

# The EPA Proposes to List PFAS as 'Hazardous Substances' under CERCLA

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Posted By: David P. Ruetz

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On August 26, 2022, the U.S. Environmental Protection Agency (EPA) issued a "Pre-Publication Notice" that proposes to list two PFAS compounds as "hazardous substances" under the "Comprehensive Environmental Response Compensation & Liability Act" (CERCLA), also known as the "Superfund" law. PFAS is an acronym for per- and polyfluoroalkyl substances, which are chemicals that were widely used from the 1960s to the early 2000s in the manufacture of a variety of consumer products, such as stain resistant carpets, non-stick cookware (e.g., Teflon), firefighting foam, food packaging (e.g., microwave popcorn bags/pizza boxes), water resistant clothing (e.g., pre-2000 GoreTex), water resistant repellent (e.g., Scotchgard) and dental floss. While the manufacture of PFAS compounds has largely been phased out in the U.S., these compounds are still used in the manufacturing of many products worldwide, and products containing PFAS are still imported to the U.S.

These substances, known as "forever chemicals," have received considerable attention by federal and state environmental regulatory agencies because of their resistance to chemical breakdown due to the chemical bond between carbon and fluorine atoms in the PFAS compounds, which is one of the strongest in nature. Because of this, humans can still be exposed to PFAS long after the chemicals were released into the environment.

The compounds that are proposed to be listed as hazardous substances under CERCLA include, perfluorooctanoic acid (PFOA) and perfluorooctane sulfonic acid (PFOS), which are two of the most common PFAS chemicals that have been historically used in numerous manufactured products. The proposed listing also includes the salts and structural isomers of these two compounds. The EPA plans to publish a formal "Notice of Proposed Rulemaking" regarding its plans to list these PFAS compounds as hazardous substances under CERCLA in the Federal Register within the next several weeks, and once it is published, there will be a 60-day public comment period.

One of the most immediate impacts of the adoption of these PFAS compounds as hazardous substances under CERCLA would be that detection of these compounds in the environment in excess of reportable quantities would require reporting of these compounds to the U.S. National Response Center and would give the EPA enforcement discretion under the CERCLA law to require investigation and/or cleanup of these chemicals. Another significant impact would require that Phase I Environmental Site Assessments (ESAs) that are conducted by environmental consultants pursuant to the American Society for Testing & Materials (ASTM) E1527 Standard Practice for Phase I ESAs and the EPA's All Appropriate Inquiry (AAI) Rule, include a review of whether PFAS compounds have ever been stored, used or manufactured at a property, and, most important, whether the PFAS may have potentially impacted the property. At present, because the ASTM E1527 Standard Practice for Phase I ESAs and the AAI Rule requires a review only of CERCLA-listed hazardous substances, since PFAS are not currently listed as CERCLA hazardous substances, an inquiry whether these substances were stored, used or manufactured at a property is not required to be included in the scope of a Phase I ESA. It is also anticipated that if the EPA lists these PFAS compounds as hazardous substances under CERCLA, that states that do not currently regulate PFAS (a few states, such as Vermont and Michigan, have adopted regulatory-based standards for PFAS) will adopt similar laws that address PFAS.

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