EPA's PFAS Rule Challenged in DC Circuit

By Rebecca Kibbe

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The Environmental Protection Agency's (EPA) recent rule designating two per- and polyfluoroalkyl substances (PFAS) chemicals, PFOA and PFOS, as hazardous substances has already been met with resistance, as several groups petitioned the United States Court of Appeals for the DC Circuit last week to review the EPA's designation before the rule goes into effect.

Under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), the EPA can respond to the release of chemicals and other substances designated as hazardous, which now includes PFOA and PFOS, and regulate their removal. PFAS, including PFOA and PFOS, are comprised of carbon and fluorine atoms that are bonded together, creating one of the strongest bonds in organic chemistry. It is the strength of that bond that makes PFAS oil, water, chemical and temperature resistant. That has led to widespread use of PFAS in personal care products, electronics, food packaging, cookware, apparel, and textiles, and even pharmaceuticals and medical devices. But it is also this bond strength that allows PFAS to persist in the environment and the human body. That is why they are sometime referred to as “forever chemicals.” According to EPA, exposure to these chemicals is associated with several adverse health effects, including high cholesterol, decreased immune response to vaccinations, and an increased risk of certain cancers, among other medical complications.

EPA's new rule would require entities to report any release of PFOA and PFOS (as well as their structural isomers and salts) equal to or greater than the reportable quantity—defined in the rule as one pound within a span of 24 hours. Such reports must be sent to EPA's National Response Center, as well as a state emergency response commission and a local emergency planning committee, or their tribal equivalents. Federal entities transferring or selling property must also report the release, storage, or disposal of these chemicals on the property and guarantee that they will clear any contamination or have done so already. CERCLA renders the landowners and contributors to the contamination strictly liable, as well as jointly and severally liable, and permits the government to require the current and former landowners and other potentially responsible parties (PRPs) to clean up the contamination or do the work itself and require those same parties to pay for the cost of remediation. CERCLA also authorizes responsible parties to file suit seeking contribution and other costs related to cleaning up contamination of hazardous materials.

This is the first time EPA has designated hazardous substances directly under CERCLA, but not everyone believes it is the most effective way to address contamination caused by PFOA and PFOS. The US Chamber of Commerce, the National Waste & Recycling Association (NWRA), and the Associated General Contractors of America (AGC) have joined together to challenge EPA's rule in the DC Circuit. NWRA represents the waste and recycling industry in the private sector and AGC represents general contractors and other service providers in the commercial construction industry. While the petition itself is silent as to the parties' basis for the challenge, representatives from the Chamber of Commerce and AGC have alleged that EPA's designation of PFOA and PFOS as hazardous will ultimately cause a flood of litigation and confusion.

Chuck Chaitovitz, the Vice President for Environmental Affairs and Sustainability for the Chamber of Commerce, stated that the “new rule fails to provide clear standards for determining whether to designate a substance as hazardous under CERCLA, creating staggering uncertainty for local governments, landowners and businesses about the potential for future designations.”

Brian Turmail, the Vice President of Public Affairs and Workforce for AGC, has voiced concerns that contractors who

have handled PFOA or PFOS materials could be liable for the costs of cleaning up contaminated sites under the EPA's new rule, which would force AGC and its contractors to defend themselves in lengthy and expensive litigation.

The petitioners are represented by a team of attorneys from Hunton Andrews Kurth LLP, as well as the US Chamber Litigation Center and AGC. The DC Circuit ordered initial submissions to be filed by July 29.

As things stand, EPA's rule designating PFOA and PFOS as hazardous substances makes it possible for the EPA to require companies to spend millions of dollars cleaning up contaminated properties. These companies may then file suit against other potentially responsible parties to recover some of their extensive costs. EPA has also announced a policy of enforcement discretion, stating that it will focus on holding parties who significantly contributed to the contamination responsible, including those that manufactured or made use of the chemicals in the industrial process, and not passive users of PFAS, such as municipal airports, farmers, public landfills, and local fire departments. Given the ubiquity of PFOA and PFOS at this point, costly cleanups followed by litigation are likely to become increasingly frequent.

The rule was scheduled to go into effect on July 8, but will now be delayed due to the challenge from AGC, NWRA and the Chamber of Commerce. Only time will tell if the petitioners can sway the DC Circuit to remand the rule. Either way, it is unlikely that EPA's crusade to regulate PFAS will end here, as the agency has already expressed its interest in designating other PFAS as hazardous substances under CERCLA.

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