

CLIENT ALERT – APRIL 2024

PFAS CERCLA DESIGNATION



USEPA action designates two widely used PFAS as hazardous substances under the Superfund law

On April 19, 2024, the U.S. Environmental Protection Agency (EPA) took another step in its efforts to regulate per and polyfluoroalkyl substances (PFAS) and reduce health risks posed by exposure to PFAS in communities across the United States. This final rule will designate two widely used PFAS, perfluorooctanoic acid (PFOA) and perfluorooctanesulfonic acid (PFOS), as hazardous substances under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), also known as Superfund, and will provide USEPA additional measures to pursue responsible parties to pay for the investigation and cleanup of PFAS impacts.

The final rule also means that federal entities (e.g., the Department of Defense) that transfer or sell their property must provide notice about the storage, release, or disposal of PFOA or PFOS on the property and guarantee that contamination has been cleaned up or, if needed, that additional cleanup will occur in the future. It will also lead the Department of Transportation to list and regulate these substances as hazardous materials under the Hazardous Materials Transportation Act which pertains to the transport of wastes containing PFOA and PFOS. In addition, the rule establishes release reporting requirements for PFOA and PFOS.

We expect that EPA will publish the Final Rule in the Federal Register shortly. The rule will be effective 60 days after the rule is published in the Federal Register.

In addition to the final rule, EPA is issuing a separate [CERCLA enforcement discretion policy](#) that makes clear that EPA will focus enforcement on parties who significantly contributed to the release of PFAS chemicals into the environment, including parties that have manufactured PFAS or used PFAS in the manufacturing process, federal facilities, and other industrial parties.

As more fully described within the Policy, EPA does not intend to pursue otherwise potentially responsible parties (PRPs) where equitable factors do not support seeking response actions or costs under CERCLA, including, but not limited to:

1. Community water systems and publicly owned treatment works (POTWs);
2. Municipal separate storm sewer systems (MS4s);
3. Publicly owned/operated municipal solid waste landfills;
4. Publicly owned airports and local fire departments; and
5. Farms where biosolids that may have contained PFAS have been applied to the land.

EPA may extend enforcement discretion under this Policy to additional parties even if they do not fall within the categories listed above, based on the equitable factors set forth in Section IV.B of the policy.

What does this mean to PRPs?

As described by the EPA in the [Questions and Answers about Designation of PFOA and PFOS as Hazardous Substances under CERCLA](#), the direct effects of the rule require:

- Releases of PFOA and PFOS that meet or exceed the reportable quantity of one pound or greater within a 24-hour period to be reported to the National Response Center, state or tribal emergency response commission, and the local or Tribal emergency planning committee for the areas affected by the release.
- Federal entities that transfer or sell their property to provide notice about the storage, release, or disposal of PFOA or PFOS on the property and a covenant (commitment in the deed) warranting that it has cleaned up any resulting contamination or will do so in the future, if necessary, as required under CERCLA 120(h).
- The U.S. Department of Transportation to list and regulate these substances as hazardous materials under the Hazardous Materials Transportation Act making transport more complex and potentially expensive.
- Owners or operators of any vessel or facility to provide reasonable notice to potential injured parties by publication in local newspapers serving the affected area of any release of these substances.

Additional considerations for this designation include:

- No response actions are required as a result of designation or when there is a release or a report of a release of a hazardous substance. Designation **does not** automatically require any investigation or cleanup actions.
- Designation **does not** automatically confer liability, nor does it alter CERCLA's statutory or regulatory framework for liability. Designation **does**, however, enable EPA to shift responsibility for cleaning up PFOA and PFOS contamination from the Superfund to those responsible for contamination.
- Designation **will not change** EPA's process for listing and/or deleting National Priorities List (NPL) sites or evaluating remedies' protectiveness through five-year reviews, and it will not require PFOA and PFOS sampling at NPL (final or deleted) sites.
- The designation of PFOA and PFOS as CERCLA hazardous substances **does not** require waste to be treated in any particular fashion, nor disposed of at any particular type of landfill. The designation also **does not** restrict, change, or recommend any specific activity or type of waste at landfills.
- Resource Conservation and Recovery Act (RCRA) and CERCLA are two different statutes that govern the federal management and cleanup of hazardous waste facilities (RCRA) and response to abandoned, uncontrolled hazardous waste sites (CERCLA). RCRA is the principal Federal law governing the disposal of solid waste and hazardous waste. **A CERCLA hazardous substance designation does not make PFOA or PFOS contaminated waste a RCRA hazardous waste or a RCRA hazardous constituent.** PFAS contaminated waste remains non-RCRA regulated and is considered non-hazardous. For waste transportation, PFOA and PFOS (including [isomers \[cdc.gov\]](#)) are expected to be designated as hazardous materials and regulated by DOT with a default Reportable Quantity of 1 pound. In other words, if a waste/material contains PFOS/PFOA, it will be regulated by DOT in its transportation requirement.

- EPA [recently proposed](#) changes to RCRA regulations by adding nine PFAS, their salts, and their structural isomers, to its list of hazardous constituents in Title 40 of the Code of Federal Regulations Part 261 Appendix VIII.

“Many environmental professionals and PRPs have been waiting for the CERCLA designation of PFAS as well as the establishment of the national enforceable drinking water standard for PFAS,” says Dr. Ryan Thomas, PhD, Parsons’ Analytical Chemistry Director – Energy and Environment. “Now with this designation combined with the previously released final analytical methods (EPA Method 1633, EPA Method 1621, and OTM-50) and updated guidance on destroying and disposing PFAS, more comprehensive investigations, management, and mitigation strategies are on the horizon. Parsons stands ready to support our clients in complying with the new regulations.”

How Can Parsons Help?

PFAS are a multifaceted issue requiring a multidisciplinary approach. Our PFAS team consists of a network of technical professionals and consultants throughout the United States and Canada who are experts in hydrogeology, human health, ecological risk assessment, water and wastewater treatment, remediation, and modeling. This combination of knowledge positions us to mitigate risks and liabilities through insight, advocacy, risk assessment, risk communication, remediation, and treatment.

Visit our website for the press release on how [Parsons supports clients addressing PFAS](#).

Dr. Ryan Thomas, Ph.D. / Analytical Chemistry Director – Energy and Environment
Remote / Direct: +1 419.574.8553
ryan.thomas@parsons.com