

PFAS CERCLA Designation May Expand

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We [previously reported](#) on the [EPA's](#) long-anticipated [proposed rule](#) to designate PFOA and PFOS as “hazardous substances” under CERCLA. The public comment period for the CERCLA PFAS proposed rule closed on November 7, 2022, and the EPA is now undertaking a review of the comments and will have the opportunity to determine whether to modify the rule before issuing a final rule.

In February 2023, the EPA also submitted a final proposal to the White House’s Office of Management and Budget indicating that it wishes to publish in the Federal Register a notice of proposed rulemaking requesting public input on whether the EPA should consider designating PFAS beyond just PFOA and PFOS as “hazardous substances” under CERCLA, and whether information exists to allow the EPA to consider designating PFAS as a class or subclass under CERCLA. On March 24, 2023, the OMB cleared the proposal, signaling that the EPA can now open for comment the notion of potentially expanding the CERCLA PFAS scope.

Now, the EPA issued an Advanced Notice of Proposed Rulemaking (ANPRM), which aims to have seven additional PFAS added to the CERCLA list of “hazardous substances.”

We have already written extensively on the enormous impacts that just a PFOA and PFOS designation under CERCLA will have on businesses. Now, with the EPA eyeing adding many more PFAS to the CERCLA list, corporations, insurers, investment firms, and private equity alike must pay attention to this future potential change in law when considering risk issues.

CERCLA PFAS Scope Designation To Date

On January 10, 2022, the EPA submitted a plan for a PFAS Superfund designation to the [White House Office of Management and Budget \(OMB\)](#) when it indicated an intent to designate two legacy PFAS – PFOA and PFOS – as “hazardous substances” under the Comprehensive Environmental Response, Compensation & Liability Act (CERCLA, also known as the Superfund law). The EPA previously stated its intent to make the proposed designation by March 2022 when it introduced its [PFAS Roadmap](#) in October 2021. Under the Roadmap, the EPA planned to issue its proposed CERCLA designation in the spring of 2022. On August 12, 2022, a CERCLA PFAS designation took a significant step forward when the OMB approved the EPA’s plan for PFOA and PFOS designation. This step opened the door for the EPA to put forth its proposed designation of PFOA and PFOS

under CERCLA and engage in the required public comment period.

When OMB initially contemplated approving the EPA's proposed rule, it designated the rule as "other significant", which meant that the rule was predicted to have costs or benefits less than \$100 million annually. However, the OMB received several pieces of feedback expressing concern that such an estimate undervalued the impact that such a designation will have. More specifically, the Chamber of Commerce provided its own estimate that the CERCLA designation would have a cost impact of over \$700 million annually. As a result, the OMB changed its designation of the EPA's proposed rule to "economically significant", which triggered the EPA to have to conduct a RIA prior to proposing the PFAS CERCLA designation. Under the RIA, the EPA will have to provide support for its position that a CERCLA designation is justified to achieve EPA goals and to provide support for the contention that such a designation is the least burdensome and most cost-effective way to achieve the EPA's goals.

Despite the call for a RIA by the OMB, the EPA nevertheless released its proposed CERCLA designation, leading many to believe that in the months when the OMB was reviewing the EPA's proposal, the EPA was working on the necessary RIA analysis so as to not delay release of the proposed rule.

Additional CERCLA Designation

In February 2023, the EPA sent a [proposed rule](#) to the OMB that states the following:

"EPA plans to publish in the Federal Register an advance notice of proposed rulemaking requesting public input on whether the agency should consider designating as hazardous substances precursors to PFOA and PFOS, whether the agency should consider designating other PFAS as CERCLA hazardous substances and whether there is information that would allow the agency to designate PFAS as a class or subclass."

The OMB reviewed the proposal and on March 24, 2023, approved the proposal so as to permit the EPA to proceed with publishing the Advanced Notice of Proposed Rulemaking (ANPRM).

On April 13, 2023, the EPA published in the Federal Register an [ANPRM](#) that seeks public comment on a proposal to list as "hazardous substances" the following additional PFAS: PFBS, PFHxS, PFNA, HFPO-DA, PFBA, PFHxA, and PFDA. The EPA indicated that the seven PFAS were chosen based on available toxicity data for the chemicals.

Opposition to CERCLA Designation

Since the EPA's submission of its intent to designate PFOA and PFOS as hazardous substance to the OMB, the EPA has been met with industry pushback on the proposal. Three industries met with the OMB earlier in 2022 to explain the enormity of regulatory and cleanup costs that the industries would face with a CERCLA designation of PFOA and PFOS – water utilities, waste management companies, and the International Liquid Terminals Association. These industries in particular are concerned about bearing the burden of enormous cleanup costs for pollution that third parties are responsible for. Industries are urging the OMB and EPA to consider other ways to achieve regulatory and remediation goals aside from a CERCLA PFAS designation.

During an April 5, 2022 meeting of the Environmental Council of the States (ECOS), several states also expressed concerns regarding the impact that a CERCLA designation for PFAS types would

have in their states and on their constituent companies. The state environmental leaders discussed with EPA representatives how the EPA would view companies in their states that fall into categories such as waste management and water utilities, who are already facing uphill battles in disposing of waste or sludge that contains PFAS.

Industries are asking the EPA to consider CERCLA PFAS exemptions for certain industries, which would exempt certain industry types from liability under CERCLA. Industries also pushed the EPA and OMB to conduct a robust risk analysis to fully vet the impact that the designation will have on companies financially. We predict that certain industries or industry groups will file lawsuits in response to the EPA action in which they will argue that the EPA acted too hastily, acted arbitrarily and capriciously, and did not properly comply with the RIA requirements.

CERCLA PFAS Designation: Impact On Businesses

Once a substance is classified as a “hazardous substance” under CERCLA, the EPA can force parties that it deems to be polluters to either cleanup the polluted site or reimburse the EPA for the full remediation of the contaminated site. Without a PFAS Superfund designation, the EPA can merely attribute blame to parties that it feels contributed to the pollution, but it has no authority to force the parties to remediate or pay costs. The designation also triggers considerable reporting requirements for companies. Currently, those reporting requirements with respect to PFAS do not exist, but they would apply to industries well beyond just PFAS manufacturers. The CERCLA PFAS scope in any final regulation is therefore critical to numerous industries that were or are downstream users of PFAS.

The downstream effects of a PFOA and PFOS designation would be massive, but a designation of the entire class of PFAS or even various subclasses of PFAS would be potentially unquantifiable in financial magnitude. With over 12,000 PFAS in existence according to the EPA and many of them in continued use to this day, the potential environmental pollution ramifications touch on countless industry types. Companies that utilized PFAS in their industrial or manufacturing processes and sent the PFAS waste to landfills or otherwise discharged the chemicals into the environment will be at immediate risk for enforcement action by the EPA given the EPA’s stated intent to hold all PFAS polluters of any kind accountable. Waste management companies should be especially concerned given the large swaths of land that are utilized for landfills and the likely PFAS pollution that can be found in most landfills due to the chemicals’ prevalence in consumer goods. These site owners may be the first targeted when the PFOA/PFOS designation is made, which will lead to lawsuits filed against any company that sent waste to the landfills for contribution to the cost of cleanup that the waste management company or its insured will bear. However, with a broader PFAS designation a possibility now, there should naturally be concern regarding re-openers in the future for these same sites.

Conclusion

Now more than ever, the EPA is clearly on a path to regulate PFAS contamination in the country’s water, land and air. The EPA has also for the first time publicly stated when they expect such regulations to be enacted. These regulations will require states to act, as well (and some states may still enact stronger regulations than the EPA). Both the federal and the state level regulations will impact businesses and industries of many kinds, even if their contribution to drinking water contamination issues may seem on the surface to be de minimus. In states that already have PFAS drinking water standards enacted, businesses and property owners have already seen local environmental agencies scrutinize possible sources of PFAS pollution much more closely than ever

before, which has resulted in unexpected costs. Beyond drinking water, though, the EPA PFAS plan shows the EPA's desire to take regulatory action well beyond just drinking water, and companies absolutely must begin preparing now for regulatory actions that will have significant financial impacts down the road.

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