PFOA/PFOS/CERCLA: U.S. Environmental Protection Agency Final Rule Designating as Hazardous Substances

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04/22/2024

The United States Environmental Protection Agency ("EPA") issued a prepublication version of a Final Rule that would designate two of the Per-and polyfluoroalkyl substances ("PFAS") as Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA") hazardous substances.

Final Rule designates perfluorooctanoic acid ("PFOA") and perfluorooctanesulfonic acid ("PFOS") as CERCLA hazardous substances.

CERCLA authorizes EPA to promulgate regulations designating as hazardous substances:

- Elements, compounds, mixtures, solutions, and substances which, when released in the environment, may present substantial danger to the public health or welfare of the environment.

PFAS are a group of man-made chemicals that have been used in industrial applications and consumer products for a number of years. Properties of these chemicals include resistance to heat, water, and oil. They have been described as persistent in the environment and resist degradation. Potential human exposure to PFAS include pathways through drinking water, air, or food.

This designation as hazardous substances will trigger certain corresponding CERCLA requirements such as:

- Application of the potentially responsible liability categories (i.e., current owner or operator, former owner or operator [in certain circumstances], transporter [in certain circumstances], and generators).
- Hazardous substance release reporting requirements (if reportable quantities are released).

One pound released within 24 hours would be the reportable quantity (i.e., "RQ").

The preamble of the prior proposed rule had listed five categories of entities that EPA believed was potentially responsible by the proposed rule:

- PFOA and/or PFOS manufacturers.
- PFOA and/PFOS processors.
- Manufacturers of products containing PFOA and/or PFOS.
- Downstream product manufacturers and users of PFOA and/or PFOS products.
- Waste management.
- Wastewater treatment facilities.

The water, wastewater, and solid waste management sectors have expressed concern about their potential liability despite their self-described status as passive receptors. For example, the National Waste and Recycling Association and Solid Waste Association of North America have stated that regulation under CERCLA would assign environmental cleanup liability to essential public services and their customers. They have asked Congress to provided municipal solid waste landfills and other passive receivers with a narrow exemption.

Similarly, wastewater and drinking water trade associations have argued that liability will be imposed upon them but not on chemical manufacturing companies who placed the substances into commerce as products. They also argue that wastewater, stormwater, and water reuse systems passively receive PFAS from various sources.

Simultaneously with the release of the Final Rule, EPA released a document titled:

PFAS Enforcement Discretion and Settlement Policy Under CERCLA ("Memorandum").

The Memorandum is described by EPA as a guidance to how it will exercise enforcement discretion under CERCLA in matters involving PFAS. The Memorandum states how the agency will focus on holding responsible entities who:

…significantly contributed to the release of PFAS contamination in the environment, including parties that have manufactured PFAS or used PFAS in the manufacturing process, federal facilities, and other industrial parties.

The policy also states that EPA does not intend to:

…pursue entities where equitable factors do not support seeking response actions or costs under CERCLA including farmers, municipal landfills, water utilities, municipal airports, and local fire departments.

Note that the Memorandum is not binding on parties who pursue CERCLA contribution actions.

A link to the EPA announcement which includes the referenced documents can be found here.