EPA Announces Policy of Enforcement Discretion in PFAS Regulation

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In October 2021, the US Environmental Protection Agency (EPA) released its Per- and Polyfluroalkyl Substances (PFAS) Strategic Roadmap, the stated goal of which was to, “hold polluters accountable.” Pursuant to the roadmap, EPA has proposed nearly two dozen regulatory actions over the past two years, ranging from tighter drinking water monitoring requirements to increased reporting and new restrictions on manufacturing. The agency expects to propose or finalize at least six rulemakings dealing with PFAS this calendar year. One of those proposed rulemakings that it expects to finalize is its proposal to designate perfluorooctanoic acid (PFOA) and perfluorooctane sulfonic acid (PFOS) as “hazardous substances” under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA). Just recently, EPA released an Advanced Notice of Proposed Rulemaking (ANPRM) in which EPA seeks public input concerning whether it should also designate perfluorobutane sulfonic acid (PFBS), perfluorohexane sulfonic acid (PFHxS), perfluorononanoic acid (PFNA), hexafluoropropylene oxide dimer acid (HFPO-DA), (sometimes referred to as GenX), perfluorobutanoic acid (PFBA), perfluorohexanoic acid (PFHxA) and perfluorodecanoic acid (PFDA) as “hazardous substances” pursuant to CERCLA. Such a designation would allow EPA to designate any site with an actual or potential release of these PFAS as a Superfund site, thus leaving “Potentially Responsible Parties” strictly liable for cleanup costs, damage to natural resources and health assessment costs.

EPA recently held two listening sessions to announce its intention to draft a formal enforcement discretion policy that would shield certain “Potentially Responsible Parties” from liability under CERCLA. EPA announced that, pursuant to this enforcement discretion policy, it would not pursue actions against public water utilities, public municipal landfills, farmers who have applied biosolids to their land, state/municipal airports and local fire departments. Instead, EPA will focus on the regulation of manufacturers of PFAS and PFAS-containing products, federal facilities, and other regulated entities who presently or historically caused or contributed to significant levels of PFAS contamination. EPA did not, however, define “significant” levels that would trigger regulatory enforcement. But, EPA did provide a list of factors that it may consider when determining whether an enforcement action is warranted. Those factors include whether the regulated entity: (i) was a passive receiver of PFAS materials that made minor contributions to contamination; (ii) is a private contractor acting in the role of a public entity; and (iii) performs a public service.

During the listening sessions, industry groups—largely stakeholders in the wastewater treatment and waste disposal industries—expressed concerns over the enforcement discretion policy, namely its failure to shield regulated entities from civil lawsuits, including citizen suits and contribution claims, and the lack of safe harbor provisions for passive PFAS receivers. Industry stakeholders were also concerned about the increased costs of transitioning away from PFAS use and the policy's failure to incentivize private development of areas with PFAS contamination.

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