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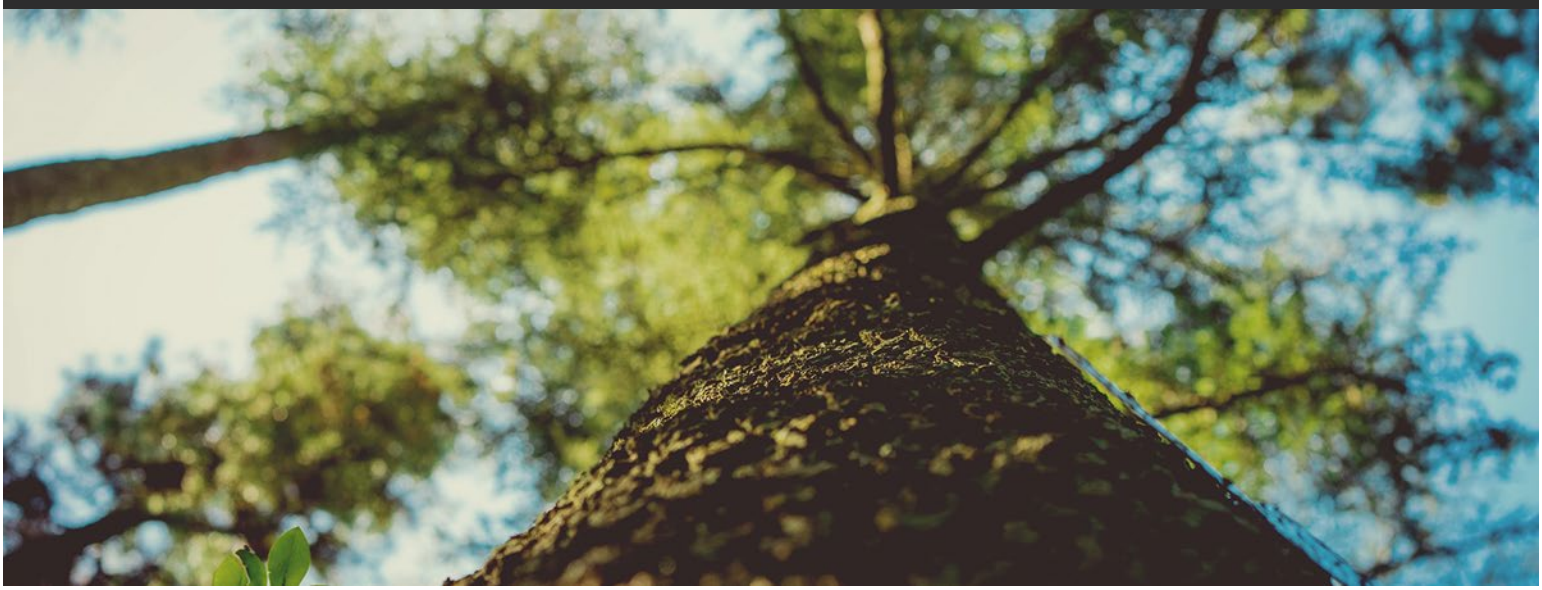
What Difference Will Listing 'Forever Chemicals' as Hazardous Substances Make?



The Environmental Protection Agency has proposed to list two "forever chemicals"—perfluorooctanoic acid (PFOA) and perfluorooctanesulfonic acid (PFOS)—as "hazardous substances" under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA or Superfund).

By David G. Mandelbaum and Kaitlyn R. Maxwell | September 30, 2022 | The Legal Intelligencer

The Environmental Protection Agency has proposed to list two "forever chemicals"—perfluorooctanoic acid (PFOA) and perfluorooctanesulfonic acid (PFOS)—as "hazardous substances" under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA or Superfund). See 87 Fed. Reg. 54,415 (Sept. 6, 2022). For some this is a hair-on-fire moment, so let's pause and evaluate what difference that listing would actually make if it became final.

To start, be clear that listing as a "hazardous substance" does not make a material containing PFOA or PFOS necessarily a "hazardous waste" subject to special regulation under the federal Resource Conservation and Recovery Act (RCRA) or the Pennsylvania Solid Waste Management Act. That is particularly true at the extraordinarily low concentrations for PFOA or PFOS on which some are focused. Industrial wastes or contaminated soils in Pennsylvania are typically regulated as "residual waste." Household waste, even waste containing detectable PFOA or PFOS, is still just municipal solid waste.

Listing as a "hazardous substance" does not imply any sort of cleanup action level (the concentration that calls for response) or cleanup standard (the concentration that constitutes "clean"). Either would require further rulemaking at the federal level, particularly selection of a drinking water standard (known as a "maximum contaminant level") under the Safe Drinking Water Act.

CERCLA, of course, is the federal cleanup statute. The program cleans up "releases" of "hazardous substances." The EPA may target a release of a "pollutant or contaminant," but it cannot make a person liable for that cleanup or the EPA's costs unless that person bears a certain relationship to a "facility" from which there is "a release, or a threatened release that causes the incurrence of response costs, of a hazardous substance …" Moreover, the EPA can incorporate measures to address or to accommodate the presence of pollutants or contaminants in its response action, even though the response is a response to a release of a hazardous substance. For example, if the EPA were cleaning up a release at a road salt storage facility, the salt is not a hazardous substance, but it can cause significant environmental harm if not contained.

So too with PFOA and PFOS even if they are not listed as hazardous substances. The EPA may design a remedy to clean up PFOA and PFOS that is co-located with other hazardous substances. The EPA can even make responsible parties pay for that cleanup, but only if it is not inconsistent with the Superfund regulation called the National Oil and Hazardous Substance Contingency Plan, a regulation that, of course, addresses only cleanup of oil and hazardous substances.

The current owner and operator of a facility is ordinarily responsible for cleanup under CERCLA whether or not that owner or operator had anything to do with a hazardous substance. Otherwise, a person must have either owned or operated the facility at the time a hazardous substance was disposed there, arranged for treatment or disposal of a material containing a hazardous substance there, or transported a material containing a hazardous substance there for treatment or disposal and participated in the selection of the facility. That is, a responsible person other than the current owner or operator has to have a connection to the facility and to a hazardous substance—although not necessarily the same hazardous substance being cleaned up. A connection to PFOA or PFOS is not presently sufficient to make one liable, but a connection to another hazardous substance is sufficient to make one liable for a cleanup that involves PFOA or PFOS.

If the proposal is finalized, liability for cleanup of sites that have experienced PFOA or PFOS releases becomes a little more straightforward. Parties that owned or operated, arranged, or transported PFOA or PFOS will ordinarily be responsible for a facility that experiences a release of PFOA or PFOS.

But, unless they have a defense, they will also be liable for facilities that experience releases of other hazardous substances. This can be significant because PFOA and PFOS were in common use and are detectable in sampling data from sites or locations with no obvious, large source. That means that businesses which disposed of waste or spilled materials containing trace PFOA or PFOS concentrations from unknown sources could find themselves responsible for cleanups of other things because of the presence of PFOA or PFOS on, for example, coated paper in an otherwise innocuous waste stream. That liability would, of course, be to the government for the cleanup; the fair share of such a party among all responsible parties is a wholly different issue. Listing of PFOA and PFOS under CERCLA also arguably affects responsibility for other, non-CERCLA cleanups in the Commonwealth. Most cleanups in Pennsylvania occur under the Land Recycling and Environmental Remediation Standards Act (Act 2). Act 2 provides standards for the cleanup of "regulated substances," defined to be substances regulated under certain other Pennsylvania environmental laws. Under Act 2, a "voluntary" responder incurs costs and obtains protection from further environmental liability.

Act 2 contains no contribution or private cost recovery provision to shift cost from the party conducting the cleanup to other responsible people. However, if the cleanup addresses a site that has experienced a release of a hazardous substance, CERCLA may provide a vehicle to shift costs; not all Act 2 cleanups, of course, are consistent with the national contingency plan. Similarly, to the extent that CERCLA does not preempt it, the Pennsylvania Hazardous Sites Cleanup Act provides opportunities for contribution or private cost recovery claims.

Currently, neither PFOA nor PFOS are HSCA hazardous substances. All CERCLA hazardous substances immediately become HSCA hazardous substances, so the clarification that the federal rule would make to CERCLA liability would also flow to HSCA liability.

But PFOA, PFOS, and another PFAS chemical called perfluorobutane sulfonate or "PFBS" have a somewhat confusing status under Act 2 and HSCA that the federal rulemaking might clarify, at least for the first two. The Environmental Quality Board has, in fact, established cleanup standards for PFOA, PFOS and PFBS, even though they are not HSCA hazardous substances, see, e.g., Giovanni v. U.S. Department of the Navy, 433 F. Supp.3d 736 (E.D. Pa. 2020), or regulated under any of the other state laws listed in Act 2's definition of "regulated substance." See 51 Pa. Bull. 7173 (Nov. 20, 2021), amending 25 Pa. Code chap. 250.

The DEP and the EQB apparently decided that these three chemicals were "pollutants or contaminants" under CERCLA and HSCA. That much was necessary if the DEP was to implement the directives of Executive Order 2018-08, 48 Pa. Bull. 6382 (Oct. 6, 2018). That order established the PFAS action team, but also called for management and cleanup of all PFAS contaminated sites.

While a pollutant or contaminant cannot give rise to liability, it can be the subject of a cleanup using public money under either the federal CERCLA or state HSCA program. There are not a lot of public PFOA, PFOS or PFBS cleanups in Pennsylvania using HSCA authority because there is very little money available for the purpose. Even so, private parties may want to clean up, that clean up may have to address PFOA, PFOS or PFBS, and so the DEP and the EQB had to decide what constituted "clean" for PFOA-, PFOS-, and PFBS-contaminated sites under Act 2.

Listing two of the three substances will not change the Act 2 cleanup standards. Moreover, Act 2 standards are intended to serve as "applicable or relevant and appropriate regulatory standards" under CERCLA. That is, the present Pennsylvania regulation is intended to set the standard for federal cleanups.

To the extent that adoption of cleanup standards under Act 2 implies that the DEP has authority to pursue cleanups of PFOA, PFOS and PFBS, listing would not really change that authority. The lack of funding also would not change. What would change would be the ability of the DEP to sue responsible parties to recover costs. But the set of responsible parties only expands to the extent that a person is not liable at all but for that person's relationship to PFOA or PFOS.

So this federal listing may affect administrative decisions, like inclusion of a site on the National Priorities List, and it may clarify some litigation and allocation issues, but it is not the big deal that it is sometimes made to be.

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