

EPA's Designation of Two "Forever Chemicals" as Hazardous Substances Brings Potential Impacts to Manufacturers, Commercial/Industrial Facilities & Property Owners

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What You Need to Know

- On April 19, 2024, the EPA announced a final rule designating two per- and poly-fluoroalkyl substances (PFAS), PFOS and PFOA, as hazardous substances under the federal Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA).
- PFOS and PFOA are often referred to as "forever chemicals" and are widely used in numerous industrial applications and consumer products.
- As designated hazardous substances, PFOS and PFOA will be subject to CERCLA's reporting and remediation requirements, significantly impacting parties including manufacturers, commercial and industrial facilities, and property owners.

On April 19, 2024, the U.S. Environmental Protection Agency (EPA) announced a final rule to regulate two per- and poly-fluoroalkyl substances (PFAS), perfluorooctanesulfonic acid (PFOS) and perfluorooctanoic acid (PFOA). The EPA indicated the final rule will be published in the Federal Register shortly and will be effective 60 days after publication – a pre-publication copy can be accessed on the EPA website.

PFAS is a class of synthetic, chemical compounds that contain a molecular bond between carbon and fluorine, which do not readily break down in nature and has earned PFAS the infamous nickname as "forever chemicals." As outlined in our August 2022 Client Alert on EPA's

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proposed designation of the rule, PFOA and PFOS have historically been used in a wide range of consumer products including carpets, clothing, fabrics for furniture, cleaning products, nonstick products and cookware, and packaging for food. PFOA and PFOS have also been used in a variety of industrial applications and products including chrome plating operations, electronics manufacturing, textile manufacturing, firefighting foams, insecticides, adhesives, paints, varnishes, inks, and photographic coatings.

PFAS join more than 800 other chemicals designated by the EPA as hazardous substances under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA). Once effective, the final rule places certain reporting and remediation requirements on potentially responsible parties, including manufacturers, commercial and industrial facilities, and property owners.

Specifically, because EPA is designating PFOS and PFOA as hazardous substances under CERCLA:

- entities are required to report releases of PFOS and PFOA into the environment;
- the EPA can require potentially responsible parties to investigate and cleanup these substances;
- parties can pursue recovery and contribution actions associated with the investigation and cleanup of these substances;
- federal entities that transfer their property are required to provide notices and covenants regarding PFOA or PFOS on the property; and
- potentially responsible parties will be subject to CERCLA's provisions of joint, several, and retroactive liability.

Importantly, the potential for a release of PFOA and PFOS into the environment will need to be evaluated as part of the pre-acquisition environmental due diligence and Phase I Environmental Site Assessment for a prospective purchaser to potentially qualify for a defense to CERCLA liability.

Concurrently with the announcement of the final rule publication, the EPA published a discretionary enforcement policy for PFAS under CERCLA. According to the enforcement policy, the EPA will focus on acting against parties who have directly produced, released, or exacerbated the presence of PFAS in the environment, inclusive of any federal agencies and facilities.

Please contact the authors of this Alert with questions related to the EPA's final rule or to discuss specific impacts on your business in greater detail.

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