

# Federal Government Moves Forward with Proposed Rulemaking Pertaining to Per- and Poly-Fluoroalkyl Substances

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There has been a flurry of activity at the federal level pertaining to per- and poly-fluoroalkyl substances (PFAS). Among the actions taken by the EPA are proposed rulemaking to designate two of the most widely used PFAS as hazardous substances under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) and, most recently, a proposed national primary drinking water regulation for six PFAS.

## What are PFAS?

PFAS comprise thousands of individual compounds, two of the most common being perfluorooctane sulfonate (PFOS) and perfluorooctanoic acid (PFOA). Like all PFAS, PFOS and PFOA are persistent in the environment and, due to the fact that they repel oil and water, are resistant to typical environmental degradation processes such as chemical and microbial treatment technologies. As a result, they are widely distributed across all ecosystem trophic levels and are found in the soil, air, and groundwater at sites across the United States.

PFAS chemicals were first developed in the 1940s. They are human-made compounds that do not occur naturally in the environment but have been used in a wide variety of consumer products, such as nonstick materials, stain-resistant textiles, water-resistant textiles, cosmetics, cleaning products, paints, and food packaging (fast food wrappers, pizza boxes). They were also a primary component of firefighting foams used at many military installations and airports.

By 2002, the primary U.S. manufacturer of PFOS voluntarily phased out production of PFOS.<sup>1</sup> In 2006, eight major companies in the PFAS industry voluntarily agreed to phase out production of PFOA and PFOA-related chemicals by 2015.

## Widespread Risks Associated with PFAS

PFOA and PFOS have been found in drinking water supplies, typically associated with manufacturing locations, industrial use or disposal. Due to the fact that PFAS are bioaccumulative, studies have found PFOS and PFOA in the blood samples of the general human population and wildlife, indicating that exposure to the chemicals is widespread. Human epidemiological studies found associations between PFOA exposure and high cholesterol, increased liver enzymes, decreased vaccination response, thyroid disorders, pregnancy-induced hypertension and preeclampsia, and cancer (testicular and kidney).

Because of their general pervasiveness, PFAS have likely been in the environment for a long period of time, and they are likely present at sites that have already been deemed closed by state or federal agencies. Further, existing treatment systems that might have been established at sites to address other contaminants of concern may be less effective at treating PFAS. However, technologies, including activated carbon, anion exchange, and high-pressure membranes, can remove PFAS as well as additional contaminants, such as disinfection byproducts, organic contaminants, certain heavy metals, and pesticides, from water systems.

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<sup>1</sup> [Technical Fact Sheet – PFOS and PFOA](#), United States Environmental Protection Agency, November 2017. EPA 505-F-17-001.

## Federal/National Regulations and Trends

### [PFAS Strategic Roadmap](#)

In October 2021, the EPA released its [PFAS Strategic Roadmap](#), which set out to highlight concrete actions the Agency would take across a range of environmental media and EPA program offices as it relates to PFAS contamination. The Roadmap included target dates to achieve each milestone and was guided by three primary goals: (1) research; (2) restrictions; and (3) remediation.

In November 2022, the EPA published a [one-year progress report](#) on its work performed since issuance of the PFAS Strategic Roadmap.

### [Proposed CERCLA Hazardous Substance Designation](#)

On August 26, 2022, Michael S. Regan, the EPA Administrator, signed a [Proposed Rule](#) for the designation of two of the most widely used PFAS, PFOA and PFOS, including their salts and structural isomers, as hazardous substances under CERCLA. The public comment period for the proposal to designate PFOA and PFOS closed on November 7, 2022. The EPA is currently in the process of reviewing public comments and anticipates issuing an Advance Notice of Proposed Rulemaking to seek public comment on designating other PFAS chemicals as CERCLA hazardous substances. Issuance of a final rule is planned for August 2023.

If this designation is finalized, releases of PFOA and PFOS that meet or exceed the reportable quantity would have to be reported to the National Response Center. Additionally, the proposed rule would, in certain circumstances, facilitate making the polluter pay by allowing the EPA and other agencies to respond to releases or threats of releases of PFOA and PFOS as hazardous substances (CERCLA 104(a)(1)(A)) without first making a determination of imminent and substantial danger (CERCLA 104(a)(1)(B)).

When finalized, this rule will strengthen the EPA's ability to clean up sites contaminated with PFOA and PFOS and to hold responsible parties accountable for that cleanup.

While the current rulemaking addresses only two of the thousands of PFAS chemicals, the EPA has explicitly stated that it anticipates developing an Advance Notice of Proposed Rulemaking in the future to seek public comment on designating other PFAS chemicals as CERCLA hazardous substances as well.

### [Proposed National Primary Drinking Water Regulation](#)

In May 2016, the EPA established drinking water health advisories of 70 parts per trillion (0.07 micrograms per liter (µg/L)) for the combined concentrations of PFOS and PFOA. Above these levels, the EPA recommended that drinking water systems take steps to assess contamination, inform consumers and limit exposure.

In February 2019,<sup>2</sup> the EPA issued a [PFAS Action Plan](#) which described the EPA's approach to identifying and understanding PFAS, approaches to addressing current PFAS contamination, preventing future PFAS contamination, and effectively communicating with the public about PFAS. The Action Plan described broad actions that the EPA had underway to address challenges with PFAS in the environment including:

Most recently, on March 14, 2023, EPA announced the [proposed National Primary Drinking Water Regulation \(NPDWR\) for six PFAS](#) including PFOA, PFOS, perfluorononanoic acid (PFNA), hexafluoropropylene oxide dimer acid (HFPO-DA, commonly known as GenX Chemicals), perfluorohexane sulfonic acid (PFHxS), and perfluorobutane sulfonic acid (PFBS).

Specifically, the EPA is proposing the establishment of legally enforceable maximum levels allowed in drinking water, called Maximum Contaminant Levels (MCLs), for PFOA and PFOS as individual contaminants, and PFHxS, PFNA, PFBS, and HFPO-DA as a PFAS mixture. The EPA is also proposing health-based, non-enforceable Maximum Contaminant Level Goals (MCLGs) for these six PFAS.

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<sup>2</sup> An [EPA PFAS Action Plan: Program Update](#) was issued by the USEPA in February 2020.

COMPOUND	PROPOSED MCLG	PROPOSED MCL
PFOA	Zero	4.0 parts per trillion <sup>3</sup> (ppt, also expressed as ng/L)
PFOS	Zero	4.0 ppt
PFNA	1.0 (unitless) Hazard Index <sup>4</sup>	1.0 (unitless) Hazard Index
PFHxS		
PFBS		
HFPO-DA		

The proposed rule would also require public water systems to:

- Monitor for these PFAS, building upon the EPA's long established monitoring frameworks where monitoring frequency depends on previous results;
- Notify the public of the levels of these PFAS, if monitoring detects these PFAS at levels that exceed the proposed regulatory standards; and
- Reduce the levels of these PFAS in drinking water if they exceed the proposed standards. This could include removing these chemicals through various types of treatment or switching to an alternative water supply that meets the standard.

Monitoring and reducing PFAS in drinking water will require significant investments in water infrastructure. The Bipartisan Infrastructure Law provides \$9 billion to invest in drinking water systems impacted by PFAS and other emerging contaminants including \$4 billion in investment through the Drinking Water State Revolving Funds (DWSRF), including a requirement that states dedicate 25% of these resources to disadvantaged communities or public water systems serving fewer than 25,000 people as well as an additional \$5 billion to communities as grants through the EPA's new Emerging Contaminants in Small or Disadvantaged Communities (EC-SDC) Grant Program, which promotes access to safe and clean water in small, rural, and disadvantaged communities while supporting local economies. States and communities can further leverage an additional nearly \$12 billion in the DWSRF dedicated to making drinking water safer, and billions more that the federal government has annually provided to fund DWSRF loans.

The EPA is requesting public comment on the proposed regulation. The public comment period will open following the proposed rule publishing in the Federal Register. Public comments can be provided at that time at [www.regulations.gov](http://www.regulations.gov) under Docket ID: EPA-HQ-OW-2022-0114.

The EPA held an informational webinar about the proposed PFAS NPDWR on March 16, 2023, and will be holding an additional informational webinar on March 29, 2023. The webinar recordings and presentation materials will be made available to the public. The EPA will also be holding a public hearing on May 4, 2023, where members of the public can register to attend and provide verbal comments to the EPA on the rule proposal. Registration is required to attend, and the last day to register to speak at the hearing is April 28, 2023.

The EPA will issue a final PFAS NPDWR after reviewing public comments provided on the proposed NPDWR and anticipates finalizing the regulation by the end of 2023.

It is clear that the EPA is moving forward with its PFAS initiative. Stay tuned for future updates as the rules are finalized and as additional rulemaking comes forward.

Should you have any questions, please contact **Dana B. Mehlman** at [dmehlman@vedderprice.com](mailto:dmehlman@vedderprice.com), **Brett D. Heinrich** at [bheinrich@vedderprice.com](mailto:bheinrich@vedderprice.com), **Joseph A. Strubbe** at [jstrubbe@vedderprice.com](mailto:jstrubbe@vedderprice.com) or your Vedder Price attorney with any questions you may have or assistance you may need.

<sup>3</sup> Using EPA methods 533 and 537.1, both government and private laboratories can now effectively measure 29 PFAS, including the six PFAS the EPA is proposing to regulate, at very low levels in drinking water – including at the levels proposed as MCLs.

<sup>4</sup> To prevent health risks from mixtures of certain PFAS in drinking water, the EPA is proposing to use this Hazard Index calculation to regulate PFHxS, GenX Chemicals, PFNA, and PFBS in public water systems. To determine the Hazard Index for these four PFAS, water systems would monitor and compare the amount of each PFAS in drinking water to its associated Health Based Water Concentration (HBWC), which is the level below which no health effects are expected for that PFAS. Water systems would add the comparison values for each PFAS contained within the mixture. If the value is greater than 1.0, it would be an exceedance of the proposed Hazard Index MCL for PFHxS, GenX Chemicals, PFNA, and PFBS.