EPA Lists PFOA and PFOS as Hazardous Substances Under CERCLA

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On April 19, 2024, the US Environmental Protection Agency (EPA) released a final rule stating that two types of per- and polyfluoroalkyl substances (PFAS), perfluorooctanoic acid (PFOA) and perfluorooctanesulfonic acid (PFOS), are now classified as “hazardous substances” under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA). The EPA states that the designations are necessary because animal studies and human epidemiological studies suggest that the ingestion of PFOA and PFOS may lead to adverse health effects and diseases. It should be noted, however, despite EPA's stated basis for the designation, there is no consensus in the scientific and medical communities concerning the potential adverse health effects of PFAS exposure, and certainly not on the level of exposure that could potentially cause those adverse health effects. EPA's proposal to designate PFOA and PFOS as “hazardous substances” was initially published on September 6, 2022, with a sixty-day comment period ending on November 7, 2022.

This new rule comes only days after EPA finalized its rule on maximum contaminant levels (MCLs) for PFAS in drinking water at 4.0 parts per trillion for both PFOA and PFOS. The new CERCLA designations require reporting of PFAS releases and enables EPA to order actions by and to recover costs from “Potentially Responsible Parties” (PRPs). Under CERCLA, current owners and operators of a property where hazardous substances are located, as well as the owners and operators at the time that the hazardous substances were disposed at the property are PRPs and may be liable for the costs of cleanup and abatement. Similarly, generators of hazardous substances and parties that arranged for the disposal or transport of the hazardous substances may be liable. The liability these entities may face is joint and several for all cleanup costs, damages to natural resources, and health assessment costs. The United States Chamber of Commerce previously estimated those costs could be between $700 million and $800,000 annually— tens of billions of dollars in total. Given the scientific uncertainty with respect to the adverse health effects of PFAS exposure and the enormous costs, it is expected that there will be challenges to the final rule. Objectors have sixty days from the Federal Register publication of the rule to file any challenges.

At the same time it issued its final rule concerning PFOA and PFOS, EPA also published its PFAS Enforcement Discretion and Settlement Policy Under CERCLA (the policy), clarifying its intentions on who it intends to pursue for response actions or costs under CERCLA. EPA intends to use its regulatory authority against parties “who significantly contributed to the release of PFAS into the environment, including parties who manufactured PFAS or used PFAS in the manufacturing process, federal facilities, and other industrial parties.” It does not, however, intend to pursue CERCLA actions against five categories of entities: “(1) community water systems and publicly owned treatment works; (2) municipal separate storm sewer systems; (3) publicly owned/operated municipal solid waste landfills; (4) publicly owned airports and local fire departments; and (5) farms where biosolids are applied to the land.” EPA may also extend this discretion to other entities based on equitable factors. Not only does EPA indicate that it will not pursue these entities, EPA further states that it will seek to require other PRPs to waive their rights to sue and seek contributions from parties in the five categories above and/or that satisfy the equitable factors.

Proponents of the rule point out that EPA can now enforce actions to clean water contaminated with PFAS at the expense of the perceived polluters. They also state that many PFAS-contaminated water sources often serve low-income areas and communities of color and that the new designation under CERCLA will provide these communities with much-needed relief.

Opponents, on the other hand, argue that there may be unintended economic consequences following the final rule and that compliance may be difficult for many entities. In addition, despite the PFAS Enforcement Discretion and Settlement Policy, concerns still exist surrounding EPA and its discretion to hold parties liable under CERCLA, even where "the equities do not support seeking CERCLA response actions or costs." As even EPA points out, this discretion is a policy decision and has no regulatory effect. The policy in no way affects EPA's ability to pursue any responsible party, including those entities [for whom the policy is meant to protect]. Moreover, EPA can change the policy at any time—for instance with a change in the Administration. As such, expect challenges to the final rule and for Congress to get involved.

As this story develops, MG+M is committed to carefully tracking EPA's recent PFAS-related rules and regulations and will provide updates as they become available.

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