Challenges of Applying Superfund Law to PFAS

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In September 2022, the US Environmental Protection Agency (EPA) proposed the designation of two per- and poly-fluoroalkyl substances (PFAS) as hazardous chemicals under the Comprehensive Environmental Responses, Compensation, and Liability Act (CERCLA).

PFAS, a group of man-made molecules consisting of fluorine and carbon atoms, have been widely used in consumer and industrial products and applications for decades. Due to their historic wide-spread use and bio-persistence, they are now found in varying amounts in water, soil and air throughout the United States. While there is no medical consensus as to the alleged negative health effects of PFAS exposure, multiple regulatory and scientific agencies claim it “likely” causes a wide-range of medical conditions including infertility, developmental delays in children and certain cancers.

If the EPA's proposal to designate perfluorooctanoic acid (PFOA) and perfluorooctane sulfonate (PFOS) as hazardous substances under CERCLA is approved, the costs to the businesses and communities involved in any potential remediation under CERCLA are limitless. Indeed, for the past few years, states such as Maine, Michigan and Minnesota have been attempting to calculate the costs of remediation of PFAS in their respective water systems—the estimated costs of remediation of PFAS in water alone are $200 million, $1.5 billion and $1.2 billion, respectively. The nationwide costs of remediation of PFAS in soil, water and potentially the air under CERCLA are potentially limitless.

Under CERCLA, the EPA can force entities that have released hazardous chemicals on land or in water to pay for the costs of remediation. Those costs not only include cleanup costs, but also damages to natural resources and certain health assessments and effects. Further, CERCLA imposes strict liability on current and past owners of a facility, those that generated or disposed of hazardous substances, and those that transported hazardous waste. It does not, however, impose liability on the manufacturers of the hazardous substance, potentially leaving water suppliers, landfill owners, farmers and other municipal entities to bear the entire costs associated with investigation and remediation of the hazardous substance, in this case PFAS.

What's more, CERCLA does not provide the EPA with authority to exempt entities from liability. EPA does, however, have some discretion when it comes to enforcement. While that discretion may mitigate the consequences of a hazardous substances designation to taxpayers and ratepayers, the widespread use of PFAS over the years means that there are very few businesses that will not be affected by a future CERCLA action.

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