

EPA Officially Lists Key PFAS as “Hazardous Substances” Under Superfund

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On April 19, 2024, EPA issued its long-awaited Final Rule officially listing two key per- and polyfluoroalkyl substances (PFAS), or so-called "forever chemicals," as "hazardous substances" under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA, also known as Superfund). The Final Rule designates the two most studied PFAS - perfluorooctanoic acid (PFOA) and perfluorooctanesulfonic acid (PFOS) - as hazardous substances. The effects of the designation will be far-reaching and will extend beyond the broad authority that Superfund gives EPA to address hazardous substances at contaminated sites. Given these sweeping changes, the way they were promulgated, and the high costs that will accompany them, legal challenges to EPA's new PFAS designation are inevitable.

Effects of Designation

The Final Rule designates these PFAS, including their salts and structural isomers, as hazardous substances. The designation was based on EPA's conclusion that, when released, they may present a substantial danger to public health or welfare of the environment, although that conclusion is not without its detractors. Previously, EPA could only address releases of PFOA and PFOS as "pollutants or contaminants" under CERCLA if they presented an "imminent and substantial danger." With the designation, EPA now can deploy a litany of tools under CERCLA to investigate and cleanup air, water, groundwater and soil in which PFOA and PFOS are present at existing and new Superfund sites.

The designation also gives rise to new reporting requirements under CERCLA and the Emergency Planning and Community Right-to-Know Act (EPCRA). Under these laws, parties must provide notice of releases of hazardous substances into the environment at or above the reportable quantity. For PFOA and PFOS, the Final Rule assigns a default reportable quantity of one pound within a 24-hour period.

The Final Rule will have significant effects on liability and litigation for parties associated with sites where PFOA and PFOS contamination is present. For example, it will allow EPA to bring enforcement actions against potentially responsible parties (PRPs) requiring them to investigate, remediate and pay for cleanup costs under CERCLA's joint and several strict liability scheme. Likewise, the designation gives parties the authority to pursue cost recovery and contribution claims against other PRPs to recoup costs they incur to cleanup PFOA and PFOS. The financial burden resulting from the designation will be substantial, especially



considering the ubiquity of the substances in the environment and the limits of the technology presently available to test for, treat, and remediate PFOA and PFOS.

Impacts from the designation will arise in litigation, transactional and regulatory contexts that go well beyond Superfund cleanups. Despite the ubiquity of PFOA and PFOS in the environment, persons who believe they have been exposed to these substances likely will rely on the CERCLA designation to support class action lawsuits against parties they believe are responsible for their exposure.

In the environmental due diligence context, the EPA-approved ASTM standard for Phase I Environmental Site Assessments satisfies the All Appropriate Inquiry (AAI) Rule, which permits parties to qualify for "Innocent Owner" and "Bona Fide Prospective Purchaser" protection under CERCLA, as well as liability assurances in state Brownfield programs. Under the current standard, ASTM Standard E1527-21, emerging contaminants like PFAS are referenced, but are outside the scope of a Phase I ESA. With the designation of PFOS and PFOA as hazardous substances, parties conducting environmental due diligence will now be required to consider potential releases of these PFAS in their Phase I assessments, which could trigger the need for Phase II soil and groundwater testing.

EPA's Enforcement Discretion

Given the breadth of CERCLA's liability structure, commenters have expressed concern regarding the potential impact that the designation will have on parties who did not generate or otherwise cause PFOA or PFOS contamination but could be forced to incur substantial costs to address them. These parties include "passive receivers," such as public water systems, publicly owned treatment works (POTWs), and landfills.

In an apparent attempt to ease these concerns, contemporaneous with its release of the Final Rule, EPA published a "PFAS Enforcement Discretion and Settlement Policy under CERCLA" (Policy). This new Policy directs EPA staff to focus on enforcing against entities that significantly contributed to the release of PFAS into the environment, including PFAS manufacturers, other industries that used PFAS, and the Department of Defense and other federal facilities, and to exercise EPA's equitable enforcement discretion for passive receivers including community water systems and POTW operators, publicly owned and operated municipal solid waste landfills, publicly owned airports and local fire departments, and farms where biosolids are applied to the land.

Many commenters question whether the Policy alone is insufficient to protect passive receivers of PFAS. For example, the Policy is of limited effect in constraining third parties' ability to pursue CERCLA cost recovery or contribution claims against passive receivers of PFAS.

Anticipated Legal Challenges to Designation



Unlike the hundreds of other hazardous substances, which were listed because they were already classified as hazards under one or more other environmental laws, EPA chose to directly designate PFOA and PFOS under Section 102(a) of CERCLA. EPA's decision to break new ground by directly designating these PFAS as hazardous substances will likely be challenged in court. Some commenters to the Final Rule also noted that EPA didn't complete a full economic analysis in deciding whether designation of PFOA and PFOS as CERCLA hazardous substances was warranted. In response, EPA argued that it adequately considered cost as part of a more holistic "Regulatory Impact Analysis," which generally considered financial cost, along with several other factors. Nevertheless, this may be another legal basis on which the new PFAS designation is challenged.

Lathrop GPM will provide additional updates regarding the designation of PFOA and PFOS as hazardous substances under CERCLA and its effects as they develop. For more information, contact Bill Beck, Ally Cunningham, Rick Kubler, Jessica Rosell, Cynthia Teel, Matt Walker, Blaine Bengtson, or your regular Lathrop GPM attorney.