EPA Announces Six-Month Delay of Final Rule Designating PFAS as Hazardous Substances

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As legislators and regulators continue to ramp up efforts to mitigate exposures to per- and poly-fluoroalkyl substances (PFAS), the Environmental Protection Agency (EPA) has just announced a six-month extension to set forth a final rule, under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), designating certain PFAS as hazardous substances. PFAS are used in a wide variety of industrial and consumer products due their thermal and chemical stability, water and stain resistance and surfactant properties. Pursuant to its PFAS Strategic Roadmap, EPA has proposed nearly two dozen regulatory actions over the past two years, including a proposal to designate perfluorooctanoic acid (PFOA) and perfluorooctane sulfonic acid (PFOS).

On June 13, 2023, EPA's Spring 2023 Unified Agenda extended the deadline from August 2023 to February 2024 for the designation of PFOA and PFOS as hazardous substances. Earlier this year, EPA released an Advanced Notice of Proposed Rulemaking (ANPRM) in which it sought public input concerning whether, in addition to PFOA and PFOS, 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. EPA's delay may signal its intent to include these other PFAS chemicals as hazardous substances as part of the final rule.

Additionally, the delay may aim to provide more time for Congress to respond with legislative protections for certain “passive receivers” of PFAS, including wastewater utilities, solid waste disposal facilities, and composting facilities, as well as for “innocent users” of PFAS products, such as farmers and airports, which otherwise face broad liability under CERCLA. A number of bills that would do just that are currently pending in Congress.

EPA's delay may also suggest that it is developing revisions to its announced policy of enforcement discretion in the regulation of PFAS, which was announced over two EPA listening sessions held in March 2023. Notably, EPA advised that, pursuant to the policy, it would not pursue actions against certain entities, for example—public water utilities, public municipal landfills, farmers who utilize biosolids, state/municipal airports and local fire departments. Rather, EPA will focus its enforcement actions on manufacturers, federal facilities and other industrial parties that cause significant environmental pollution through PFAS.

Whatever underlies EPA's delay, it is clear that EPA will continue to aggressively move forward with continued PFAS regulation in order to meet its stated goal to “hold polluters accountable.” As such, companies that previously or currently manufacture, use or dispose of PFAS and/or PFAS-containing materials should implement measures to reduce or eliminate their PFAS output, particularly in those areas EPA has deemed environmental justice communities. Additionally, given EPA's stated intent to forego pursuit of entities where equitable factors do not support action, companies should evaluate and pursue equitable defenses in anticipation of potential EPA enforcement actions.

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