

EPA Releases Long-Awaited Proposed Rule Designating Certain PFAS as CERCLA Hazardous Substances

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On August 26, the US Environmental Protection Agency (EPA) released a pre-publication version of its proposal to designate two of the most widely used per- and polyfluoroalkyl substances (PFAS) as hazardous substances under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) Section 102(a).

[The proposal](#) applies to perfluorooctanoic acid (PFOA) and perfluorooctanesulfonic acid (PFOS), including their salts and structural isomers, and is based on evidence EPA believes shows that the substances may present a substantial danger to human health or welfare or the environment. If finalized as proposed, the designation would fully apply CERCLA's liability and comprehensive cost recovery scheme to PFOA and PFOS. This would include CERCLA's reporting requirements as well: under the proposed rule, a facility must report a release of one pound or more of PFOA or PFOS within a 24-hour period that does not fall within an exemption (such as federally permitted releases).

As we recently described in a [previous blog post](#), the US Office of Management and Budget determined earlier this month that the proposal is an "economically significant rule," meaning the rule should be expected to result in costs of \$100 million or more annually. As an economically significant rule, EPA is required by Executive Order to prepare a regulatory impact analysis (RIA).

Under the RIA, which has not been issued yet, EPA has to provide support for its position that (1) a CERCLA designation is justified in order to achieve EPA goals, and (2) that such a designation is the least burdensome and most cost-effective way to achieve EPA's goals. Although EPA could have delayed its issuance of the proposed rule to allow its prior completion of an RIA, EPA has obviously elected not to do so, opting instead (presumably) to provide an RIA with the final rule.

As the proposal marks the first time EPA has exercised its authority to designate hazardous substances directly under CERCLA Section 102(a), EPA included the criteria it used to determine whether a listing is appropriate under Section 102(a). These criteria could be applied to any future designation under Section 102(a) — stakeholders should therefore be aware of the potentially broad implications of this proposed rule.

In the proposed rule, EPA also announced it will be developing an advance notice of proposed rulemaking seeking comments and data to assist in the development of potential future regulations pertaining to other PFAS designation as hazardous substances under CERCLA.

The rule is expected to be published in the Federal Register shortly, triggering a 60-day comment period. If you have any questions about the proposed rule, or desire assistance in drafting a comment for the proposed rule, please reach out to a member of the Firm's environmental group.

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