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Kirkland Alert

## EPA Makes the Next Move in Increasing Regulation of Certain Broadly Used Man-Made PFAS Chemicals Under CERCLA

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The U.S. Environmental Protection Agency (“EPA”) released a proposed rule on September 6, 2022, seeking for the first time to exercise its authority under Section 102(a) of the Comprehensive Environmental Response, Compensation, and Liability Act (“CERCLA”) to designate two broadly used man-made chemicals, perfluorooctanoic acid (“PFOA”) and perfluorooctanesulfonic acid (“PFOS”), under the CERCLA definition of “hazardous substances.” PFOA and PFOS are two of the most extensively produced and studied members of the chemical group commonly known as per- and polyfluoroalkyl substances (“PFAS”). PFAS have been manufactured and used in a wide variety of industries and consumer products, including carpets, clothing, furniture fabrics, food packaging and nonstick cookware. PFAS-containing firefighting foam has been used for decades. According to the EPA, designating the two PFAS chemicals as hazardous substances is intended to increase the speed and frequency of remediation of PFAS-contaminated sites under CERCLA.

The long-awaited proposed designation, signaled in our [prior Alert](#), if finalized as proposed, is expected to have significant cost implications across industrial categories given the potential for triggering new and reopened cleanups across the country. Currently, PFOA and PFOS are considered “pollutants and contaminants” under CERCLA, meaning the EPA and other agencies with delegated authority are authorized to respond to releases of PFOA and PFOS, but only to the extent that such releases pose an imminent and substantial danger to public health or welfare or the environment. Under [the proposed rule](#), these agencies would no longer need to show that a release of PFOA/PFOS poses an imminent or substantial danger to conduct or order a response action. The proposed rule would also allow the federal government to require responsible private parties to address releases of PFOA/PFOS at sites without other ongoing cleanup activities and allow both the government and private parties to

pursue recovery of cleanup costs from potentially responsible parties (“PRPs”) when certain statutory criteria are met.

This article provides an overview of the proposed rule and some of the direct and indirect consequences for industries and companies if the rule is finalized, considerations for industries and companies to mitigate their risk under CERCLA as it pertains to PFOA and PFOS going forward and factors to consider in future corporate and real estate transactions.

## What are PFOA and PFOS?

The term PFAS refers to thousands of man-made chemicals that have been used ubiquitously in certain industries and consumer products in the U.S., including stain- and water-repellant fabrics, nonstick products, paints, waxes, cleaning products, and firefighting foams used to extinguish fires at airfields, refineries, military bases, and other industrial and commercial properties. PFAS have been detected in surface and subsurface soils, surface water samples, groundwater monitoring wells and public drinking systems since their emergence in the 1940s. PFOA and PFOS are two of the most produced and studied PFAS. PFOA and PFOS production in the U.S. has been mostly phased out starting in the early 2000s, although these chemicals are sometimes created as a byproduct in the manufacture of other PFAS chemicals that are still manufactured in the U.S. Both chemicals persist in the human body and the environment, do not easily break down, and can accumulate over time. According to the EPA, exposure to these substances may lead to adverse human health effects, including thyroid disorders, pregnancy-induced hypertension and preeclampsia, and cancer. As a result, the EPA asserts that these substances therefore satisfy the CERCLA Section 102(a) standard for designation as “hazardous substances.”

## History of Regulatory Focus and Efforts

The proposed rule is not the first time the EPA has addressed PFOA and PFOS, but it represents the agency’s most significant action to date signaling clean-up standards to come. In 2006, the EPA launched the 2010/2015 PFO Stewardship Program, under which eight major chemical manufacturers and processors agreed to phase out these chemicals (a feat which was accomplished by 2015). In 2009, the EPA published a drinking water health advisory level (HAL) requiring 400 ppt or less for PFOA and 200 ppt for PFOS. In 2016, the EPA modified its published lifetime drinking water HAL for PFOA and PFOS to 70 ppt. In June 2022, the EPA revised those amounts downward to

0.004 ppt for PFOA and 0.02 ppt for PFOS. As discussed further below, the HALs are not legally binding standards, but have been used by states to establish groundwater limits.

The EPA previewed its intent to designate PFOA and PFOS as CERCLA hazardous substances. The [EPA's Per- and Polyfluoroalkyl Substances \(PFAS\) Action Plan](#) published in February 2019 indicates that the regulatory development process to add PFOA and PFOS as hazardous substances under CERCLA was initiated in 2018. More recently, the [PFAS Strategic Roadmap: EPA's Commitments to Action 2021-2024](#), released on October 18, 2021, stated that the proposed rulemaking was under development and outlined the anticipated timeline for the designation of PFOA and PFOS as CERCLA hazardous substances.

Several states, including Massachusetts, New Jersey, Michigan, New Hampshire, Illinois, Minnesota, Hawaii, Alaska, Indiana, Nevada, Pennsylvania, Maine, Vermont, Colorado, Alaska, North Carolina, Delaware, Florida, Montana, Texas and Rhode Island, have already added or are in the process of adding groundwater regulations and cleanup-level guidance for certain PFAS. For example, in Massachusetts, the designation of PFOA and PFOS means that they are subject to the notification, assessment and cleanup requirements of the Massachusetts Waste Site Cleanup Program. There has also been action internationally, as the European Union, Japan, Australia and New Zealand have taken steps to address PFOA and PFOS contamination, including introducing new regulations and testing requirements.

## Applicability and Direct Consequences of the Proposed Rule

On September 6, 2022, the EPA published in the *Federal Register* its proposed rule designating PFOA/PFOS as hazardous substances under CERCLA. If finalized, CERCLA would require any person in charge of a vessel or facility to report releases of PFOA/PFOS of one pound or more<sup>1</sup> within a 24-hour period to the National Response Center and other relevant federal, state, tribal and local authorities upon knowledge of such a release.

The EPA identified broad categories of entities that could be affected by this designation, including PFOA/PFOS manufacturers, importers, and processors; manufacturers of products containing PFOA/PFOS; downstream product manufacturers and users of PFOA and/or PFOS products; and waste management and wastewater treatment facilities.

The EPA also released a non-exhaustive list of potentially affected industries with a wide variety of operations, including aviation; car washes; polish, wax and cleaning product manufacturers; chemical manufacturers; coatings services; carpet manufacturing; chrome electroplating, anodizing and etching services; medical devices; firefighting foam manufacturing and municipal fire departments or training centers; landfills; pesticides and insecticides; petroleum and coal manufacturing; waste management; paper mills; photographic film manufacturers; certain printing facilities where inks are used in photolithography and polymer manufacturers.

In addition to the reporting requirements described above, federal agencies would be subject to obligations included in CERCLA Section 120(h) when selling or transferring federally owned property where PFOA or PFAS “was stored for one year or more, known to have been released, or disposed of.” Such obligations include notice requirements and covenanting that “all remedial action necessary to protect human health and the environment with respect to any [hazardous substances] remaining on the property has been taken before the date of such transfer, and any additional remedial action found to be necessary after the date of such transfer shall be conducted by the United States.” Finally, because CERCLA Section 306(a) requires CERCLA hazardous substances to be listed and regulated as hazardous materials by the Department of Transportation (“DOT”), any entity that transports PFOA or PFOS would be subject to various DOT regulations that govern the safe transportation of these substances, including requirements under the Hazardous Materials Transportation Act.

Most significantly, as previously noted, the proposed rule would also allow the federal government to require responsible private parties to address releases of PFOA and PFOS at sites, potentially including sites without other ongoing cleanup activities, and would allow both the government and private parties to pursue recovery of cleanup costs from PRPs for PFOA or PFOS contamination. Costs to address site contamination can be expected to include investigation, remediation and monitoring activities, and could also include providing a drinking water supply and repairing damage to natural resources caused by PFOS and PFOA.

## Expected Impact on PRPs and Regulated Industries

Given CERCLA’s strict, and presumptively joint and several, liability regime for addressing hazardous substances in the environment, and the extensive range of industrial and consumer products containing PFOA/PFOS, industry and government officials have expressed concern regarding how the rule may increase the universe of

PRPs at any given cleanup site, including current owners and operators who did not contribute to legacy contamination on their properties, and the number of cleanup sites in general.

In addition to an increased number of PRPs, the proposed rule will likely result in new sites being added to the National Priority List for cleanups and increased costs at existing cleanup sites, and could result in the reopening of sites previously deemed remediated or closed by regulatory authorities to address PFOA and PFOS contamination. With an increased number of cleanup sites and PRPs, there may be additional enforcement action by the EPA and the Department of Justice to identify PRPs and require them to clean up sites. Likewise, there may be additional litigation and litigation-related costs for PRPs that operate PFOA- and PFOS-contaminated sites, or that have been involved in the manufacture, distribution or disposal of PFOA- and PFOS-containing products. PRPs may also face litigation from other PRPs who will want to bring in other parties responsible for PFOA and PFOS contamination for contribution to site cleanup costs.

## What's Next: Costs, Timing and Anticipated Challenges

The designation of PFOA and PFOS, and potentially other PFAS chemicals, as hazardous substances under CERCLA has widespread and potentially costly implications for industries, companies and land owners that currently own or operate PFOA- and PFOS-contaminated sites, or that have been involved in the manufacture, distribution or disposal of PFOA- and PFOS-containing products. The EPA is accepting public comments on the proposed rule until November 7, 2022, and intends to publish a final rule in the summer of 2023. Industries, companies and land owners should consider commenting on the proposed rule, given the potential for additional cleanups, enforcement action and litigation. Furthermore, given the uncertainty regarding how regulatory agencies may implement remedial actions to clean up PFOA and PFOS contamination, such parties should also consider evaluating their potential future liability relating to sites known to be or potentially contaminated by historic releases of PFOA, PFOS and other PFAS chemicals.

The EPA has also signaled that it will seek to designate additional PFAS chemicals as hazardous substances. After the 60-day comment period closes on the proposed rule, the EPA plans to issue an Advance Notice of Proposed Rulemaking seeking public comment on designating other PFAS chemicals as hazardous substances under CERCLA.

Delays in finalization and implementation of the proposed rule are nearly certain due to cost considerations and expected challenges to the EPA's legal authority. Anticipating cost-based challenges from the regulated community, the EPA asserted that CERCLA Section 102(a) precludes it from considering costs associated with the proposed designation because Congress did not include cost as a statutory consideration. In a separately released economic assessment, the EPA outlined a variety of unknowns, such as the number of contaminated sites and the uncertainty of remediation standards, as the basis for the conclusion that it could not quantify any of the cleanup and other indirect costs. The EPA estimates potential direct costs associated with the proposed rule (i.e., from reporting releases) to be relatively small, projected at \$370,000 annually. Stakeholders, however, estimate that this rulemaking could result in costs that reach \$700-800 million annually for cleanup costs. Separately, the Office of Management and Budget ("OMB") has deemed the proposed rule "economically significant" (i.e., expected to impose costs of \$100 million or more annually), which requires the EPA to issue a regulatory impact analysis that includes a broader look at the rule's potential direct and indirect costs and benefits.

This point of contention, in addition to anticipated challenges based on the uncertain nature of the impacts and remedial measures to effectively address PFOA/PFOS contamination, could result in a delay to the projected finalization of the rule (currently slated for summer of 2023), and could serve as fodder for litigation and additional years of implementation delay following the final rule publication. Notably, the proposed rule designating PFOA and PFOS as hazardous substances does not answer the question of what cleanup standards will govern PFOA and PFOS remediation. The previously mentioned the EPA HALs are non-enforceable and non-regulatory, and are instead intended to provide technical information to state agencies and public health officials on health effects, analytical methods, and treatment technologies associated with drinking water contamination. However, the extremely low HALs signal the EPA's likely intent to adopt drinking water standards that are likely to also be extremely low. Unlike HALs, the drinking water standards promulgated under the Safe Drinking Water Act will be enforceable standards, are typically default groundwater remediation standards, and are expected to be proposed by the end of 2022, ahead of a statutory deadline in March 2023. States may adopt or revise their own cleanup standards on the basis of these upcoming federal remediation standards. While regulatory action and prioritization is uncertain, it is likely that upon promulgation of the national primary drinking water regulations for PFOA and PFOS, initial regulatory scrutiny and enforcement will focus on regions with impacted drinking water supplies. The EPA also has said that it intends to focus on sites with significant PFAS releases and will use enforcement discretion and other approaches to ensure fairness for minor parties who may have been inadvertently impacted by the contamination.

# Expected Impact on Corporate and Real Estate Transactions

The rapidly changing regulatory landscape with respect to PFAS chemicals has been a subject of focus by legal and technical environmental due diligence professionals for several years. As discussed above, the EPA has specifically signaled its plans to designate PFOA and PFOS as “hazardous substances” under CERCLA in the past, and other regulatory actions relating to PFAS have already been implemented at the federal, state and local levels. As such, considerations relating to increasing regulatory scrutiny of PFAS are already customarily incorporated into the environmental due diligence process.

The designation of PFOA and PFOS as CERCA hazardous substances would, however, bring new due diligence considerations to bear as well as emphasize existing trends relating to PFAS. A key consideration with respect to the EPA’s proposed designation is the potential for regulatory reopeners. In both corporate and real estate transactions, buyers can often get comfortable with environmental risk where a regulatory agency has issued regulatory closure for a property or a release (i.e., a “no further action” letter or similar determination indicating the regulator will not require additional investigation or remediation). Designation of new CERCLA hazardous substances, however, creates the potential for matters that previously received regulatory closure but where PFAS were not a focus of investigation or remediation to be reevaluated and reopened by regulators, potentially leading to additional investigation, remediation and monitoring activities and costs.

Further, if the proposed rule is finalized, companies across all industries and land owners alike relying on Phase I or Phase II environmental site assessments may also be impacted. Prospective purchasers of property conducting “all appropriate inquiries” under CERCLA will be required to assess risk of PFOA and PFOS contamination. This change would bring PFOA and PFOS into the scope of potential bona fide prospective purchaser protections under CERCLA. Many technical environmental professionals have already been incorporating PFAS risks into environmental diligence reporting as “non-scope considerations,” “business environmental risks,” or “other considerations,” including those consultants who have already adopted the proposed ASTM E1527-21 standard (which requires PFAS risks to be considered).

The extent of the impact of this proposed rule on the availability of insurance and financing for transactions involving PFAS risks is unclear, as insurance carriers and lenders have already demonstrated a wariness to take on PFAS-related risk. With

tightening federal regulations, insurance carriers may more readily exclude coverage for properties with potential PFOA/PFOS contamination and lenders may be less willing to allow borrowers to collateralize such properties. While the insurance market in particular is increasingly tight, there is still some appetite for PFAS risk in the market, particularly where there is only a contingent risk of PFAS contamination and fulsome diligence has been conducted.

Lastly, it is expected that the scope of PFAS regulations will continue to expand in the coming years. As such, buyers in both real estate and corporate transactions should be thinking about not only how they can get comfortable with PFAS risk, but how a subsequent buyer may be able to get comfortable with PFAS risk in a future, presumably stricter, regulatory environment. As a result, buyers should complete a thorough risk assessment of current and historical PFAS use at and in the vicinity of target properties, including evaluating existing PFAS sampling data, determining potential pathways for such chemicals to be released to the environment, identifying nearby potential sources (e.g., industrial sources, landfills, airports, firefighting facilities) or sensitive receptors (e.g., drinking water sources, residential properties), regulatory scrutiny at sites or regions known or suspected to be impacted by PFAS contamination and any potential migration from offsite sources. Post-closing, buyers should develop and implement a tailored PFAS risk management plan to reduce the potential of incurring PFAS liabilities and facilitate a clean exit. Such a plan may include securing environmental insurance (under the right circumstances and with fulsome diligence), phasing out the use or storage of PFAS (if possible), ensuring any use or storage of PFAS (including in firefighting systems) is conducted in a manner so as to minimize the risk of release, and keeping abreast of any federal or state regulatory scrutiny of PFAS-impacted sites or regions in the area.

This latest action by the EPA solidifies that PFAS diligence will remain a key aspect of corporate and real estate acquisitions and divestitures with a continued need to identify the avenues and costs of potential PFAS liability and develop creative risk solutions.

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1. The EPA may consider issuing a regulation adjusting the reportable quantities for these substances. [↩](#)

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## Related Services

### Practices

- Environmental

## Suggested Reading

- 16 August 2022 Kirkland Alert The Inflation Reduction Act is Signed into Law by President Biden: Key Energy and Infrastructure Provisions
- 08 August 2022 Kirkland Alert Release of Draft Carbon Credit Principles Underscores Importance of Integrity to Voluntary Carbon Market Ambitions
- 04 August 2022 Kirkland Alert Manchin-Schumer Inflation Reduction Act: Proposed Environmental and Climate Policy Initiatives

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