EPA Designates Two PFAS as Hazardous Substances Under CERCLA | Part I: Impacts on Potentially Responsible Parties

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Part I

On April 19, 2024, the U.S. Environmental Protection Agency (EPA) announced its final rule designating perfluorooctanoic acid (PFOA) and perfluorooctanesulfonic acid (PFOS), two of the most common and well-known per- and polyfluoroalkyl substances (PFAS), as hazardous substances under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) (also known as the Superfund law). The final rule comes nearly two years after the proposed rule was announced and is expected to be published in the Federal Register this week.

Impacts of the Rule

In its FAQs on the new rule, EPA details what it calls the "direct effects" of the rule:

- Qualifying releases of PFOA and PFOS must be reported;
- Federal entities must provide certain information when transferring or selling property;
- The U.S. Department of Transportation must list and regulate PFOA and PFOS as hazardous materials under the Hazardous Materials Transportation Act; and
- Owners or operators must provide notice to potentially injured parties.

However, it is the indirect effects of the rule that are the most meaningful and why the Office of Management and Budget labeled the rule as "economically significant," meaning it expects the rule to impose annual costs of at least $100 million. The primary indirect effect here is that this listing exposes

parties to liability under CERCLA for the costs of actions to address actual or threatened releases of these newly listed hazardous substances. Because liability under CERCLA is strict (*i.e.*, intent does not matter) and joint and several (*i.e.*, multiple parties can share in liability and any party found responsible can be held liable for the entire judgment, even if only nominally at fault), this listing exposes parties to significant liability regardless of their affirmative conduct or role in a release of PFOA and/or PFOS.

The listing rule could profoundly affect several aspects of the Superfund landscape. Certainly, data about these constituents generated under various existing sampling and reporting requirements could spur the designation of new Superfund sites. In addition, the new rule could result in substantial effects and costs at existing sites, including additional site investigation efforts and costs, potentially increased or additional remedial action work, increased long-term monitoring costs, and re-visiting remedy selection decisions at sites in the process of being closed or already closed. Further, not addressed in the listing rule, and currently the subject of EPA study, is what clean-up levels for PFAS will be, whether to be set at risk-based levels or other criteria. Finally, it can be expected that discovery of actionable levels of PFAS constituents at a site could materially affect allocations of costs among potentially responsible parties (PRPs).

Potential Limits on Legal Exposure

Recognizing the potential inequitable consequences of the broad reach of its listing rule, EPA issued a companion "PFAS Enforcement Discretion and Settlement Policy Under CERCLA" on the same date as the new rule. That policy, which will be detailed in Part 2 of Nossaman's review of this new rulemaking, essentially states that EPA intends to exercise its discretion not to pursue certain parties subject to the listing rule based on equitable concerns.[1] In the Policy EPA clarifies that the intent of the new listing rule is to hold accountable those "major PRPs" that have played a significant role in releasing or exacerbating the presence of PFAS constituents in the environment, particularly those that have manufactured or used PFAS constituents, including federal agencies and facilities.

Next Steps

Once in the Federal Register, the rule will become effective 60 days thereafter. However, given the substantial impact of the rule and its wide applicability, litigation challenging the rule could delay its effective date.

Additional information on the rulemaking can be found on EPA's webpage for the rule.

[1] Those protected parties include:

1. Community water systems and publicly owned treatment works (POTWs);
2. Municipal separate storm sewer systems (MS4s);
3. Publicly owned/operated municipal solid waste landfills;
4. Publicly owned airports and local fire departments; and
5. Farms where biosolids are applied to the land.