Expansion of PFAS Hazardous Substances Designation "To Be Determined"

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In April 2024, the Environmental Protection Agency (EPA) designated perfluorooctanoic acid (PFOA) and perfluorooctanesulfonic acid (PFOS) as hazardous substances under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), also known as Superfund. It was expected that shortly thereafter that EPA would follow up by also designating seven other precursors to PFOA and PFOS—perfluorbutanesulfonic 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. That was based on EPA's Advanced Notice of Proposed Rulemaking (ANPRM), released in April 2023, which set a deadline of April 2025 to finalize this rule based on available toxicity data. EPA's July 2024 Unified Agenda, however, now indicates that the deadline for designation of these additional PFAS is “to be determined.”

It is unclear why EPA has delayed the designation of additional PFAS as hazardous substances under CERCLA, but it may be related to legal challenges to EPA's designation of PFOA and PFOS as hazardous substances. On June 10, 2024, The United States Chamber of Commerce (USCC), the National Waste & Recycling Association (NWRA), and the Associated General Contractors of America (AGC) joined together to file a legal challenge to EPA's CERCLA designation in the DC Circuit Court of Appeals. The petitioners challenge, among other issues, whether EPA appropriately considered costs before promulgating the rule, and whether EPA provided an adequate and reasonable explanation for its conclusion that PFOA and PFOS should be designated as hazardous substances. It is interesting that petitioners raise the costs associated with rule compliance, as the White House Office of Management and Budget (OMB) initially designated the rule as “other significant,” based on EPA's estimate that compliance costs would not exceed $100 million annually. Following feedback (particularly USCC's estimate of $700M-$900M in annual costs) that EPA woefully underestimated the costs associated with rule compliance, OMB changed its designation of the proposed rule to “economically significant,” triggering the need for EPA to conduct a regulatory impact analysis (RIA) that demonstrates that such a designation is the least burdensome and most cost-effective way to achieve EPA's goals—something it failed to do. EPA may decide to wait for the court's ruling before moving forward with additional CERCLA designations so that it can tweak any future rules to enhance the likelihood that they survive legal challenges.

Any changes to the rule or delay in its implementation could have a tremendous impact on industry. A hazardous substance designation under CERCLA provides EPA with the power to force parties that it deems responsible for the contamination to either cleanup the site or reimburse EPA for the full cost of remediation of the contaminated site. As such, companies that utilized PFAS in their operations and either discharged PFAS or transported it for disposal are certainly at risk for Superfund litigation. That could result in strict, as well as joint and several, liability for investigation and remediation costs, and potentially massive liability.

It will be interesting to see how the courts view these rules, particularly after the Supreme Court recently repudiated the *Chevron* doctrine of deference to agency statutory interpretations, and how a change in Administration could impact further PFAS rule promulgation and enforcement. Stay tuned.

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