

# EPA DESIGNATES PFAS CHEMICALS AS HAZARDOUS SUBSTANCES IN NEWLY PROPOSED CERCLA REGULATIONS

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## U.S. Policy and Regulatory Alert

By: David J. Raphael, Cliff L. Rothenstein, Brian S. Montag, Dawn M. Lamparello, Ankur K. Tohan, Brianna K. Edwards

On Friday, 26 August 2022, the U.S. Environmental Protection Agency (EPA) moved forward with a proposed rulemaking regarding how certain PFAS chemicals will be regulated in the future. EPA announced plans to regulate certain perfluoroalkyl and polyfluoroalkyl substances (PFAS), also known as “forever chemicals,” under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), or “Superfund.”<sup>1</sup> Per EPA's proposal, two of the most widely used PFAS, perfluorooctanoic acid (PFOA) and perfluorooctanesulfonic acid (PFOS), will be designated by EPA as hazardous substances. This proposed rulemaking is based in part on the recommendations outlined in EPA Administrator Michael Regan's PFAS Strategic Roadmap,<sup>2</sup> released in October 2021.

The proposed rule comes after decades of urging by environmental groups for regulation targeting “forever chemicals.” The Biden administration previously committed to targeting PFAS pollution as part of its efforts to safeguard drinking water.<sup>3</sup> Announcing the proposed rule, Administrator Regan explained, “Communities have suffered far too long from exposure to these forever chemicals. The action announced today will improve transparency and advance EPA's aggressive efforts to confront this pollution.”

PFAS have long been used in a variety of commercial products, including nonstick frying pans, water-repellent sports gear, stain-resistant rugs, and cosmetics. Significant evidence suggests that PFAS, including PFOA and PFOS, can accumulate and persist in the body for long periods of time. Animal and human studies indicate that exposure to PFOA and PFOS may lead to cancer in addition to other serious health problems. In June 2022, EPA announced that PFOA and PFOS are more dangerous than previously thought even at low, presently undetectable levels.<sup>4</sup>

By listing PFOA and PFOS as hazardous substances under CERCLA, EPA is seeking to hold potentially responsible parties accountable for cleaning up communities affected by PFAS contamination. While most U.S. manufacturers have previously phased out PFOA and PFOS, these substances are still in limited use. Studies have shown that PFOA and PFOS remain in the environment and do not degrade over time.

Under CERCLA's strict, joint, several, and retroactive liability, EPA requires potentially responsible parties to clean up sites contaminated by hazardous substances. This responsibility extends in perpetuity from the time of contamination and includes all parties with potential involvement with the disposal of hazardous substances. Given their extensive use and long-term persistence within the environment, PFOA and PFOS will likely be the focus of additional investigations and testing requirements at a large range of contaminated sites, including

landfills, each with numerous potentially responsible parties. Companies involved in the disposal of PFOA and PFOS, as well as successors to such companies, including water and wastewater utilities, should be prepared to address those remedial investigations in the near future. The proposed rule will also require the reporting of releases of PFOA and PFOS that meet or exceed the reportable quantity, creating new compliance requirements for related industries.

The listing of PFOA and PFOS as new hazardous substances under CERCLA will create unique concerns at all stages of the remediation process. Entities involved in site remediation matters involving EPA should anticipate an evaluation of PFOA and PFOS in a remedial investigation (RI) and feasibility study (FS), and related clean-up efforts will be detailed as appropriate in future Records of Decision (ROD). Existing remediation plans will be subject to change with the addition of PFOA and PFOS considerations.

Potentially responsible parties that have previously remediated contaminated sites and subsequently entered into consent decrees with EPA must also be aware of the implications of PFOA and PFOS regulation. While consent decrees can provide a release from future liability, these releases are often limited to matters specifically covered by the settlement. Consent decrees may contain “reopener” provisions that allow EPA to bring new claims against potentially responsible parties post-remediation if new conditions arise, like the listing of new chemicals of concern. EPA’s new regulation of PFOA and PFOS could require parties who previously completed their remediation efforts to undertake further remediation.

EPA expects to publish notice of the proposed rulemaking within the next several weeks. Additionally, EPA announced that it will seek public comment on designating other PFAS chemicals as CERCLA hazardous substances after the close of public comment on the PFOA and PFOS rulemaking. EPA also plans to engage with impacted PFAS communities, wastewater utilities, businesses, farmers and other parties during the consideration of the proposed rule.

## FOOTNOTES

<sup>1</sup> <https://www.epa.gov/newsreleases/epa-proposes-designating-certain-pfas-chemicals-hazardous-substances-under-superfund>.

<sup>2</sup> <https://www.epa.gov/pfas/pfas-strategic-roadmap-epas-commitments-action-2021-2024>.

<sup>3</sup> <https://www.whitehouse.gov/briefing-room/statements-releases/2022/06/15/fact-sheet-biden-harris-administration-combatting-pfas-pollution-to-safeguard-clean-drinking-water-for-all-americans/>.

<sup>4</sup> <https://www.epa.gov/newsreleases/epa-announces-new-drinking-water-health-advisories-pfas-chemicals-1-billion-bipartisan>.

## KEY CONTACTS



**DAVID J. RAPHAEL**  
PARTNER

HARRISBURG, PITTSBURGH  
+1.717.231.4574  
DAVE.RAPHAEL@KLGATES.COM



**BRIAN S. MONTAG**  
PARTNER

NEWARK  
+1.973.848.4044  
BRIAN.MONTAG@KLGATES.COM



**ANKUR K. TOHAN**  
PARTNER

SEATTLE  
+1.206.370.7658  
ANKUR.TOHAN@KLGATES.COM



**CLIFF L. ROTHENSTEIN**  
GOVERNMENT AFFAIRS ADVISOR

WASHINGTON DC  
+1.202.778.9381  
CLIFF.ROTHENSTEIN@KLGATES.COM



**DAWN M. LAMPARELLO**  
PARTNER

NEWARK  
+1.973.848.4148  
DAWN.LAMPARELLO@KLGATES.COM

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