination as PRPs. Although the EPA's enforcement discretion does not extend to potential third-party claims for contribution to CERCLA response costs, the EPA noted a number of additional protections built into the statute that may deter such third-party claims:

- Bona fide prospective purchasers, contiguous property owners, and innocent landowners who meet the statutory criteria are provided with CERCLA liability protections. See CERCLA §§ 107(35), 107(40), 107(b)(3), and 107(q). This reinforces the importance of conducting all appropriate inquiries before purchasing a property and maintaining a record of this due diligence;
- CERCLA liability is limited for releases that are federally permitted. CERCLA § 101(10);
- CERCLA provides that the "normal application of fertilizer" does not constitute a release and, therefore, does not trigger liability under the statute. CERCLA § 101(22).22);
- CERCLA provides a municipal solid waste (MSW) exemption that provides statutory protections for residential, small business, and non-profit generators of MSW. CERCLA § 107(p);
- Parties may have a defense to CERCLA liability if they can show that the contamination was solely caused by acts or omissions of a third party. CERCLA § 107(b)(3);
- EPA can enter into settlements with major PRPs that provide contribution protection for non-settling parties so that the major PRP cannot turn around and pursue contribution claims from other potential PRPs. EPA can also affirmatively settle with parties whose contribution is *de minimis* in comparison to other parties, and CERCLA provides a statutory exemption to *de micromis* parties. CERCLA § 107(o); and
- Parties must incur response costs before they can recover those costs from other parties, and these response costs must be consistent with the National Contingency Plan. CERCLA § 107(a)(4)(B).

EPA's Enforcement Discretion and Settlement Policy does not provide protections for manufacturers or importers of products that contain PFAS. Manufacturing and other industrial parties that may be targets of EPA and/or third-party claims for legacy releases of PFOA or PFOS under the new rule should consider:

- Reviewing contracts with suppliers that may have provided parts or products containing PFOA or PFOS for any indemnification or other protectionary provisions;
- Locating environmental insurance policies that would have been in effect at the time of any legacy release of PFOA or PFOS; and
- Determining whether any component parts or products currently being manufactured or imported contain PFOA, PFOS, or any other PFAS.

If you have questions regarding PFAS and the guidelines under CERCLA, please reach out to [Elizabeth Haskins](#), [Noelle E. Wooten](#), or any member of Baker Donelson's [Environmental Group](#).

¹ "Hazardous substance" under CERCLA includes EPA-listed hazardous substances, as well as Clean Water Act § 311 Hazardous Substances, Clean Water Act § 207(a) Toxic Pollutants, Clean Air Act § 112 Hazardous Air Pollutants, Resource Conservation and Recovery Act (RCRA) § 3001 Hazardous Waste, and Toxic Substance Control Act § 7. There are no PFAS currently listed as hazardous substances under these other statutes. EPA has proposed to amend its regulations under RCRA to add nine specific PFAS to the list of hazardous constituents at 40 CFR part 261 appendix VIII, but it has not proposed to add any PFAS to RCRA's list of hazardous wastes. Listing PFAS as hazardous constituents is a first step towards listing these PFAS as hazardous waste, which would automatically add all nine specific PFAS to the CERCLA hazardous substances list and would trigger RCRA's cradle-to-grave requirements.

² EPA published FAQs regarding the release reporting requirements as they relate to PFOA and PFOS here: [FAQs on Release Reporting Requirements for the Final Rule Designating PFOA & PFOS as Hazardous Substances | US EPA](#)

³ In 2022, the EPA provided guidance on PFAS discharges to states authorized to administer their NPDES permitting programs: https://www.epa.gov/system/files/documents/2022-12/NPDES_PFAS_State%20Memo_December_2022.pdf

⁴ EPA's PFAS Enforcement Discretion and Settlement Policy is not a law or regulation, and policies may be changed without the public notice that would be required by a change in regulations.