

March 27, 2023

EPA's Second Listening Session on a Proposed Enforcement Discretion and Settlement Policy for PFAS Raises Concerns

On March 23, EPA held the second of two public "listening sessions" to provide the public with an opportunity to comment on EPA's proposal to develop an enforcement discretion and settlement policy with regard to per- and polyfluoroalkyl (PFAS) cleanup enforcement actions under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA). EPA's evaluation of an enforcement discretion policy relates to enforcement concerns stemming from its Notice of Proposed Rulemaking, published September 6, 2022, to list perfluorooctanoic acid (PFOA) and perfluorooctanesulfuric acid (PFOS) as hazardous substances under CERCLA, thereby making them subject to EPA's authority to pursue responsible parties for contamination from these substances. While EPA has identified over 9,000 PFAS substances, EPA has found that PFOA and PFOS are the most widely used of the PFAS substances and most prevalent in the environment. The ubiquitous nature of PFAS contamination combined with the broad implications for enforcement, should PFOA and PFOS be listed under CERCLA, pose significant challenges for many parties that have no direct involvement in the manufacture, use, distribution or disposal of PFAS. The listing of these substances also raises uncertainty about the potential reopening of CERCLA cases at certain sites where parties may have "settled" their liability with the EPA.

EPA's stated purpose for the sessions was to get stakeholder input before publishing the policy. Participants in the March 23 session included various trade associations representing interests in construction, water utilities, liquids terminals, municipal and private waste and recycling facilities, biosolids applicators, and members of the community. EPA did not respond to comments during the session but will address the comments in documentation supporting the policy once developed.

EPA's director of its Regional Support Division, Office of Site Remediation Enforcement in the office of Enforcement and Compliance Assurance explained that EPA intends to focus its CERCLA enforcement efforts on manufacturers of PFAS, federal facilities, and other industrial parties that contribute significant amounts of PFAS contamination to the environment. EPA did not offer any comments on whom "other industrial parties" referred to or what it deemed "significant amounts" of contamination. EPA stated that there may be situations where it chooses not to enforce against responsible parties, based on the facts and circumstances. It also stated that it may settle with parties sued by others to provide protection against third-party contribution claims for matters addressed in the settlement agreement.

EPA advised that it does not intend to take CERCLA enforcement action for PFAS against five categories of potentially responsible parties: (1) water utilities and publicly owned treatment works; (2) publicly owned and/or operated municipal landfills; (3) farmers applying biosolids; (4) tribal or local fire departments; and (5) state, municipal and tribal airports. The latter two categories of parties are likely to have or are continuing to use aqueous film forming foam (AFFF) for fire suppression, and its use will continue until an effective alternative exists.

EPA noted that its enforcement discretion would have limitations: (1) it is limited to CERCLA and does not apply to other statutes; (2) it would not apply to situations that present an imminent and substantial endangerment to public health or the environment; and (3) it would not apply to parties who fail to cooperate with EPA, such as refusing to provide access to

property or responding to information requests. EPA reinforced its adherence to the polluter pays principle underlying CERCLA and that its policy would not affect EPA's ability to determine what response or enforcement action to take in a particular situation.

During this listening session, many commenters supported the idea of an enforcement discretion policy, but concerns were noted as well. Members of the community stated their concerns that polluters are not being held accountable for their contribution to PFAS contamination. Stakeholders in the construction industry noted that contractors are often exposed to citizen suits and third-party cleanup liability merely as a result of the involvement in the redevelopment of sites where they would not otherwise have knowledge of PFAS contamination in the absence of sampling requirements or set detection limits. Similarly, various organizations representing water utilities were also concerned that they would not be shielded from third-party liability. Interests in the waste and recycling industries, both public and private, pointed out that two-thirds of municipal waste goes to privately operated municipal landfills that are subject to the same permitting and technical requirements as public landfills. Without enforcement discretion extending to private landfills, municipalities could have an unbalanced liability exposure compared to private facilities, and the costs to taxpayers could be astronomical.

Comments have closed on the proposed rule to list PFOA and PFOS as hazardous substances under CERCLA. EPA did not give any indication as to when any final determinations on the rule or the enforcement discretion policy would be made. Questions also remain with regard to whether and when EPA may list other PFAS substances. There is no question, however, that should EPA's current proposed rule become final, the economic and legal ramifications could be significant, and the scope of EPA's enforcement discretion policy and the consistency of how EPA applies it will need to be closely monitored.

Authors



Kirstin M. Etela

Partner

Hartford, CT | (860) 275-0206

ketela@daypitney.com



Elizabeth C. Barton

Of Counsel

Hartford, CT | (860) 275-0371

ecbarton@daypitney.com



Harold M. Blinderman

Partner

Hartford, CT | (860) 275-0357

hmbinderman@daypitney.com



Todd W. Terhune

Partner

Parsippany, NJ | (973) 966-8040

tterhune@daypitney.com



Drew A. Levinson

Senior Associate

Parsippany, NJ | (973) 966-8051

dlevinson@daypitney.com



Brianna E. Tibett

Associate

Hartford, CT | (860) 275-0141

btibett@daypitney.com