What could the US EPA's proposed Superfund listing for PFOA and PFOS mean for industry?

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Two hazardous substance designations under CERCLA will create significant compliance, enforcement and litigation risks related to site cleanup, says Hunton Andrews Kurth's environmental team

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On 6 September, the US EPA released its proposed rule to add perfluorooctanoic acid (PFOA) and perfluorooctanesulfonic acid (PFOS) to the list of hazardous substances under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), also known as Superfund.

If finalised, these hazardous substance designations could have a significant impact on many industries, from creating new reporting obligations to increased compliance, enforcement and litigation risks related to site cleanup.

The EPA's efforts involving PFOA and PFOS were first announced in the agency's PFAS Strategic Roadmap and represent the first exercise of its authority under CERCLA section 102(a) to designate a hazardous substance.

Proposed PFOA/PFOS rule

The EPA proposes to amend Part 302 of the CERCLA regulations to add PFOA and PFOS, including their salts and structural isomers, to the list of hazardous substances – a change with significant impacts on cleanup of these compounds in the environment.

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In order to list a "hazardous substance", CERCLA section 102(a) requires that the agency determine that "when released into the environment [it] may present a substantial danger to the public health or welfare or the environment". The proposal says it relies on the "totality of the evidence" for potential adverse effects from PFOA and PFOS exposures to make this finding.

If the proposal is finalised, the EPA says the pace of site remediation for PFOA/PFOS contaminated sites would increase because:

- the agency will be able to require cleanup by issuing administrative orders at sites where PFOA/PFOS is the only contaminant; and
- the EPA, other federal agencies and private parties will be able to seek to recover site cleanup costs for PFOA and PFOS releases from potentially responsible parties.

The agency treats these as indirect effects of the rulemaking, potentially ignoring the most impactful result of this action.

Impact of hazardous substance designations

If finalised, this proposed rule would likely create more

Superfund liability by activating the full panoply of CERCLA enforcement authorities. The implications of a hazardous substance designation for PFOA and PFOS could include:

- additions to the National Priorities List (NPL);
- uncertainty for cleanups and costs;
- reopening of sites;
- EPA enforcement risks;
- private party CERCLA claims;
- environmental due diligence; and
- common law claims.

Additions to the NPL

There will likely be more sites added to the NPL, including those with PFOA and PFOS releases that previously did not qualify. The NPL is the list of sites compiled by EPA that are prioritised for long-term remedial evaluation and response under CERCLA. Listing is typically a multistep process that begins with a preliminary assessment and site inspection. These provide data that the EPA uses to score the site under the Hazard Ranking System (HRS), a numerically based screening system that assesses the relative potential of sites to pose a threat to human health or the environment.

The EPA proposes listings to the NPL in the Federal Register, providing an opportunity for public notice and comment before the listings are finalised. A hazardous substance designation, and the scientific findings underlying that determination, will almost certainly bring increased attention to PFOA and PFOS sites for inclusion on the NPL.

Although listing of a site on the NPL does not assign liability to any person, it allows a site to be eligible for EPA-financed remedial actions, which carry significant enforcement implications for future cost recovery actions.

Uncertainty for cleanups and costs

There is the potential for disruption to ongoing remediation activities at existing sites that currently are, or may become, Superfund sites, as well as added complexity and costs if parties are required to utilise different treatment technologies to address PFOA and PFOS.

Predicting the treatment technologies and costs that will be required to address PFOA and PFOS is further complicated by the uncertainty surrounding the cleanup standards that will apply to these substances.

While the EPA has issued lifetime health advisories for certain PFAS, states also have enacted regulatory and guidance standards for PFAS compounds in soil and drinking water, creating a patchwork of cleanup standards at varying levels and degrees of enforceability across the country.

In some instances, states may advocate that state standards are 'Applicable or Relevant and Appropriate Requirements', commonly known as ARARs, that could be used in setting site-specific cleanup levels and remedial action goals pursuant to section 121 of CERCLA and the National Contingency Plan.

Reopening of sites

The reopening of existing Superfund sites where PFOS/PFOA is found is possible if EPA finds that previously undertaken remedial actions are no longer protective during its five-year reviews, with the potential to put closed sites back into the CERCLA cleanup process.

Although many CERCLA settlements with EPA contain covenants not to sue, those covenants are almost always subject to reopener provisions and a long list of reservations of rights, some of which may be invoked even after a remedial action is certified as complete.

One of these reopener provisions is the "new information" reopener. The EPA may seek to invoke this clause to reopen settlements and cleanups to address situations where additional information about PFOA or PFOS reveals that a remedy is no longer protective of human health and the environment.

EPA enforcement risks

The EPA's enforcement-first approach to Superfund sites would likely continue at those with PFOA or PFOS contamination if there are potentially responsible parties, and particularly if those sites are located in or impacting environmental justice communities.

Once PFOA and PFOS are listed as hazardous substances, the EPA could take the position that it has:

- CERCLA enforcement authority to unilaterally order parties to undertake removal or remedial actions under section 106 to address PFOA and PFOS; and
- cost recovery authority under section 107 to recover costs EPA incurs in conducting response actions to address these substances.

The EPA may seek to invoke these authorities after the hazardous substances listings are finalised, particularly at sites with PFOA or PFOS in soil, sediment or groundwater with potential pathways to drinking water sources or other sensitive receptors.

Given CERCLA's retroactive, strict and joint and several liability scheme, and the EPA's tendency to group large geographic areas into one "site", even parties that might have contributed minimally to PFOA or PFOS contamination at a site could be affected. For example,

parties seeking to allege the conditional de micromis exemption or enter de minimis settlements with the EPA would likely need to engage environmental counsel and consultants to substantiate these positions to EPA's satisfaction. De minimis settlements also require a cash payment to the federal government, and property owners seldom meet the requisite eligibility requirements for these settlements.

Private party claims

There could be a significant rise in expensive and disruptive Superfund litigation initiated by private parties seeking contribution under section 113 (or section 107 cost recovery, where allowed) for PFOA and PFOS contamination. CERCLA litigation is legally and factually complex, lengthy, difficult and unpredictable.

Private parties are not legally bound by the same discretionary EPA enforcement policies issued to blunt some of the harshness of CERCLA liability, including those addressing residential homeowners, owners of properties contaminated by subsurface migration from another source, and small contributors that fall outside of the statutory de micromis exemption.

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Moreover, at sites that are the subject of private party litigation, the EPA may be unwilling to dedicate sufficient resources to negotiate de minimis or other settlements providing small contributors with protection from contribution actions by other potentially responsible parties.

And, even if EPA does enter such settlements, it may not protect settlors from private party cost recovery claims under section 107 of CERCLA.

Environmental due diligence

The importance of environmental due diligence associated with real estate transactions will likely increase. Given the widespread use of PFAS chemicals in the past, the fact that previously they were considered to be quite safe, and the extremely low concentrations that are now of concern to regulators, many sites without an obvious history of industrial use may still present PFOS/PFOA contamination. Upon PFOA/PFOS being listed as CERCLA hazardous substances, environmental consultants will need to use the American Society for Testing and Materials (ASTM) standard for conducting Phase I environmental site assessments and follow the EPA's All Appropriate Inquiry regulations while considering the storage, use and manufacture of PFOA and PFOS at properties. Many environmental consultants have already been considering PFAS risks – based on use of the property and surrounding properties – as a business environmental risk or other consideration, particularly in states that already regulate these chemicals.

Common law claims

The EPA's regulatory determinations are likely to spur additional private party litigation, and potential liabilities may extend well beyond traditional CERCLA site cleanup costs to include claims of damage to property value, personal injury and/or the need for long-term medical monitoring due to exposure to PFAS. Plaintiffs in these tort-based cases will cite the EPA's regulatory actions, and the scientific findings alleged to support those actions, to argue for standards of care applicable to defendants and as a proxy to establish general causation for certain health conditions.

Economically significant rulemaking
Cost estimates for this rulemaking provided by stakeholders ranged from $11bn to $22bn for private party compliance costs, and corresponding annualised private party PFOA/PFOS cleanup costs at non-federal sites between $700m and $800m.

After some questions about the EPA's intent to assess the full costs and benefits of the rulemaking to the economy, the White House Office of Management and Budget (OMB) ultimately deemed the rule "economically significant".

The EPA's Economic Assessment of the Potential Costs and Other Impacts of the Proposed Rulemaking to Designate Perfluorooctanoic Acid (PFOA) and Perfluorooctanesulfonic Acid (PFOS) as Hazardous Substances (published 7 September) describes many "uncertainties" regarding indirect impacts of the rule, including the number of potential sites affected, cleanup standards, cleanup technologies and response activities. However, the agency has refused to develop a full regulatory impact analysis (RIA) that would fully address impacts to the economy, consistent with OMB Circular A-4.

The EPA's proposed interpretation of CERCLA section 102(a) is that the agency is precluded from considering costs when designating a hazardous substance. It distinguishes the proposed rule's potential direct and

indirect economic impact by accounting for only minimal increases in reporting costs. The larger (presumably indirect) costs of additional cleanup, are merely "shifted" from the public to potentially responsible parties, EPA suggests.

The proposal asserts that site cleanup costs remain unquantifiable at this preliminary stage (despite methods suggested by the regulated community) since hazardous substance designations do not automatically compel EPA or private parties to undertake contingent, discretionary and site-specific response actions. This assertion ignores the foreseeable consequences of the listing.

The EPA has announced near-zero interim health advisories, which recommend levels below available detection or treatment methods. And the heightened focus on PFAS, combined with the growing amount of data state regulators are collecting on levels of PFAS in the environment, will almost certainly result in the EPA prioritising sites with PFOA and PFOS releases for CERCLA response actions and enforcement.

Opportunity for stakeholder input

Affected stakeholders must provide comments to the EPA by 7 November 2022. Stakeholders may wish to consider providing input on:

- the EPA's authority to designate PFOA/PFOS as "hazardous" substances and its "substantial danger" finding;
- EPA's interpretation of CERCLA section 102(a) to preclude consideration of cost; and
- the significant economic, operational and other business consequences that will flow from this unprecedented EPA regulatory action.

Similar actions regarding other PFAS are on their way. An advanced notice of proposed rulemaking expected later this year will consider designating additional PFAS as hazardous substances under CERCLA.

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The views expressed in this article are those of the authors and are not necessarily shared by Chemical Watch. The author transparency statement can be seen here.

FURTHER INFORMATION

EPA PFAS Strategic Roadmap →
Part 302 of the Cercla regulations →
Proposed rule →