

REGULATORY FLEXIBILITY ANALYSIS
FOR SMALL BUSINESSES AND LOCAL GOVERNMENTS

Emergency Rule and Proposed Rule Amendments to:

6 NYCRR Part 597
Hazardous Substances Identification, Release Prohibition, and Release Reporting

1. EFFECT OF RULE

The purpose of the emergency rule and proposed rule is to:

1. Add perfluorooctanoic acid (PFOA-acid, Chemical Abstracts Service (CAS) No. 335-67-1), ammonium perfluorooctanoate (PFOA-salt, CAS No. 3825-26-1), perfluorooctane sulfonic acid (PFOS-acid, CAS No. 1763-23-1), and perfluorooctane sulfonate (PFOS-salt, CAS No. 2795-39-3) to 6 NYCRR Section 597.3;
2. Allow fire-fighting foam containing PFOA-acid, PFOA-salt, PFOS-acid, or PFOS-salt to be used to fight fires (but not for training or any other purposes) on or before April 25, 2017, a use which would not otherwise be allowed under the regulation since the release of a hazardous substance is prohibited; and
3. Correct the list of hazardous substances by providing units for reportable quantities (RQs).

This emergency rule and the proposed rule applies statewide in all 62 counties of New York State (State). As further discussed below under “Compliance Requirements,” the listing has two primary effects. First, as of April 25, 2016, certain facilities storing PFOA-acid, PFOA-salt, PFOS-acid, and PFOS-salt are required to register their facilities (6 NYCRR Part 596) with the New York State Department of Environmental Conservation (Department) under the Department’s Chemical Bulk Storage (CBS) program. If a facility is already storing PFOA-acid, PFOA-salt, PFOS-acid, or PFOS-salt subject to the registration requirements, the registration requirements became effective on April 25, 2016, the effective date of this emergency rule.

Facilities with existing storage of PFOA-acid, PFOA-salt, PFOS-acid, and PFOS-salt have until April 25, 2018

before they must comply with the applicable handling and storage requirements for hazardous substances (6 NYCRR Parts 598-599).

Production of PFOA-acid, PFOA-salt, PFOS-acid, and PFOS-salt has been restricted or reportedly been phased out and alternative substances have been developed as replacements. With the discontinued production and elimination of PFOA-acid, PFOA-salt, PFOS-acid, and PFOS-salt from products, the primary materials that would be subject to the CBS registration requirement would be facilities storing PFOA-related and PFOS-related substances manufactured prior to the manufacturing phase-out. A product likely still in circulation that could be subject to the CBS registration requirement is older stocks of fire-fighting foam that contain PFOA-acid, PFOA-salt, PFOS-acid, and PFOS-salt. As stated in the Regulatory Impact Statement, this emergency rule and proposed rule add a provision allowing entities with fire-fighting foam the time necessary to determine if stored foam contains PFOA-acid, PFOA-salt, PFOS-acid, and PFOS-salt. If the stored foam contains one of these substances, the facility would be required to arrange for the proper disposal of the foam by April 25, 2017. Small businesses are not likely to store these foams in quantities that would be subject to the CBS registration requirement, as explained below. Large local government agencies (fire departments, fire districts) may still maintain stocks of fire-fighting foam that could be subject to the registration requirement.

The most common types of facilities subject to the CBS regulations are municipal facilities, manufacturing facilities, and utilities. In total, there are over 1,400 registered facilities in the Department's CBS database that store a wide variety of hazardous substances. The Department believes that the great majority of the owners and operators of these facilities would likely be categorized as small businesses. Local governments have registered over 580 CBS facilities. The Department believes that the types of facilities registered by local governments are water and wastewater treatment facilities that would not be expected to store PFOA-acid, PFOA-salt, PFOS-acid, or PFOS-salt.

Under the federal Toxic Substances Control Act, the United States Environmental Protection Agency (USEPA) has worked with industry to voluntarily phase out the use of PFOA-related substances by December

2015, and proposed a significant new use rule (SNUR) to limit the production and importation of PFOA-related substances in anticipation of the phase-out deadline (80 FR 2885; January 21, 2015). USEPA completed the SNUR to limit the production and importation of PFOS-related substances in 2002.

Since production of PFOA-acid, PFOA-salt, PFOS-acid, and PFOS-salt has already been reportedly phased out or restricted, and alternative substances have been developed to take the place of these hazardous substances, the number of facilities that would be required to register as a CBS facility is expected to be small and go to zero as stocks of PFOA-acid, PFOA-salt, PFOS-acid, and PFOS-salt are eliminated.

The Department is unable to make an estimate of how many small businesses are subject to regulation under the existing CBS rules (6 NYCRR Parts 596 through 599) or will be required to comply with the emergency rule and proposed rule because the Department does not collect data with respect to the number of the persons employed by the owner or operator of any subject CBS facility or on the industrial classification of a registered facility. Therefore, the Department is unable to identify the size of businesses that are or may be affected by the rule.

The second main effect of the promulgation of this emergency rule and proposed rule is the permanent prohibition of the release of PFOA-acid, PFOA-salt, PFOS-acid, and PFOS-salt to the environment after the 12-month phase out period for firefighting foams. Part 597 prohibits the unauthorized release of any hazardous substance to the environment (subdivision 597.4(a)). Effective immediately, the emergency rule prohibits the release of PFOA-acid, PFOA-salt, PFOS-acid, and PFOS-salt including any older stocks of fire-fighting foams and any other material containing PFOA-acid, PFOA-salt, PFOS-acid, and PFOS-salt in the possession of small businesses or local governments. This will likely have the effect of requiring local government and small businesses to dispose of any PFOA-acid, PFOA-salt, PFOS-acid, and PFOS-salt- containing materials rather than use them in a way that could result in a release to the environment. Releases may occur from the use of a fire-fighting foam containing PFOA-acid, PFOA-salt, PFOS-acid, or PFOS-salt to extinguish or prevent a fire or explosion. Releases of a listed hazardous substance above the RQ given in Part 597 for the substance (one

pound for PFOA-acid, PFOA-salt, PFOS-acid, and PFOS-salt) must be reported to the Department's spill hotline (subdivision 597.4(b)).

The number of sites that would become remedial sites because of the addition of these four substances to Section 597.3 is unknown. The Department has placed one site on the Registry of Inactive Hazardous Waste Disposal Sites (Registry) as a result of adding PFOA-acid to Section 597.3 (Site Registry ID No. 442046). The Department expects that other sites that used PFOA-acid, PFOA-salt, PFOS-acid, or PFOS-salt in commercial or industrial processes may have PFOA-acid, PFOA-salt, PFOS-acid, or PFOS-salt environmental contamination. Locations where PFOA-acid, PFOA-salt, PFOS-acid, or PFOS-salt disposal occurred or where PFOA-acid, PFOA-salt, PFOS-acid, or PFOS-salt were components of materials released to the environment may become remedial sites subject to the requirements of Part 375.

The Department anticipates that remediation issues would be most significant for areas where PFOA-acid, PFOA-salt, PFOS-acid, or PFOS-salt were manufactured, used to make other products, released, or disposed of. Based upon currently available information, PFOA-acid, PFOA-salt, PFOS-acid, and PFOS-salt have not been manufactured in New York State, but have been used here to create other products. It is not known how many small businesses or local governments own properties that will be subject to regulatory requirements of Part 375 due to contamination from PFOA-acid, PFOA-salt, PFOS-acid, or PFOS-salt.

2. COMPLIANCE REQUIREMENTS

This emergency rule and proposed rule do not make any substantive changes to the requirements for CBS facilities other than to place PFOA-acid, PFOA-salt, PFOS-acid, and PFOS-salt on the list of hazardous substances in Section 597.3.

Facilities that store PFOA-acid, PFOA-salt, PFOS-acid, or PFOS-salt in amounts and in certain tanks that make them subject to the registration requirements of 6 NYCRR Part 596 must include their tank systems on facility registration forms with the Department and pay the registration fee associated with the CBS program.

Hazardous substances regulated under Parts 596-599 are most commonly stored in stationary aboveground tank systems with a capacity greater than 185 gallons. Registration fees apply to each regulated tank and depend upon the capacity of each tank. The fees range from \$50 per tank for tanks with capacities less than 550 gallons capacity to \$125 per tank for capacities greater than 1,100 gallons.

If a facility is already storing PFOA-acid, PFOA-salt, PFOS-acid, or PFOS-salt and is subject to the registration requirements, the registration requirements became effective on April 25, 2016, the effective date of this emergency rule. A facility planning to start storing PFOA-acid, PFOA-salt, PFOS-acid, or PFOS-salt subject to the registration requirements must obtain a valid registration certificate prior to storing the material. Facilities with existing storage of these substances are not required to comply with the handling and storage requirements for hazardous substances until April 25, 2018 (6 NYCRR subdivision 598.1(h)). The Department anticipates that facilities that currently store PFOA-acid, PFOA-salt, PFOS-acid, or PFOS-salt will phase out their storage of the substance prior to April 25, 2018 and therefore would not have substantive CBS compliance requirements beyond the registration requirement.

Part 597 prohibits the unauthorized release of hazardous substances to the environment (subdivision 597.4(a)). This emergency rule and proposed rule prohibition will apply to PFOA-acid, PFOA-salt, PFOS-acid, and PFOS-salt. Releases of a listed hazardous substance above the RQ for the substance set forth in Part 597 must be reported to the Department's spill hotline (subdivision 597.4(b)). Since PFOA-acid, PFOA-salt, PFOS-acid, and PFOS-salt are being listed as hazardous substances, releases of PFOA-acid, PFOA-salt, PFOS-acid, or PFOS-salt to the environment are prohibited (subdivision 597.4(a)). Certain firefighting foams would be subject to phase out by April 25, 2017. Any release of a listed hazardous substance above the RQ set forth in Section 597.3 must be reported to the Department's spill hotline (subdivision 597.4(b)). All other releases are prohibited. Releases of more than one pound (the RQ established for PFOA-acid, PFOA-salt, PFOS-acid, and PFOS-salt) to the environment must be reported.

Listing PFOA-acid, PFOA-salt, PFOS-acid, and PFOS-salt as hazardous substances will result in PFOA-acid, PFOA-salt, PFOS-acid, and PFOS-salt contaminated sites otherwise meeting regulatory criteria becoming subject to the inactive hazardous waste disposal sites regulatory requirements of Part 375 for the first time. In these cases, investigation and cleanup requirements are established by Part 375 and by Department orders and agreements with regulated entities. Part 375 sets forth requirements for the investigation of site conditions to determine the nature and extent of environmental contamination, evaluate remedial alternatives, design and construct a remedy, complete the operation and maintenance activities required to achieve the remedial action objectives for a site, and maintain any institutional or engineering controls needed to maintain the effectiveness of a remedy. Remedial programs for a site tend to be complex, multi-phased, and take from a few to many years to complete.

3. PROFESSIONAL SERVICES

No new or additional professional services would likely be needed for small businesses or local governments to comply with this emergency rule or the proposed rule regarding the CBS requirements if they discontinue storing PFOA-acid, PFOA-salt, PFOS-acid, and PFOS-salt before April 25, 2018 (two years after a facility becomes subject to the registration requirement for the storage of existing stocks). If facilities continue to store PFOA-acid, PFOA-salt, PFOS-acid, or PFOS-salt after April 25, 2018, when the storage and handling standards go into effect, small businesses and local governments may need professional services to assist them in meeting the handling and storage requirements for hazardous substances.

If a small business or local government becomes a remedial party subject to requirements to implement a remedial program under Part 375, it would likely require consulting and contractual services to assist in carrying out the remedial program. This could include professional engineers or qualified environmental professionals as defined in Part 375 and contractual services needed to undertake site investigation field work, analyses of environmental samples, or other specialized services.

4. COMPLIANCE COSTS

Because the production of PFOA-acid, PFOA-salt, PFOS-acid, and PFOS-salt has been phased out and the substantive CBS tank system requirements for handling and storing PFOA-acid, PFOA-salt, PFOS-acid, and PFOS-salt will not apply until April 25, 2018, the Department expects that the compliance costs for meeting the CBS requirements will be minimal. If a facility discontinues storage by April 25, 2018, when the storage and handling standards go into effect, there will be no other substantive costs.

The prohibition of releases of hazardous substances is not expected to present significant compliance costs for small businesses and local governments.

The costs of complying with the requirements of Part 375 to implement a remedial program where PFOA-acid, PFOA-salt, PFOS-acid, or PFOS-salt is the primary contaminant would vary widely as costs depend upon many factors. These include the quantity released to the environment, media contaminated (e.g., soil, groundwater, surface water, sediment, bedrock), the horizontal and vertical extent of contamination for each medium, the accessibility of contamination, whether there are human or environmental receptors to protect while a remedial program is undertaken, the difficulty of removing PFOA-acid, PFOA-salt, PFOS-acid, or PFOS-salt from contaminated environmental media, the anticipated future use of the area of contamination, and other factors. Because of the wide variety of scenarios, it is not possible to meaningfully estimate potential costs to small businesses and local governments resulting from listing PFOA-acid, PFOA-salt, PFOS-acid, and PFOS-salt as hazardous substances other than to note that remedial program costs for other hazardous substances have ranged from the thousands to millions of dollars on a case-by-case basis.

5. ECONOMIC AND TECHNOLOGICAL FEASIBILITY

The economic and technological feasibility for small businesses or local government to comply with this emergency rule and proposed rule depend upon which compliance requirements apply. If a small business or local government is required to comply with only the CBS registration requirements, no significant

impediments to compliance would be faced. If a facility decides to store PFOA-acid, PFOA-salt, PFOS-acid, or PFOS-salt subject to the CBS handling and storage requirements after April 25, 2018, when the storage and handling standards go into effect, costs would be incurred to comply with handling and storage requirements. Costs could include design, construction, and ongoing maintenance of tank systems capable of meeting the technical requirements for release prevention, release detection, and containment of any spills that may occur. These costs present no technological feasibility issues, but costs would be incurred commensurate with the amounts of the regulated material stored.

The economic and technical feasibility of complying with the requirements to remediate a PFOA-acid, PFOA-salt, PFOS-acid, or PFOS-salt-contaminated site for a small business or local government will depend upon the circumstances. For cases where contamination is limited (e.g., shallow soil contamination with no other media contaminated), there may be no significant economic or technical issues to resolve. If contamination is extensive, there will be both economic and technical obstacles for a small business or local government. Costs could extend into the millions of dollars for a complicated site. Since PFOA-acid, PFOA-salt, PFOS-acid, and PFOS-salt are persistent and mobile compounds, removal of PFOA-acid, PFOA-salt, PFOS-acid, or PFOS-salt contamination from some media (e.g., deep groundwater, bedrock, sediment) may be technically challenging. The US DoD's Strategic Environmental Research and Development Program has spent more than a decade evaluating remedial technologies that may be effective for PFOA-acid, PFOA-salt, PFOS-acid, and PFOS-salt remediation. These efforts are ongoing in partnership with the USEPA and United States Department of Energy and may provide significant guidance to small businesses and local governments faced with undertaking significant PFOA-acid, PFOA-salt, PFOS-acid, and PFOS-salt remediation projects, if any become needed.

6. MINIMIZING ADVERSE IMPACT

The Department is adopting this emergency rule and proceeding with this proposed rule based upon the conclusion of the New York State Department of Health (NYSDOH) that the combined weight of evidence from human and experimental animal studies indicates that prolonged exposure to significantly elevated levels of these compounds can affect health and, consequently, pose a threat to public health in New York State when improperly treated, stored, transported, disposed of or otherwise managed. NYSDOH scientists have concluded that it is essential to list these chemicals as hazardous substances. See the Regulatory Impact Statement for additional information, including NYSDOH's letter requesting that these chemicals be added to the List of Hazardous Substances (Section 597.3).

This action does not lend itself to the mitigating measures listed in State Administrative Procedure Act section 202-b(1), but there are existing requirements established in the regulations that help to minimize adverse impacts. For example, the CBS regulations allow a two-year period after a new chemical is added to the list of hazardous substances before the handling and storage requirements of Part 598 apply to existing tanks storing one of these substances (subdivision 598.1(h)). The Department has determined through other rule making actions that the remaining regulatory compliance provisions, including the storage, handling, release prohibition, and disposal provisions, appropriately apply to small businesses and local governments.

7. SMALL BUSINESS AND LOCAL GOVERNMENT PARTICIPATION

The Department provides statewide outreach to persons who are subject to this emergency rule and the proposed rule, including small businesses and local governments. The Department will ensure public notice and input by issuing public notices in the State Register, newspapers, and the Department's Environmental Notice Bulletin; holding a comment period of at least 45 days; and holding public hearings. Interested parties, including small businesses and local governments, would have the opportunity to submit written comments and

participate in the public hearings. The Department will also post relevant rule making documents on the Department's website.

8. CURE PERIOD OR OTHER OPPORTUNITY FOR AMELIORATIVE ACTION

There can be no ameliorative actions or cure period regarding the prohibition against releasing PFOA-acid, PFOA-salt, PFOS-acid and PFOS-salt to the environment because the prohibition is absolute and intended to prevent the harm that would come to public health due to the fact that prolonged exposure to significantly elevated levels of these compounds can affect health and, consequently, pose a threat to public health in New York State when improperly treated, stored, transported, disposed of or otherwise managed. If there has been a release to the environment that requires remediation under a Department remedial program, the timing and content of the remediation is developed on a case-by-case basis. This allows the Department to consider and apply appropriate ameliorative actions. The concept of a cure period does not apply in the case of a remedial program.

If a facility subject to the PFOA-acid, PFOA-salt, PFOS-acid and PFOS-salt CBS facility registration requirement fails to register in accordance with Part 596, the facility owner/operator would be subject to penalties that have been in place and imposed by the Department for all types of parties, including small businesses and local governments, for decades. The listing of PFOA-acid, PFOA-salt, PFOS-acid and PFOS-salt as hazardous substances makes applicable the existing compliance requirements discussed above, all of which all have well-established and exercised enforcement procedures including impositions of monetary penalties when appropriate. Therefore, no additional ameliorative actions or cure period are established for this emergency rule and the proposed rule regarding CBS registration and handling and storage requirements.

9. INITIAL REVIEW OF THE RULE

DEC will conduct an initial review of the rule within three years of the promulgation of the final rule.