April 30, 2024

EPA PFAS Update: Two PFAS Designated as Hazardous Substances Under CERCLA

On April 19, 2024, the Environmental Protection Agency (EPA) released a pre-publication version of its final rule designating two per- and polyfluoroalkyl substances (PFAS), also known as "forever chemicals", as hazardous substances under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) (the "Final Rule"). The designation of these two PFAS chemicals will have broad implications for site remediation and CERCLA liability.

Once the Final Rule takes effect, the rule will extend CERCLA's reporting, remediation and liability provisions to releases associated with two common PFAS chemicals, impacting owners or operators of a facility with PFOA or PFOS contamination and potentially complicating, among other considerations, business and real estate transactions and site clean ups. The Final Rule becomes effective sixty (60) days after publication in the Federal Register.

The two PFAS chemicals subject to the Final Rule are perfluorooctanesulfonic acid (PFOS) and perfluorooctanoic acid (PFOA), two of the most common PFAS chemicals. By this designation, PFOS and PFOA are now incorporated into CERCLA's strict, joint, several, and retroactive liability statutory scheme. This change provides EPA the authority to require potentially responsible parties (PRPs), including current owners/operators, and arrangers, transporters and former owner/operators at the time of a release or disposal, to investigate and remediate releases of PFOS and/or PFOA in the environment. In addition, EPA, other governmental authorities and private parties will now be able to seek cleanup costs from PRPs for PFOA and PFOS releases under CERCLA's cost recovery and contribution provisions. Moreover, due to CERCLA's retroactive liability provisions, current owners/operators may be subject to liability even if they did not own the property when the release occurred or cause the release of PFOA or PFOS. PRPs will also be liable for natural resource damages associated with PFOS and PFOA contamination. The Final Rule also could pave the way for a re-opener of CERCLA liability for sites where a party may have already "settled" its liability.

In the environmental due diligence context, parties conducting environmental due diligence that seek to satisfy the "All Appropriate Inquiry" rule in support of certain CERCLA defenses will be required to consider potential releases of PFOA and PFOS in their Phase I assessments, which may trigger Phase II investigations. The identification of releases of PFOA and/or PFOS are likely to increase site clean-up costs.

This designation also creates reporting requirements under CERCLA and the Emergency Planning and Community Right-to-Know Act (EPCRA). Under CERCLA, persons in charge of a facility or vessel will now be required to report releases of PFOS and PFOA, provided that the release meets or exceeds a newly established one-pound reportable quantity within a 24-houd period to the National Response Center and applicable to state, tribal and local authorities. Under EPCRA, facility owners/operators will now also be responsible for reporting requirements relative to the storage, usage and release of PFOA and PFOS.

Simultaneously with its announcement of the Final Rule, EPA also released a memorandum titled "PFAS Enforcement Discretion and Settlement Policy Under CERCLA" (PFAS Enforcement Policy). In its press release, EPA indicated that it "will focus on holding responsible entities who significantly contributed to the release of PFAS contamination into the environment, including parties that have manufactured PFAS or used PFAS in the manufacturing process, federal facilities, and other industrial parties." EPA also stated that it "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." It is important to keep in mind, however, that EPA's PFAS Enforcement offers guidance but no regulatory certainty as it does not "create any substantive or procedural rights for any persons".

A link to EPA's press release on the Final Rule can be found here, and a prepublication version of the Final Rule can be found here.

A link to EPA's PFAS Enforcement Policy document can be found here.

If you or your organization have questions about the Final Rule, PFAS Enforcement Policy or other PFAS-specific questions, please reach out to one of the attorneys in the sidebar.

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