
PFAS Update: Perfluoroalkyls or Polyfluoroalkyls of Concern (“PFAC”) and the Issue of Designating them as “Hazardous Substances” Under CERCLA

Legal Alert

November 22, 2019

Earlier this week, Flaster Greenberg's Airport and Environmental PFAS Team presented a webinar on the origin, chemical make-up, and concerns throughout the country of the potentially harmful human health and environmental impacts of PFAS chemicals, the numbers of which have been estimated to exceed at least 4,000 and possibly many more. One of the goals of the webinar was to identify and focus upon the compounds of highest concern to human health and the environment.

Those particular compounds are as follows:

Perfluorobutyric acid (**PFBA**), Perfluorohexanoic acid (**PFHxA**), Perfluoroheptanoic acid (**PFHpA**), Perfluorooctanoic acid (**PFOA**), Perfluorononanoic acid (**PFNA**), Perfluorodecanoic acid (**PFDeA**), Perfluoroundecanoic acid (**PFUA**), Perfluorobutane sulfonic acid (**PFBS**), Perfluorohexane sulfonic acid (**PFHxS**), Perfluorooctane sulfonic acid (**PFOS**), Perfluorododecanoic acid (**PFDoA**), Perfluorooctane sulfonamide (**PFOSA**), 2-(N-Methyl-perfluorooctane sulfonamide) acetic acid (**Me-PFOSA-AcOH**), 2-(N-Ethyl-perfluorooctane sulfonamide) acetic acid (**Et-PFOSA-AcOH**).

We call these 16 specific compounds the “Perfluoroalkyls of Polyfluoroalkyls of Concern” (“**PFAC**”) to distinguish them from the over 4,000 compounds commonly known as per- and polyfluoroalkyl substances, or PFAS for short.

Fourteen (14) of these 16 compounds come from a survey of the National Health and Nutrition Examination Survey (“NHANES”) 2003-2004, (Calafat et al, 2007). The other 2 (PFBA and PFHxA) come from other monitoring studies. All of these studies measured blood serum collected from a representative U.S. population (12+ years old).

Of these 16 compounds, the five PFAC listed as most likely to adversely affect human health and the environment are as follows: **PFOA**, **PFOS**, **PFNA**, **PFHxS**, and **PFBA**.

PFAS has become a major Department of Defense cost issue for military facility site investigations and remediation. Against this background, on June 27, 2019, the United States Senate passed legislation to regulate PFAS. The regulation came in the form of a rider to the 2020 National Defense Authorization Act (NDAA) (S1790). A House version passed on July 12, 2019.

There are significant differences between the version passed by the Senate and the version passed by the House. The differences primarily concern whether or not, and to what extent, if any, the full range of PFAS compounds (or some lesser numbers, if any) will be designated as “hazardous substances” under CERCLA.

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The Senate version makes no mention of any PFAS being designated as “hazardous substances” under CERCLA. The Senate’s position is that any such determination should be made by the United States Environmental Protection Agency (USEPA). The USEPA already had represented that this determination would be issued under proposed rule-making by the end of 2019. The House version includes the designation of all 4,000+ PFAS as “hazardous substances”. Primarily for this reason, different versions of the legislation have been languishing in Joint Committee negotiations.

Perhaps fittingly, during the webinar, the USEPA issued advanced notice of proposed rule-making designating two of the PFAC as “hazardous substances” under CERCLA. Those two are **PFOA** and **PFOS**. No indications have been made on whether, and if so when, USEPA might propose to add any of the other PFAC – or other PFAS chemicals generally – as hazardous substances.

This is not surprising for the following reasons: (1) the USEPA Drinking Water Health Advisories, its May 2016, “EPA Response to External Peer Review Comments on EPA Draft Documents: PFOA and PFOS”, and its Clarification Letter of November 15, 2016, addressed only **PFOA** and **PFOS**; (2) the USEPA’s “Draft Interim Recommendations to Address Groundwater Contaminated with PFOA and PFOS” submitted for public comment, also only listed **PFOA** and **PFOS**; and (3) at last count, 22 states also had adopted final, or interim rule-making or had issued proposed rule-making or recommendations focused only upon **PFOA** and **PFOS** (although eight states have also included, in some manner, either by regulations, proposals, notice of intention, or recommendations, legislative or regulatory action with respect to **PFNA**; 1 **PFBA**; 8 **PBFA** compounds; and 7 **PFHxS** compounds as well).

It also should not go unnoticed that today, November 22, 2019, the movie “Dark Waters” is being released throughout the United States. This movie concerns the poisoning of cattle and crops, and thousands of personal injury claims as well, that happened in West Virginia. Claims were asserted against DuPont as the result of the claimed impact of toxic wastes, primarily PFAS, from a landfill. DuPont, without admitting any liability, paid a reported \$670 million to settle all the claims. It will remain a question as to whether the timing of the USEPA’s announcement was coincidental with the release of the movie, but in any event it is likely that even more than before the country will be talking all about PFAS.

If you have any questions about this legal alert, please feel free to contact a member of Flaster Greenberg’s Airport and Environmental PFAC Team: Frank Riesenburger, Daniel Markind, Marty Judge or Lauren Schwimmer.

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