



Contaminants *Compass*

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McGuireWoods is distributing this special edition of the monthly “Contaminants Compass” newsletter to provide an update on the [Environmental Protection Agency’s long-anticipated decision](#) to designate two per- and polyfluoroalkyl substances (PFAS) — perfluorooctanoic acid (PFOA) and perfluorooctanesulfonic acid (PFOS) and their salts and structural isomers — as hazardous substances under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA). [EPA announced](#) the decision on April 19, 2024, and the designation will become effective 60 days after the final rule is published in the Federal Register. EPA also released a [PFAS Enforcement Discretion and Settlement Policy Under CERCLA](#) memorandum intended to guide how EPA will exercise its CERCLA enforcement discretion in matters involving PFAS.

I. EPA’s Designation of PFOA and PFOS as CERCLA Hazardous Substances

CERCLA gives EPA broad authority to address past, current and future releases or threat of releases of hazardous substances to air, water, groundwater and soil. CERCLA’s two primary objectives are (1) to promote the timely cleanup of contaminated sites and (2) to ensure potentially responsible parties (PRPs) bear site cleanup costs for contamination.

EPA designated PFOA and PFOS as hazardous substances after determining that these compounds “may present substantial danger to public health or welfare or the environment” due to their persistence, prevalence and mobility in the environment. EPA’s decision enables it to streamline cleanup of contaminated sites, shift responsibility for cleanup of existing Superfund sites from the EPA to PRPs and compel PRPs to address additional contaminated sites. Prior to designation, the agency could only address PFOA and PFOS as “pollutants or contaminants,” which meant it could not initiate a response until it formally determined that the contamination presented an “imminent or substantial danger to the public health or welfare.” Designation of PFOA and PFOS as hazardous substances removes this step and allows EPA to compel PRPs to conduct or pay for response work, which it could not do for “pollutants or contaminants.”

II. Direct Impacts: Release Notification Requirements

The designation of PFOA or PFOS as hazardous substances will automatically trigger release reporting requirements under CERCLA and the Emergency Planning and Community Right-to-Know Act (EPCRA) that will go into effect 60 days after the final rule is published in the Federal Register.

Under CERCLA, any owner or operator with knowledge of any release of PFOA, PFOS, or their salts or structural isomers from its facility in quantities *equal to or greater than 1 pound or more within a 24-hour period* must immediately notify the National Response Center of such release. Facility owners or operators must also notify potentially injured parties of any reportable releases of PFOA or PFOS by publishing notice of the release in the local newspaper.

Section 304 of EPCRA requires owners or operators to immediately notify the community emergency coordinator for their local or tribal emergency planning committee (LEPC or TEPC) regarding any area likely to be affected by the release and notify the state or tribal emergency response commission (SERC or TERC) of any state or tribal region likely to be affected by the release of these substances. Facilities with reported releases must submit a follow-up written report to the SERC or TERC and LEPC or TEPC as soon as practicable after the release — typically within 30 days.

III. Indirect Impacts: Increased Scope and Cost of Release Responses

The designation of PFOA and PFOS as hazardous substances will likely expand the scope of the response actions at several existing National Priorities List (NPL) sites. It may even lead to the relisting of several deleted sites where EPA has previously determined that all cleanup goals had been achieved. EPA noted in the [preamble that an estimated 33.1%](#) of the final, proposed or deleted nonfederal NPL sites that were tested have detectable levels of PFOA and/or PFOS. Additionally, the designation will likely increase response actions at non-NPL sites where cleanup is overseen by state regulators.

IV. Industries Affected

EPA identified over [85 industries](#) it believes are most likely to be directly or indirectly affected by the designation. The list includes the following major industry sectors: oil and gas extraction; mining; sewage treatment utilities; textile mills; paper manufacturing; petroleum and coal products manufacturing; chemical manufacturing; plastics and rubber products manufacturing; metal manufacturing; machinery manufacturing; electronic component manufacturing; truck and rail transportation; and waste treatment and disposal facilities.

V. PFAS Enforcement Policy

In connection with the hazardous substance designation, EPA also issued the PFAS Enforcement Policy memorandum to provide direction to enforcement and compliance staff about how EPA will exercise its enforcement discretion under CERCLA in matters involving PFAS. Under the policy, EPA will hold responsible those entities that significantly contributed to the release of PFAS into the environment, including PFOA and/or PFOS manufacturers and processors, as well as those who manufactured products using PFOA and/or PFOS.

EPA says that it *does not* intend to pursue entities where equitable factors do not support seeking response actions or costs under CERCLA. These [five protected entities](#) include 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. For other entities, EPA may extend its enforcement discretion to additional parties based on considering the following equitable factors, such as whether the entity fulfills a public service role, whether the entity manufactured or used PFAS in an industrial process, and whether and to what degree the entity was involved in the use, storage, treatment, transport or disposal of PFAS.

About McGuireWoods

McGuireWoods supports clients as they assess and mitigate their PFAS risk, develop and apply business operational responses to changing PFAS laws and regulations at federal and state levels, and defend litigation as it arises, including navigating and coordinating national scientific defenses in novel contexts. [Click here](#) to learn more.

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